No. 08-1371

IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AND UNION FOR REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING RESPONDENTS

KARA H. STEIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 751-4000

SAMUEL ESTREICHER
Counsel of Record
TODD R. GEREMIA
D. THEODORE RAVE
ANDREW D. BRADT
RAJEEV MUTTREJA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
sestreicher@jonesday.com

Counsel for Amici Curiae

March 15, 2010

[*Additional counsel listed on inside front cover*]

AYESHA N. KHAN
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, NE
Washington, DC 20002

RABBI DAVID SAPERSTEIN
UNION FOR REFORM JUDAISM
2027 Massachusetts Avenue, NW
Washington DC, 20036

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTEREST OF *AMICI CURIAE*[1]

The American Jewish Committee (AJC), a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews, seeks to advance the basic principles of pluralism and tolerance at home and around the world as the best defense against anti-Semitism and other forms of bigotry. It maintains 26 regional offices in major cities nationwide and has more than 175,000 members and supporters. AJC has participated as *amicus curiae* in numerous cases throughout the last century in defense of religious liberty for all and in support of antidiscrimination principles.

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public-interest organization based in Washington, D.C. Americans United's mission is twofold: to advance the free-exercise right of individuals and religious communities to worship as they see fit; and to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by this Court and the U.S. Courts of Appeals.

---

[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief.

The Union for Reform Judaism (Union) is the congregational arm of the Reform Jewish Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The Union comes to this issue out of its longstanding commitment to the principles of religious freedom and non-discrimination.

AJC, Americans United, and the Union are all strongly committed to defending religious freedom. *Amici* believe that private religious groups should be free to craft their own membership requirements in accordance with the dictates of their faith, and that the state may not use its coercive powers to compel such groups to include as members or officers individuals who do not share the group's beliefs. But while the state is not free to prohibit a private religious group, or other expressive association, from exercising its right to discriminate, the state is under no constitutional obligation to subsidize the exercise of that right. That is, *amici* believe that a private religious group's right to exclude non-adherents from its membership and governance decisions is not incompatible with a public university's interest in preventing discrimination in its educational activities. Both interests are respected under the policy challenged in this case.

SUMMARY OF THE ARGUMENT

This case is about a state university's decision, in furtherance of the educational purpose in hosting on-campus student organizations, to withhold funding and official recognition from any student group that is not open to all of its students. The courts below correctly held that this decision, which allowed more restrictive student organizations access to the campus, but denied them funding and university recognition, did not violate the First Amendment rights of these unrecognized groups.

1. Universities have a strong interest in barring exclusionary practices by recognized on-campus student organizations because a principal purpose of providing such organizations with meeting space and financial (and other) assistance is to enable students to experience an on-campus educational laboratory for democratic values in action. Opportunities to participate in the organizational life of these student groups teach students critical interpersonal and leaderships skills which are necessary to participation in a democratic society and helpful to a student's career and professional opportunities. Unfortunately, these opportunities have historically been denied to some groups of students on account of their race, religion, gender, or sexual orientation. Especially in light of this history, it is an important component of a university's educational mission to ensure that the student groups it recognizes and funds are open to all students.

2. In providing opportunities for students to participate in extracurricular activities, a state university may reasonably set ground rules for official recognition and funding of student groups to ensure that such participation furthers its educational mission. In this case, the University of California-Hastings College of the Law's (UC-Hastings or the University) nondiscrimination policy serves to ensure that the benefits of student-group

membership are available to all of its students. The University is also acting to safeguard that the student activity fees all students must pay support only those groups that are open to all students. Especially in light of the history of racial and religious exclusion on college campuses, UC-Hastings also has a strong interest in avoiding the appearance of facilitating discrimination by its officially recognized and funded student groups.

