

IN THE  
**Supreme Court of the United States**

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

Petitioner,

v.

LEO P. MARTINEZ, et al.,

Respondents.

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

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BRIEF ON THE MERITS FOR RESPONDENTINTERVENOR

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## **QUESTION PRESENTED**

Does the First Amendment allow room for a public university, in choosing to establish a forum for student groups that receive official recognition and a small subsidy, to establish, as a viewpoint-neutral condition for receiving limited benefits, the requirement that a recognized group be open to all students?

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## INTRODUCTION

Hastings College of Law gives each student the opportunity to participate in any of their many student organizations. Each student has the right to be a part of an organization regardless of their individual status or any beliefs they may have. Hastings College believes that the students benefit educationally from the equal opportunity to meaningfully participate in any recognized student organization.

Student groups that allow open membership are given certain limited benefits by Hastings College. The petitioner believes that they have the constitutional right to an exemption from Hastings Nondiscrimination Policy. The Christian Legal Society claims that they should still receive the benefits of following the Nondiscrimination Policy regardless of not following it. However, Hastings intends on only giving this benefit to those student organizations that abide by the college's Nondiscrimination Policy. Hastings concludes that its open access policy channels resources in a matter that will enhance the educational opportunities provided to its students.

CLS has the right to express their rights both on the law school campus and around the community. Even though Hastings does not support it, CLS technically has the right to exclude any potential members from being a part of their group. But CLS does not have the right to expect such subsidies from Hastings when they do not follow their Nondiscrimination Policy. There is no record that Hastings' policy is aimed at suppressing certain specific viewpoints or ideas, Hastings' policy must be upheld under the First Amendment.

**I. HASTINGS' NONDISCRIMINATORY POLICY IS CONSTITUTIONAL AND SHOULD BE FOLLOWED.**

**A. Public universities, such as Hastings, have special interest in enforcing their non-discrimination policies.**

Hastings University is the place where thousands of students gather to evaluate new ideas, challenge themselves to understand them and at the same time defend their own beliefs. Diversity is crucial to the university's mission. Hastings should remain as the place where ALL students can debate and advocate for their ideas. It's directly connected to freedom students feel to have on the campus. A public university is the huge marketplace of ideas where students should have an opportunity to learn through different viewpoints.

**B. Petitioner refuses to follow Hastings' nondiscriminatory policy.**

Based on the value of diversity in education Hastings policy requires any groups who want to be officially recognized by the university to have open membership for all the students "regardless of their status or beliefs."

This policy isn't pointed against any religious groups but it protects Hastings from unreasonable discriminatory practices. The policy is viewpoint-neutral and applies to everyone including administration, faculty, student government, and programs sponsored by Hastings. This policy is fully applicable with the law that we shall not "discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."

**C. Hastings' non-discrimination open-membership policy follows California state law.**

California law declares that any postsecondary educational institution that receives any financial assistance from the state shouldn't discriminate based on some numerous factors. This provision legally proves the reasonableness of Hastings' decision to have an open membership requirement for Registered Student Organizations (RSOs). Public funds and facilities shouldn't be granted to the groups that California laws finds discriminatory.

For every student group that is willing to become an RSO there is one requirement: open-membership. Hastings' policy guarantees that every student can become a member of student groups "regardless of their status or beliefs" None of the groups have the right to close their membership to certain students. This policy is how Hastings prevents discrimination on campus and follows legal obligation of California state law.

CLS is asking for the ability to use the school's money, name and logo. It will be natural for the public to make assumptions that Hastings is favoring the discrimination. The university is responsible for the people of California and its image should be protected.

**II. IF THE RULES ARE VIEWPOINT-NEUTRAL, REASONABLE AND NON-COERCIVE, THE GOVERNMENT CAN CONDITION FUNDING AND PARTICIPATION**

**A. Hastings' policy passes the settled principles for public funding and limited forums.**

RSOs are considered as an important part of Hastings' educational system. Because the university provides the funding for RSOs, the leadership, educational and social opportunities should be available to every single student. Hastings can't sponsor bringing an outside speaker to the campus whose speeches won't be open to everyone. When Hastings actually creates and subsidizes a forum, the educational experience is better when opportunity is provided to everyone.

Because RSOs are funded, it's mandatory for them to meet certain requirements. They must be (1) relevant to the educational mission, (2) benefit the student body and (3) make significant contributions to student life.

In *Rumsfeld v. FAIR* (2006) it was ruled that the state is "free to attach reasonable and ambiguous conditions" to organizations participating in a government program. In this case, association of law schools challenged Congress' decision to respect homosexual in the military but still was receiving federal money. The Court decided that First Amendment right is unconstitutional when it's in unconstitutional condition.

In *Grove City College v. Bell* (1984), this Court held that requiring non-discrimination policies for schools to receive federal funding doesn't violate First Amendment rights. Later, in *Rosenberger v. Rector of the University of Virginia* (1995), this Court ruled that purpose, conditions and participation of government subsidy programs must be viewpoint-neutral and public universities can limit the forum to legitimate purposes. Finally, *Pleasant Grove City v. Sumnum* (2009) ruled that the government can restrict speech if the restriction is reasonable and viewpoint-neutral.

Based on these cases, Hastings' open-membership is acceptable as long as it is (1) viewpoint neutral, (2) reasonable for the purposes of the program and (3) not coercively regulating the groups choices.

**B. Hastings' policy is viewpoint-neutral.**

The petitioner argues that Hastings' policy selectively targets Christian Legal Society because its beliefs are based on religion and disapprove a certain kind of sexual behavior. According to CLS, other groups at campus are free to choose their members based on their beliefs and the policy doesn't apply to them.

