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

REPLY BRIEF FOR PETITIONER

GREGORY S. BAYLOR
COUNSEL OF RECORD
KIMBERLEE WOOD COLBY
CENTER FOR LAW & RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 300
Springfield, VA 22151
(703) 642-1070 ext. 3502
Counsel for Petitioner

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ARGUMENT

I. THE SPLIT WITH THE SEVENTH CIRCUIT'S DECISION IN *CHRISTIAN LEGAL SOCIETY v. WALKER* IS IRRECONCILABLE.

None of Respondents' alleged factual and procedural differences (Br. in Opp. 18-21) between the Ninth Circuit in the instant case and the Seventh Circuit in *Christian Legal Society v. Walker,* 453 F.3d 853 (7th Cir. 2006), explain the stark difference between the two appellate courts' outcomes and their approaches to the same legal claim by local chapters of the same national

organization challenging public law schools' refusal to recognize the chapters because of the same faith-based leadership and voting membership policies. Pet. 18-20.

The conflict leaves Christian Legal Society and other nationwide campus religious groups in an untenable position, requiring them to set leadership criteria under directly opposed regimes of constitutional law. *See Brief* Amici Curiae *of National Association of Evangelicals, Campus Crusade for Christ, InterVarsity Christian Fellowship, and Beta Upsilon Chi in Support of Petitioner,* No. 08-1371 (U.S. June 8, 2009).

The Ninth and Seventh Circuits sharply diverge in their *approaches* to a CLS chapter's claim that a public law school violated its First Amendment right of expressive association. The Seventh Circuit actually undertook expressive association analysis, asking whether application of a university's policy to CLS would undermine its ability to propound public or private viewpoints. 453 F.3d at 861-63. The Seventh Circuit then analyzed whether such a burden survived strict scrutiny. *Id.* at 863-64. Obviously, the Ninth Circuit addressed none of these questions.

None of the various procedural and factual differences Respondents invoke are relevant. First, the procedural posture of *Walker* – an interlocutory appeal of the denial of a motion for a preliminary injunction – does not change the fact that the Seventh Circuit engaged in expressive association

analysis while the Ninth Circuit did not. Invoking the preliminary character of that analysis – whether the chapter was likely to succeed on the merits of its expressive association claim – is unresponsive to the point made in the petition: the Seventh Circuit applied *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), while the Ninth Circuit did not.

Second, contrary to Respondents' contention, the comparatively undeveloped nature of the record in *Walker* hardly explains the Ninth Circuit's refusal to apply this Court's expressive association precedents. The Seventh Circuit would still have applied *Dale* and *Hurley* had the appeal occurred at a later stage of the litigation with a more extensive record.

Third, the existence of evidence in *Walker* that the university unevenly applied its policy does not diminish the conflict between the Seventh and Ninth Circuits in their approaches to CLS's expressive association claim. Evidence of uneven application did not trigger the Seventh Circuit's expressive association analysis. Relatedly, questions about whether SIU's Affirmative Action/Equal Opportunity policy was intended to apply to student groups have nothing to do with the Seventh Circuit's correct decision to analyze the CLS chapter's expressive association claim. The existence of *additional* problems with the university's treatment of the CLS chapter does not mitigate the disagreement between the two circuits.

Fourth, the Seventh Circuit's decision that it need not resolve *other* legal questions (*e.g.*, the nature of the speech forum, the reasonableness of the policy in light of the forum's purposes) is irrelevant to the stark contrast between the two appellate courts' approaches to CLS's expressive association claims.

Respondents' illusory offer of minimal access to CLS does not distinguish *Walker*. Br. in Opp. 1 n.1, 9, 20 n.10, 27, 29. The facts make this a hollow offer, and this Court's holdings make it legally irrelevant.