3. UC-Hastings's ground rules for student-group recognition and funding in furtherance of its educational mission are viewpoint neutral. Organizations of any political, religious, or ideological character can become recognized student organizations if they will allow any UC-Hastings student to become a member and possibly seek a leadership role. The University's nondiscrimination policy is not aimed at any group's expression; rather, it is designed to ensure that the educational benefits of participation in extracurricular student groups are in fact available to all students. Other organizations, like petitioner Christian Legal Society (CLS), can meet on campus and exclude from their membership and leadership those students who do not adhere to their beliefs. They have no claim, however, on the University's resources or educational imprimatur in light of their exclusionary policy.

ARGUMENT

I. STUDENT GROUPS THAT ARE OPEN TO ALL STUDENTS SERVE THE UNIVERSITY'S EDUCATIONAL MISSION, ESPECIALLY IN LIGHT OF THE HISTORY OF EXCLUSION OF

RACIAL AND RELIGIOUS MINORITIES IN HIGHER EDUCATION

Extracurricular students groups are far more than a forum for facilitating students' expression of a variety of viewpoints. Participation in extracurricular activities is an important component of a complete education, particularly in professional schools. But such opportunities have not always been open to all students on an equal basis. In the not-too-distant past, many institutions of higher education, including some of the most prestigious in the land, encouraged and assisted student groups that excluded religious and other minorities from the educational, professional, and social opportunities of campus life. UC-Hastings's policy of ensuring that these valuable on-campus opportunities are open to all of its students—not limited because of a student's race, religion, gender, or sexual orientation—is an important component of its educational mission.

America's institutions of higher learning have an unfortunate history of excluding certain racial and religious minorities. In the years following World War I, "[u]niversities had to make certain concessions to the social snobbery, if not to the ethnic, racial, and religious prejudices, of their clientele. From the 1920s to the late 1940s, they imposed admissions quotas on Jews and, perhaps, on Catholics, as well. []Concurrently, Princeton totally excluded blacks, while Harvard and Yale took only a handful each.[]" Marcia Graham Synnott, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton*, *1900-1970*, at xviii (1979). As this Court has observed with reference to the educational arena, "discrimination . . . prevailed, with official approval, for the first 165 years of this Nation's constitutional history." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.).

Jews, in particular, have long been a target of discrimination because of their religious beliefs. During the early decades of the previous century, universities employed quotas to limit the number of Jews they would admit. Indeed, "[t]wentieth century discrimination against Jews continued a long history in American higher education. Many of the great universities were founded as religious institutions, steeped in the tradition of various Christian denominations. Jews attended as outsiders in a campus milieu that was dominated by Christian theology, purpose, and culture. . . . Anti-Semitism was part and parcel of Christian teaching and behavior, and permeated the experience of Jews at many of the 'best' colleges and universities in the United States." Gary A. Tobin, Aryeh Kaufmann Weinberg & Jenna Ferer, *The Uncivil University: Intolerance on College Campuses* 66 (rev. ed. 2009).

Selective institutions like Harvard, Yale, Princeton, Columbia, and Dartmouth have well-documented histories of using quotas to restrict the admission of Jewish candidates. In the 1920s, Harvard, Yale, and Princeton used various means to implement their quota policies, including "photographs attached to admission forms, specific questions regarding the applicant's race and religion, personal interviews, and restriction of scholarship aid." Synnott, *supra*, at 19-20.[2] And in the 1940s, "Columbia like most other colleges and universities did discriminate, especially against Jews . . . ." William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 Wash. & Lee L. Rev. 3, 35 (1995).

---

[2] Harvard president Abbott Lawrence Lowell justified Harvard's use of quotas limiting the number of Jews as a mechanism for *reducing* anti-Semitism within the student body: "'If their number should become 40 percent of the student body,' he explained in a letter to Alfred Benesch, a prominent Jewish alumnus from Cleveland, 'the race feeling would become intense. When on the other hand, the number of Jews was small, the race antagonism was also small.'" Henry L. Feingold, *Lest Memory Cease: Finding Meaning in the American Jewish Past* 95 (1996) (quoting Nathan C. Belth, *A Promise To Keep* 101-02 (1979)).