Petitioner doesn't mention the actual subject of the argument – the open-membership policy and its constitutionality. Instead, CLS is more focused on claiming that Hastings refuses funding their group based on religious ideology.

Hastings open-membership requirement applies to all RSOs and doesn't exclude any of them. Hastings' target isn't any special group, organization, religious or non-religious speech. The main point of CLS' argument is that Hastings can't exclude the students who believe that homosexuality is morally wrong. But they also claim that compared to Hastings, CLS can exclude students who believe it is not. This is illogical.

Hastings policy is viewpoint-neutral when it prohibits discrimination based on specific factors.

**C. The choice presented to student groups is non-coercive.**

RSOs can choose whether or not to abide by the discriminating policies and receive funding. This Court has repeatedly held that denial of funding is neither coercive nor penal. In *National Endowment for the Arts v. Finley (1998)*, "denial of participation in a tax exemption or other subsidy scheme does not, as a general rule, have any

significant coercive effect. In *Dale*, an expressive association can't claim immunity from anti-discriminatory laws just because they claim it would "impair" their message.

By ensuring that all students who join RSOs are eligible for leadership positions the policy simply ensures that they're full-fledged members, not second-class ones. Hastings' policy is over 20 years old and had never been challenged before now.

The petitioner hypothesizes that Hastings' policy would allow dissenters to take over or hijack a group. However, neither the petitioners nor their amice provided any actual examples. This Court does not decide cases based on made-up circumstances.

### **III. PETITIONER'S THEORY OF THE CASE IS BASED ON PRECEDENTS THAT ARE EASILY DISPROVED.**

#### **A. Petitioner's reliance on Healy and Widmar is misplaced.**

The petitioner built his case around these two decisions, but they're both inapplicable. In *Healy v. James (1972)*, the school was trying to completely eliminate a group from campus, not prevent discrimination. The petitioner is therefore wrong in claiming that it's prior restraint.

The petitioners also analogized *Widmar v. Vincent (1981)* with prior restraint, and are wrong for the same reason. The school's policy completely eliminated religious groups from campus.

Both cases involved total expulsion on a viewpoint discriminatory (aimed at one group) basis. In contrast, Hastings' policy is directed at every group that desires public funding.

Even though they don't apply to CLS' rule, *Healy* and *Widmar* support Hastings because they confirm that schools can be denied recognition when they don't accept viewpoint-neutral rules, like the nondiscriminatory policy in question here.

**B. Neither Dale nor Hurley extends to the choice at issue here.**

Petitioner is wrong in comparing this case to *Boy Scouts of America v. Dale* (2000). In *Dale*, New Jersey tried to force the Boy Scouts of America to elect a gay rights activist as their leader. Hastings was in no way forcing CLS to do anything. They gave them the option of either open membership and enjoy public funds, or do without that money and discriminate at will.

College campuses have always been deemed a limited forum subject to rules, so petitioner is incorrect in saying Hastings is "driving views from the square".

**C. Petitioner's half-hearted free exercise argument is telling.**

The petitioner dares only to briefly discuss the Establishment Clause because *Employment Division v. Smith* (1990) is a huge hurdle for their argument to get over. Under *Smith*, neutral, generally applicable laws aren't subject to First Amendment challenge no matter how severe an impediment they may be to the exercise of religion. For some reason, petitioner amici don't think this applies to religious groups. In fact, religious groups are exactly what *Smith* targets.

The *Smith* decision includes that just because a law makes a religious group

exempt from a practice-based behavior doesn't mean it's required by the Constitution. Courts have generally allowed Title VII exceptions for churches, but that's not at issue here. The policy at issue doesn't compare the selection of anyone.

**IV. CLS' DISCRIMINATORY POLICY DOESN'T HAVE TO BE RECOGNIZED BY HASTINGS UNIVERSITY BECAUSE THE RELIGIOUS GROUP CAN STILL FUNCTION WITHOUT LEGAL RECOGNITION.**

**A. The First Amendment does not require states to pay for discriminatory practices.**

States don't have to pay for discriminatory practices just because they pay for nondiscriminatory ones. A State's financial support for a certain group's mission or activities might be an unintended sign of their approval of it. This is especially true in this case, because sponsored clubs at Hastings are entitled to the school's name and logo.

The petitioner wants the Court to create a straightforward rule so the ruling only applies to First Amendment (religion, namely) but all other factors (such as age, military status, marital status, disability, etc) can be grounds for refusing a group public money.

The petitioner's idea is very dangerous to all of the groups mentioned above as well as laws requiring a group's use of public forums only after they agree not to discriminate.

If the petitioner is correct, the Hastings outdoor club could refuse to let Chinese students on a school-sponsored biking trip because they disagree with their country's communist government.

Agreeing with the petitioner is buying a first-class ticket to a slippery slope. It's foreseeable that first, the State will be required to support homosexuals being discriminated against, then blacks, then women

**B. As an unregistered organization, CLS can still communicate with Hastings' student body.**

University of Hastings isn't forcing CLS to accept the people they're discriminating. Also it isn't requiring the organization to disappear. Hastings just refuses to give its name, reputation, and megaphone to the student group that is in conflict with its basic policy.

CLS can still function without being officially recognized as RSO. They can still throw events, have bible studies, start a website, and recruit new members. After being rejected for RSO, Christian Legal Society still had all the opportunities and numerous alternative avenues: CLS was still permitted to have group meetings, participate in the student organization fair, reserve the university's rooms for events and post announcements about their activities all around the campus.

## **CONCLUSION**

Either the Ninth Circuit's decision should be affirmed or the writ of certiorari should be dismissed as wrongly granted.

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