Respondents' counsel explained their offer of meeting space to the district court as follows: "Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis . . . if they're available after priority is given to registered organizations." ER 641. Respondents offer CLS use of facilities on a space-available basis *only* after priority is given to the 60 recognized groups; moreover, CLS could be charged a rental fee. App. 78a-79a (Reg. 32.10.A.4). Permission could be revoked at any time. ER 642. In addition, Respondents have frozen CLS out of all campus channels of communication, except bulletin boards that are available to off-campus persons. ER 348, 422. Travel funds were revoked. ER 345-46. The student fair that CLS attended occurred *before* denial of recognition. ER 345-46.

In any event, the offer is ultimately meaningless: CLS would still be subject to the nondiscrimination policy and openness requirement under Regulation

31.12, which requires "[a]ll persons on College property . . . to abide by College policies and campus regulations." App. 77a.

The offer is also legally irrelevant. In *Healy,* this Court required recognition for a political student group even though the college officials claimed that the group "still may meet informally on campus." *Healy v. James,* 408 U.S. 169, 182-83 (1972) (denial of recognition "by itself constitutes an unconstitutional burden on a student group's right of expressive association"). In *Board of Education v. Mergens,* 496 U.S. 226, 247 (1990), the Court rejected the school's protest that a Christian student group could meet informally on campus and required school officials to grant the group formal recognition, pursuant to the Equal Access Act, with all the attendant benefits of access to meeting space and channels of communication.

II. THE SPLIT WITH THE SECOND CIRCUIT'S DECISION IN *HSU v. ROSLYN UNION FREE SCHOOL DISTRICT* IS STARK.

The Ninth Circuit decision directly conflicts with the Second Circuit's pre-*Dale* ruling in *Hsu v. Roslyn Union Free School District No. 3,* 85 F.3d 839 (2d Cir. 1996), holding that a religious student group's "Christian officer requirement, as applied to some of the club's officers, is essential to the expressive content of the meetings and to the group's preservation of its purpose and identity," and, thus, a school district's denial of recognition based on its nondiscrimination policy violated the group's rights

of expressive association and speech under the Equal Access Act. *Id.* at 848, 858-59, 862. Writing without the benefit of this Court's guidance in *Dale*, the Second Circuit found that three of the group's five officer positions affected the group's religious expression; therefore, the group could limit those positions to persons who shared its religious commitment. *Id.* at 857-59, 862.

Thus, the Second Circuit protected the right of a religious student group to require leaders who directly affect the content of its meetings to share its religious beliefs, while the Ninth Circuit ruled that a religious group could not require any leader to share its religious viewpoint. Nor did the Ninth Circuit attempt even a minimal analysis of the impact non-Christian leaders would have on a Christian group's expression of its religious message. App. 2a.

Respondents' effort to dismiss this conflict on the technical claim that *Hsu* was decided on statutory grounds (Br. in Opp. 22-24) ignores the essential fact that the Second Circuit's statutory holding was explicitly anchored in this Court's constitutional jurisprudence protecting expressive association. Ruling for the students under the Equal Access Act, as is proper when both statutory and constitutional rights are claimed, the Second Circuit held that "the Act contains an implicit right of expressive association" because "the right to associate for the purpose of holding such a meeting is a necessary corollary" of the equal access right to meet. 85 F.3d at 859. The Second Circuit conducted an extensive expressive association analysis focused on this

Court's constitutional analysis in *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987), and *Hurley*. 85 F.3d at 858-59. The Second Circuit concluded that this Court's constitutional jurisprudence required it to interpret the federal act as protecting the right of a religious group to require its key leaders to share its core religious beliefs. *Id.* at 859. The Ninth Circuit failed to perform any expressive association analysis whatsoever.

Additionally, *Hsu* conflicts with the Ninth Circuit's specific holding – and Respondents' primary argument – that neutral application of a nondiscrimination policy to all groups satisfies a school's duty to provide a religious group with equal access. App. 2a; Br. in Opp. 3-4, 12, 14, 20, 24-28, 31-35. Observing that a "focus on the even application of [a] nondiscrimination rule misses the point," the Second Circuit instead found that "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" 85 F.3d at 860. Rejecting the claim, echoed here by Respondents (Br. in Opp. 35), that this would give the religious group "special rights," the Second Circuit reproved school officials for "ignor[ing] one of the principal ways in which many extracurricular clubs typically define themselves: by requiring that their leaders show a firm commitment to the club's cause." *Id*. at 860.