In 1934, Dartmouth alumnus Ford H. Whelden wrote to Robert C. Strong, the school's director of admissions, stating: "[T]he campus seems more Jewish each time I arrive in Hanover. And unfortunately many of them . . . seem to be the 'kike' type." W. Honan, *Dartmouth Reveals Anti-Semitic Past*, N.Y. Times, Nov. 11, 1997, at A16. In response, Strong stated: "I am glad to have your comments on the Jewish problem, and I shall appreciate your help along this line in the future. If we go beyond the 5 percent or 6 percent in the Class of 1938, I shall be grieved beyond words." *Id.*

In his 1944-45 annual report as the Chairman of the Board of Admissions at Yale during the 1940s, Edward Noyes wrote, "the Jewish problem . . . continues to call for the utmost care and tact. . . . [T]he proportion of Jews among the candidates who are both scholastically qualified for admission and young enough to matriculate has somewhat increased and remains too large for comfort." Dan A. Oren, *Joining the Club: A History of Jews and Yale* 177 (1985) (emphasis added) (quoting Edward S. Noyes, Report of the Board of Admissions, *Yale Reports To The President*, *1944-45*, at 3).

These discriminatory policies were not limited to admissions; they extended to extracurricular organizations and social clubs: "WASP undergraduates limited or excluded altogether the Jews, Catholics, and the few blacks from their extracurricular organizations and clubs. Membership in these [clubs was] . . . part of the recruitment and conditioning process that selected the next generation of managers and leaders. . . . And in order to make it easier for themselves to climb the ladder to the higher echelons, they saw to it that 'outsiders' were barred from the lower rungs." Synnott, *supra*, at xviii. For instance, at Harvard, "old-stock Americans rarely extended invitations to blacks, Italians, or Jews. Not only were Jews almost entirely absent from social club rosters, but they were often excluded from athletic teams of the major sports, debating societies, editorial boards, and musical clubs." *Id.*, at 23. And "[t]he badge of bigotry that Yale earned for a time was displayed most prominently in the fraternities and secret senior societies, the undergraduate institutions most important to Elis." Dan A. Oren, *Joining the Club: A History of Jews and Yale* 36 (1985). At many other universities, racially discriminatory fraternities excluded African-American students. *See* Allen B. Ballard, *The Education of Black Folk: The Afro-American Struggle for Knowledge in White America* 4-5 (1973) ("Social life [at Kenyon College] revolved around the fraternities, from which we Blacks were automatically excluded. The cumulative toll, both psychically and academically, was heavy. . . . We looked forward eagerly to weekends away from that alien campus.").

Exclusion from student groups served to reinforce prejudicial attitudes both at the university and the larger society: "The total exclusion of Jews from the summit of Harvard's social system confirmed what many had long suspected: the sheer fact of being Jewish—regardless of background, education, and personal demeanor—remained a serious social handicap at Harvard" in the early twentieth century. Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 98 (2005) (noting the "relative paucity of Jews in extracurricular life"). Although conditions have improved significantly in recent decades—due in part to state and private enforcement of nondiscrimination policies—"many experts agree that anti-Semitism persists on college campuses." United States Commission on Civil Rights *Briefing Report: Campus Anti-Semitism* 1 (July 2006).

Especially in light of this history, a university's official recognition and funding of student groups that discriminate on account of religious faith would at the least create the appearance that the university itself facilitates discrimination. UC-Hastings thus has a strong interest in withholding funding from groups that will not admit to membership students with different beliefs.

Additionally, the University seeks to ensure students' equal access to on-campus student organizations because participation in these groups provides an important component of a high-quality education. Participation in extracurricular activities can significantly improve students' career prospects, particularly students from traditionally underrepresented groups. *See* Stephen Lipscomb, *Secondary School Extracurricular Involvement and Academic Achievement: A Fixed Effects Approach*, 26 Econ. of Educ. Rev. 463, 464 (2006); Susan B. Gerber, *Extracurricular Activities and Academic Achievement*, 30 J. Res. & Dev. In Educ. 42, 48 (1996) (noting that "participation in [extracurricular activities] promotes greater academic achievement" and that "participation in school-related activities was more strongly associated with achievement than was participation in activities outside of school").

Involvement in campus organizational life is especially important in professional schools. One study found that while classroom work is important, "[t]o excel . . . requires that students also become adept at communications and management leadership—skills that students cannot simply 'possess' but must practice in order to achieve proficiency. . . . [And] participation in extracurricular activities may be the most *effective* route to skill improvement." Sabeen Sheikh, *Improving Communication and Leadership Skills: The Impact of Extracurricular Activities on MBA Students* 1-2 (Graduate Management Admission Council Working Paper 2009) (based on study of over 5000 students at 150 business schools reporting on participation in extracurricular groups) (emphasis in original). Such participation—and the opportunity to serve in a leadership capacity—is crucial to developing skills that lead to success in one's career. *See id.*

Another study—this one of undergraduate students—found a significant correlation between participation in extracurricular student groups and superior performance on an assessment of interpersonal skills, even after controlling for variables like grade point average, cognitive ability, and personality. *See* Robert S. Rubin, William H. Bommer & Timothy T. Baldwin, *Using Extracurricular Activity As An Indicator Of Interpersonal Skill: Prudent Evaluation Or Recruiting Malpractice*, 41 Hum. Resource Mgmt. 441, 447-49 (2002). The correlation was even greater for students holding leadership positions in these organizations. *See id.* Notably, employers recruiting on college campuses frequently use membership in, and leadership of, student groups as a proxy for interpersonal and leadership skills. *See id.* at 444.

Even participation in purely social organizations like university eating clubs—often in the past barred to students because of their race, gender, and religion[3] —can provide the opportunity to hone interpersonal and leadership skills and to forge lasting professional associations. *See* Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-*

---

[3] Certain eating clubs at Princeton began admitting women only after the New Jersey Supreme Court held the clubs' longstanding policies of gender discrimination to be illegal. *See Frank v. Ivy Club*, 576 A.2d 241, 260-61 (N.J. 1990) ("The eradication of the cancer of discrimination has long been one of our State's highest priorities.") (internal quotation marks omitted); *see also* Alessandra Stanley, *Court Tells Princeton Clubs They Must Admit Women*, N.Y. Times, July 4, 1990, § 1 at 33.

Private Clubs, 2 Mich. J. Gender & L. 27 (1994); Michael M. Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321 (1983); *see also* Rubin, et al., *supra* at 447 (finding significant correlation between interpersonal skills and membership in social organizations like fraternities and sororities).

Indeed, some writers maintain, exclusion of racial and religious minorities was often done precisely to ensure that they would not develop the leadership skills and connections that foretell professional success. *See* Karabel, *supra* at 74 ("Jews . . . were excluded from Princeton's eating clubs as surely as they were kept out of the country clubs that arose in the suburbs of America's cities in the late nineteenth and early twentieth centuries. In both cases, social exclusion—and the preservation of Anglo-Saxon dominance—was one of the main functions of the institution.")

Given the importance of participation in extracurricular activities and student groups to the educational mission of an institution of higher learning, it would be inimical to the purpose of the university to require it to recognize and fund organizations that exclude students because of their race, religion, gender, or other like characteristics. As this Court has explained:

> [U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of

> leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Grutter v. Bollinger, 539 U.S. 306, 332-33 (2006). The same can be said of school-supported extracurricular groups.

II. UC-HASTINGS MAY CONSTITUTIONALLY SET GROUND RULES FOR THE STUDENT GROUPS IT RECOGNIZES AND FUNDS TO FURTHER ITS EDUCATIONAL GOALS

In providing extracurricular opportunities to its students, a public university must be able to set ground rules to ensure that the on-campus groups and activities it supports further its educational mission.