The Second Circuit spurned Respondents' underlying premise that a religious group's "concern that the Club risked facing non-Christian leadership and might be taken over by students inimical to the Club's purpose was . . . speculation." *Id.* at 861 (quotation marks and brackets omitted). The Second Circuit noted that the religious group had not made "any showing that [non-Christians] would desire to communicate any particular message." 85 F.3d at 856. Nonetheless, the Second Circuit found that "it is also speculation . . . to conclude that there would be no hostility toward" the religious group, particularly given that "religious groups have historically been the object of hostility and persecution more often than, say, chess players or glee clubs." *Id.* at 861.

III. THERE IS A CONFLICT WITH *BOY SCOUTS OF AMERICA v. DALE* AND *HURLEY v. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON*.

Respondents contend that the Ninth Circuit's judgment does not contradict *Dale* and *Hurley*, arguing that only police power rules can violate the right of expressive association. Br. in Opp. 25-30. To the contrary, in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), this Court tacitly but clearly rejected that contention. There, law schools claimed that the Solomon Amendment violated their right of expressive association. *Id.* at 68-70. The Solomon Amendment was a condition on access to federal funding, *id.* at

51; this Court nonetheless examined whether compliance would significantly undermine the ability of the law schools to express their message. *Id.* at 68-70. Citing *Healy*, 408 U.S. at 180-84, this Court explained that laws that "d[o] not directly interfere with an organization's composition" but instead "impose penalties or withhold benefits" can violate the right of expressive association.[1] 547 U.S. at 69. If the Ninth Circuit – and Respondents – were correct that expressive association analysis is relevant only when police power rules were involved, this Court would not have undertaken that analysis in *FAIR*.[2]

Respondents also claim that the Ninth Circuit's decision does not contradict *Dale* and *Hurley* because CLS allegedly presented inadequate evidence that compliance with Respondents' policy would undermine the chapter's ability to express its religious messages. Br. in Opp. 29-30. To the contrary, the CLS chapter in this case presented the same evidence as the chapter in *Walker*, showing that CLS chapters are organized around shared religious commitments, both doctrinal (*e.g.*, belief in the Trinity) and ethical (*e.g.*, the limitation of sexual

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[1] The Court's declaration belies Respondents' suggestion that the nature of the speech forum somehow determines whether speakers possess the right of expressive association.

[2] This Court rejected the law schools' expressive association claim because Congress did not condition the receipt of federal funding upon having military recruiters "become members" or "part of the law school." 547 U.S. at 69. Of course, in the instant case, Respondents will recognize CLS only if it agrees to allow *anyone* to become a leader or voting member, without regard to his or her viewpoint, conduct or expression.

activity to married couples). Pet. App. 99a-108a; ER 334. Following *Dale*, the Seventh Circuit asked "whether application of [the university's] antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity." 453 F.3d at 862. Declaring "[t]o ask this question is very nearly to answer it," *id.,* the *Walker* court sensibly did not demand empirical studies predicting what the community would think of CLS were it to comply with the university's demands. Nor did the court require CLS to prove that there were individuals rejecting its religious beliefs and practices who were waiting to join. It was virtually self-evident to the Seventh Circuit that the inclusion of such individuals in leadership and voting membership positions would impair CLS's ability to communicate its message. In light of this, Respondents' assertion that CLS presented "no evidence" that compliance with school policy would undermine its message is untenable.

Respondents also suggest that CLS would not suffer a burden from complying with the policy because, during the 2004-2005 school year, it allowed non-member attendees to pray.[3] Br. in Opp. 9, 23-24. Participants' prayers do not affect the group's overall message, unlike the leaders and

[3] The practices of groups that existed prior to the formation of CLS and its affiliation with the national organization are irrelevant. It is undisputed that none of these fellowships were CLS chapters. ER 237, 250. The first chapter approved by the national organization started at Hastings in September 2004.

voting members, who control the group's message, vote on its decisions, amend its constitution, and lead its Bible studies. Respondents seem to suggest that CLS has no expressive association rights unless it either categorically excludes non-members from attending meetings or muzzles those who attend.