"A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981). As the Court recognized in *Rosenberger v. Rector & Visitors of*

University of Virginia, 515 U.S. 819, 829 (1995), a state university may place reasonable limits on its program supporting extracurricular student groups to ensure that it furthers the "limited and legitimate purposes for which it was created." *See also Healy v. James*, 408 U.S. 169, 189 (1972) ("Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."). For example, a state university need not "make all of its facilities equally available to students and nonstudents alike, or . . . grant free access to all of its grounds or buildings." *Widmar*, 454 U.S. at 268 n.5. Likewise, a state university may, as here, determine that its educational goals are best served by providing recognition and funding only to student groups that are open to all of the university's students.

The University in this case provides support for extracurricular student groups because of the educational value these groups offer students. *See* J.A. 349 (testimony by UC-Hastings's Director of Student Services noting that extracurricular activities "further [students'] education, contribute to developing leadership skills, and generally contribute to the University community and experience"). And it reasonably seeks to provide all of its students with the opportunity to participate in these groups. It has thus adopted a nondiscrimination policy applicable to all recognized student groups.[4]

---

[4] As Respondent UC-Hastings's brief makes clear, the parties stipulated in the district court that recognized student groups cannot discriminate against any student on any ground,

The University also has a legitimate interest in ensuring that the mandatory student activity fees paid by all students do not, in effect, subsidize groups that exclude from membership some of those students. As this Court has held, "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean it requires state support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455, 463 (1973). Indeed, "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *see also Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) ("The constitutional obligation of the state requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.") (internal quotation marks omitted).

UC-Hastings further has a strong interest in avoiding the appearance of facilitating discrimination. Preventing discrimination is a legitimate goal of a public educational institution, as this Court has stated on many occasions. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("[W]here the state has undertaken to provide it, [public education]

(continued…)

not just those grounds forbidden by the University's written policy; registered student organizations must accept all comers. *See* J.A. 221. Thus, for example, the UC-Hastings Democratic Caucus cannot bar students who hold Republican political beliefs from becoming a member or seeking a leadership position in that student organization. *See id.*

is a right which must be made available to all on equal terms."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."); *cf. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (noting "[t]he State's compelling interest in assuring equal access to women"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (noting "Minnesota's compelling interest in eradicating discrimination"). Although the University disclaims any endorsement of the activities or views of its recognized student groups, its official recognition and funding of student groups undoubtedly facilitates their activities. Even the authorized use of the UC-Hastings name further ties the group (in the public's eye) to the University.

In sum, the University properly may set the ground rules for the types of on-campus student organizations that it will recognize and fund in furtherance of its educational mission. Conditioning funding and recognition of student organizations on their compliance with a nondiscrimination policy designed to ensure that all UC-Hastings students are able to participate as members is "reasonable in light of the purpose served by" recognition of registered student organizations. *Rosenberger*, 515 U.S. at 829.

III. THE NONDISCRIMINATION POLICY DOES NOT TARGET OR INFRINGE ANY POLITICAL OR RELIGIOUS VIEWPOINT OR ANY GROUP'S RIGHT OF EXPRESSIVE ASSOCIATION

A state university's right to set the ground rules for its recognition and funding of student organizations is not without limit. Those rules cannot discriminate against speech based on the viewpoint of the speaker. *Rosenberger*, 515 U.S. at 829-30. A university cannot, for example, deny a religious student group access to campus facilities or suppress its speech simply because of the religious nature of that group's speech. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Widmar*, 454 U.S. 269-70. But UC-Hastings's condition for student-group recognition and funding—compliance with its nondiscrimination policy—is viewpoint neutral. Organizations of any political, religious, or ideological stripe can become recognized groups provided they adhere to the nondiscrimination policy. As this Court has held, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The University's ground rules for student-group recognition do not discriminate against any political or religious viewpoint. Nor do they target CLS in any way; CLS remains free to meet on campus and exclude from its membership roles students who do not subscribe to its religious tenets.

A. UC-Hastings's Nondiscrimination Policy Is Viewpoint Neutral

The University's nondiscrimination policy is viewpoint neutral on its face. It applies equally to every student group, whether religious or non-religious, racist or anti-racist, in favor of or against gay rights, or voicing any other political or ideological position. Regardless of a group's viewpoint, *all* are prohibited from discriminating against UC-Hastings students desiring to become members or leaders of the group.

The test for whether a restriction on speech is content—and, *a fortiori*, viewpoint—neutral is whether "it is *justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis in original and quotation marks omitted). Thus, a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Here, the University's nondiscrimination policy is not directed at the content of the exclusionary student group's speech or beliefs—just its exclusionary membership practice. The University's policy is based on the reasonable judgment that its students should not be excluded from the educational benefits of campus organizational life because of their religious beliefs or sexual orientation. It does not matter what the purpose, focus, or message of the student group is; all groups are barred from University recognition and financial assistance if they discriminate against a student on any of the proscribed grounds. *See id.*; *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S.

753, 762-63 (1994) (upholding restriction when "none of the restrictions imposed by the court were directed at the contents of petitioner's message"). As this Court has recognized in many contexts, a generally applicable nondiscrimination policy is viewpoint neutral. *See, e.g.*, *Rotary Int'l*, 481 U.S. at 549 (holding that nondiscrimination statute "makes no distinctions on the basis of the organization's viewpoint"); *Roberts*, 468 U.S. at 623-24 (finding nondiscrimination statute viewpoint neutral).

CLS itself acknowledges that the University's prohibition on discrimination on the basis of religion is commendable as applied to most organizations, including nonreligious clubs, Pet. Br. 36-37, but argues that as applied to groups organized around shared religious beliefs, the prohibition exceeds constitutional bounds. So even CLS recognizes that the prohibition on discrimination applies to *all* groups, religious and non-religious alike. The University is not acting to suppress or censor a religious (or any other) group's view, *see Perry*, 460 U.S. at 46, but rather seeks to protect students from discriminatory exclusion in *all* school-funded contexts. Here, the University's policy "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." *Hill v. Colorado*, 530 U.S. 703, 723 (2000).

The University's policy has nothing to do with the religious orientation or views of the student group. In *Rosenberger*, by contrast, the university had a policy against using student-activity fees to fund any student group's activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 825 (alteration in original). Thus when a religious student group, at the time a registered student organization, sought reimbursement for the costs of printing its publication, Wide Awake: A Christian Perspective at the University of Virginia, the school denied funding precisely because the publication espoused a religious viewpoint. The "specific motivating ideology [and] the opinion or perspective of the speaker [was] the *rationale* for the restriction." *Id.* at 829 (emphasis added). Indeed, the university in *Rosenberger* "justifie[d] its denial of [funding] to [the student group] on the ground that the contents of Wide Awake reveal an avowed religious perspective." *Id.* at 832.[5]

The restrictions on religious groups' access to school property invalidated in *Lamb's Chapel* and *Widmar* likewise do not resemble the policy at issue

[5] *Rosenberger* is also noteworthy for what it did not decide. The university in *Rosenberger* had a very similar policy to that of UC-Hastings, where any student group seeking recognition by the university and access to special benefits had to "pledge not to discriminate in its membership." 515 U.S. at 823. The Christian student group in *Rosenberger* agreed to abide by the school's nondiscrimination policy and was a registered student organization under the university's program. *See id.* at 823, 825-26. The student group did not claim that this nondiscrimination policy impaired its ability to express itself, and the Court did not find any First Amendment problem with the university's policy of conditioning official recognition on adherence to such a policy. The challenge in *Rosenberger* was to the facially viewpoint-discriminatory policy of denying registered student organizations funding for "religious activities." *Id.* at 831.

here. As the Court explained in *Rosenberger*, "the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message." *Id.* at 832 (citing *Lamb's Chapel*, 508 U.S. at 827). Similarly, in *Widmar*, the university barred a student group from using campus facilities specifically because of its desire "to engage in religious worship and discussion." 454 U.S. at 269.[6]

UC-Hastings's generally applicable nondiscrimination policy, by contrast, seeks to protect students from discriminatory exclusion, not restrict or suppress any group's particular viewpoint. It has simply placed restrictions on the type of student organizations it is willing to recognize and assist financially. Other groups can meet on campus; they cannot, however, receive funding or the University's imprimatur if they discriminate against students seeking membership in the group.