Respondents' understanding of their unwritten "openness" policy as a broad "all comers" requirement magnifies their interference with associational freedom. Such a policy means that all student groups at Hastings have lost the right to choose their leaders and members. The Hastings Democratic Caucus cannot expel a member who tore down "Obama 2008" signs while shouting "Vote for McCain." The Hastings Association of Muslim Law Students cannot remove a group president who drew a picture of Muhammed. Like the airport policy in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), that banned all "First Amendment activities," the "openness" policy is a classic example of an overbroad regulation of speech that is a *per se* violation of the First Amendment. Just as it was "obvious that . . . no conceivable governmental interest would justify [the airport's] absolute prohibition of speech," *id.* at 575, it is obvious that Respondents' ban on expressive association offends the First Amendment.

IV. THIS COURT SHOULD NOT WAIT FOR A DIFFERENT CASE TO RESOLVE THE QUESTION PRESENTED.

Respondents predictably urge this Court to wait for some other case to resolve the important question presented in the petition. Br. in Opp. 16-17. Yet, the costs of delay will be substantial.

First, the conflict among the circuits leaves educational officials – particularly those in states whose circuit courts have not addressed the issue – without necessary guidance. Given the Ninth Circuit's departure from *Dale*, and its conflict with *Walker* and *Hsu*, it is likely that even more extensive litigation will be necessary to resolve these controversies.

Second, there is no assurance that a similar case, with the issue so clearly presented, will soon come before this Court. Respondents propose that one of the cases discussed on pages 32-39 of the petition might be a better candidate for review. An examination of the listed cases reveals the emptiness of that suggestion. In *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *appeal docketed*, No. 08-13332 (11th Cir. Jul. 30, 2008), the University of Florida claimed to change its nondiscrimination policy and filed a motion to dismiss the appeal as moot, which is pending. Petitioners have been unable to ascertain any pending case in the Seventh Circuit on this issue, despite Respondents' cryptic claim that one exists. Br. in Opp. 16. If Respondents are referring to the

Walker case, it ended when, in response to the Seventh Circuit's 2006 ruling, the university changed its policy to respect associational freedom. The cases at the University of North Carolina, Washburn University, the University of Minnesota, the University of Toledo, the University of Illinois, Arizona State University, Ohio State University, the University of Georgia, and Penn State University have all been completed.

Third, this Court has expressly stated that "[t]he fact that the Court of Appeals' order under challenge [] is unpublished carries *no weight* in our decision to review the case." *Commr. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) (emphasis added). This Court has not hesitated to take up an important and unsettled issue even though the lower court's judgment is unreported. *See, e.g.*, *Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000). *See* Michael Hannon, *A Close Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 227-28 (2001).

Fourth, there is no reason to believe that the Ninth Circuit and its district courts will do anything more than the Ninth Circuit did in the instant case: decline to apply expressive association analysis and summarily rule against religious groups. Already, in *Christian Legal Society v. Eck*, 2009 WL 1439709 at *2 & n. 8 (D. Mont. May 19, 2009), *appeal docketed*, No. 09-35581 (9th Cir. June 18, 2009), a district court cited and relied upon the district court and Ninth Circuit judgments in the instant case in ruling

against a CLS chapter challenging its derecognition by University of Montana officials. The 317 postsecondary educational institutions in the Ninth Circuit have been given a green light to deny recognition to religious groups who simply want to protect their religious identity by requiring that their officers and voting members share their religious viewpoints. Pet. 31.

CONCLUSION

For these reasons and those stated in the petition, this Court should issue a writ of certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted,

GREGORY S. BAYLOR
COUNSEL OF RECORD
KIMBERLEE WOOD COLBY
CENTER FOR LAW &
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 300
Springfield, VA 22151
(703) 642-1070 ext. 3502
Counsel for Petitioner

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