B. UC-Hastings Has Not Suppressed Or Censored CLS's Speech, Denied It Access To Campus, Nor Infringed On Its Right Of Expressive Association

By conditioning student-group recognition and funding on compliance with a generally applicable, viewpoint-neutral nondiscrimination policy, UC-Hastings has not suppressed or censored the speech of non-complying organizations. Nor has it infringed on their rights of expressive association. It has not

---

[6] Also, unlike this case, the university in *Widmar* sought to bar the student group from using campus facilities altogether. *See* 454 U.S. at 265.

tried to force these groups to include individuals they would rather exclude; these groups remain free to meet on campus and to exclude any individuals they choose. UC-Hastings has simply declined to certify and subsidize groups that it has reasonably determined do not advance its educational mission. A state university has no duty to subsidize expressive activity that is unrelated to its educational mission. And groups, like CLS, that wish to exclude non-adherents from membership, are free to turn down the university's offer of support and continue their practices.

1. UC-Hastings Has No Obligation To Subsidize CLS

While the state is not free to prohibit a private religious group from exercising its freedom of expressive association by excluding those who do not subscribe to its tenets, *see, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 648, 656 (2000), the state is under no constitutional obligation to subsidize the exercise of that right. *See, e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. __, 129 S. Ct. 1093, 1098 (2009) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."). *See generally* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1924-27 (2006).[7] So

[7] For example, the government need not fund private schools, even if it funds public ones. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973). It need not subsidize abortions or abortion advocacy, even if it funds childbirth or family planning. *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-11 (1989); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980); *Maher v. Roe*, 432 U.S. 464, 474-77

long as the government does not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," the government is free to "subsidize some speech, but not all speech." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (quotation marks and brackets omitted).

Thus, although a religious student group like CLS has a right to insist that its members share its religious beliefs, and even that they refrain from homosexual conduct, a state university like UC-Hastings has no obligation to subsidize such a group.

2. UC-Hastings Has Not Infringed CLS's First Amendment Right Of Expressive Association

Through official recognition, UC-Hastings offers registered student groups a package of benefits

---

(continued…)

(1977). It need not make government property or benefits available to all speakers, even if it provides access to some. *Perry*, 460 U.S. at 47-48; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806-11 (1985). It need not facilitate through payroll deductions public employees' contributions to unions' political-action committees, even when it provides payroll deductions for union dues used to support other union speech. *Ysursa*, 555 U.S. at ___, 129 S. Ct. at 1098-99. And the government need not provide tax exemptions for lobbying or electioneering donations, even when it exempts donations that go towards other types of speech. *Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959); *see also id.* at 515 (Douglas, J., concurring) (rejecting "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.").

(*e.g.*, funding, use of the UC-Hastings name, access to the school listserve, the ability to reserve classroom space). The University may condition access to this package of benefits—which it provides to further its educational mission—on compliance with a reasonable viewpoint-neutral nondiscriminatory membership policy.[8]

Non-recognition does not infringe on CLS's right of expressive association. Indeed, although it may permissibly restrict all access to its campus facilities on viewpoint-neutral grounds, UC-Hastings has opened its campus even to non-registered groups like CLS. As the stipulated facts reflect, UC-Hastings has not prohibited CLS members from meeting as a group on campus, and CLS members are free to reserve the school's classrooms, use the school's audiovisual equipment, and communicate with the school's students through physical and electronic means (*e.g.*, classroom blackboards, email, web pages). J.A. 232-33. Accordingly, in conditioning its official recognition, the University is neither

---

[8] Although CLS only briefly addresses the point, the Free Exercise Clause does not entitle the group to a constitutional exemption from the school's neutral, generally applicable nondiscrimination policy. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). The policy is not targeted at religion generally, let alone at any particular religion. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-42 (1993). The Establishment and Equal Protection Clauses are unavailing for the same reason: UC-Hastings's policy reflects neither hostility to religion nor disparate treatment of religious groups. Whether the Establishment Clause would prohibit UC-Hastings from giving CLS the exemption it seeks is an issue not presented by this case and one the Court should not reach.

directly nor effectively forcing CLS to change its membership criteria in order to maintain a presence in the UC-Hastings community.

Healy v. James, 408 U.S. 169, 181 (1972), is distinguishable both because the university's purpose in that case was viewpoint-based exclusion of a group whose "philosophies were counter to the official policy of the college," *id.* at 187 (quotation marks omitted), and because the group was completely denied "use of campus facilities," *id.* at 181. The school authorities in *Healy* went so far as to actively break up the student group's meeting at a campus coffee shop. *Id.* at 176 n.6.

Here, by contrast, the University is not targeting CLS because of its viewpoint and, in addition, allows this group to meet on campus and reserve campus facilities. Moreover, CLS has several other ways of reaching the student body, particularly in today's world, where students frequently interact through websites and online social networks. *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 874 (7th Cir. 2006) (Wood, J., dissenting). Indeed, although lacking official recognition for the 2004-2005 school year, the group still played an active role in the UC-Hastings community: It held weekly meetings, hosted a campus lecture, held several fellowship dinners, organized other activities, and recruited new members. Pet. App. 13a; J.A. 229-30.

The choice faced by CLS—accepting university funding and recognition conditioned on allowing non-adherent students to join as members or rejecting the state's funding and continuing to exclude them—is not unlike the choice faced by certain law schools under the Solomon Amendment, the federal policy upheld in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 58 (2006). The Solomon Amendment requires law schools receiving federal funds to give military recruiters access to their students. Some schools argued that this requirement violated the First Amendment because the schools disagreed with the recruiters' policies yet had to allow them on campus in order to receive federal support. *Id.* at 53. But this Court found that the Solomon Amendment did not violate the law schools' associational rights, noting that they remained free to turn down the funding and exclude military recruiters. *Id.* at 59; *see also Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984) (finding no First Amendment violation where Congress conditioned federal funds on compliance with the nondiscrimination policy of Title IX). Alternatively, the schools could accept the funding and the recruiters, but were still able "to voice their disapproval of the military's message," *FAIR*, 547 U.S. at 70, because the Solomon Amendment did not "limit[] what law schools may say." *Id.* at 60.

As with the law schools in *FAIR*, CLS—like any other group disagreeing with the nondiscrimination policy—may turn down the school's support, and exclude students from membership on the grounds of religion, sexual orientation, or any other basis covered by the policy. And if a group chooses to do so, it would still retain access to UC-Hastings students and its ability to propound its message.

3. UC-Hastings's Nondiscrimination Policy Is Not An Unconstitutional Condition On CLS's First Amendment Rights.

UC-Hastings's nondiscrimination policy does not, as CLS suggests, place an unconstitutional condition on the group's First Amendment rights of free association. CLS claims that exercising its freedom of association (and continuing to discriminate) would require it to forfeit its right to "equal treatment within a forum for speech." Pet. Br. at 55. CLS is, of course, correct that the state "may not deny a benefit [*i.e.*, the school's support] to a person on a basis that infringes his constitutionally protected . . . freedom of speech." *FAIR*, 547 U.S. at 59. But because the forum at issue is a limited public forum, CLS does not have an unfettered right of access to the forum; access to the forum can be conditioned on reasonable, viewpoint-neutral requirements. *See Rosenberger*, 515 U.S. at 829.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to affirm the Ninth Circuit's decision.

Respectfully submitted,

KARA H. STEIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 751-4000

AYESHA N. KHAN
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, NE
Washington, DC 20002

RABBI DAVID SAPERSTEIN
UNION FOR REFORM JUDAISM
2027 Massachusetts Avenue, NW
Washington DC, 20036

SAMUEL ESTREICHER
Counsel of Record
TODD R. GEREMIA
D. THEODORE RAVE
ANDREW D. BRADT
RAJEEV MUTTREJA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
sestreicher@jonesday.com

March 15, 2010

Counsel for Amici Curiae