

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHRISTIAN LEGAL SOCIETY CHAPTER :

4 OF THE UNIVERSITY OF CALIFORNIA, :

5 HASTINGS COLLEGE OF THE LAW, :

6 AKA HASTINGS CHRISTIAN FELLOWSHIP, : No. 08-1371

7 Petitioner :

8 v. :

9 LEO P. MARTINEZ, ET AL. :

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11 Washington, D.C.

12 Monday, April 19, 2010

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 a.m.

17 APPEARANCES:

18 MICHAEL W. McCONNELL, ESQ., Stanford, California; on
19 behalf of Petitioner.

20 GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of
21 Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-1371, Christian Legal Society Chapter of the University of California-Hastings v. Martinez.

Mr. McConnell.

ORAL ARGUMENT OF MICHAEL W. McCONNELL

ON BEHALF OF THE PETITIONER

MR. McCONNELL: Mr. Chief Justice, and may it please the Court:

If Hastings is correct, a student who does not even believe in the Bible is entitled to demand to lead a Christian Bible study, and if CLS does not promise to allow this the college will bar them from its forum for speech.

The First Amendment -- under the First Amendment, rights run the opposite way. Hastings is the government; CLS is private. A public forum for speech must be open and inclusive, but participants in the forum are entitled to their own voice.

JUSTICE KENNEDY: Now, these are fundamental arguments, and I don't want to spend too much time on factual matters because that's frustrating to both the Court and the counsel.

1 But we do have the problem of the
2 stipulation. The stipulation makes it clear that
3 Democrats and Republicans can both get into the other
4 one's club. That's Stipulations 17 and 18 at 220 of the
5 Joint Appendix. You want to get away from the
6 stipulation by what, according to your reply brief,
7 Hastings said in its answer, but the stipulation
8 supercedes the answer.

9 So if both counsel could just address for a
10 moment: What is the case that we have here? You have
11 different views on what case is before us.

12 MR. McCONNELL: Happy to, Justice Kennedy.

13 If you just look with me at Joint
14 Stipulation 17, I think it makes this completely clear.
15 That's on page 221 of the Joint Appendix, and it states:
16 "Both parties agreed that in order to become a
17 registered student organization a student organization's
18 bylaws must provide that its membership is open to all
19 students," -- that's the all-comers policy -- "and the
20 organization must agree to abide by" -- "abide by the
21 Nondiscrimination Policy." That's capital N, capital P,
22 a defined term. The "Nondiscrimination Policy" is
23 defined in Joint Stipulation No. 15. That is what we
24 have been calling the written policy. And the idea that
25 membership must be open to all students is described in

1 Joint Stipulation 18, which is simply a description of
2 what that policy is.

3 JUSTICE SCALIA: But doesn't -- doesn't the
4 one -- isn't the all-comers policy broader than the
5 nondiscrimination policy, so that if you comply with
6 that you automatically comply with everything in the
7 nondiscrimination clause?

8 MR. McCONNELL: It is broader. It's our
9 position that either of these justifications for
10 excluding CLS is unconstitutional.

11 JUSTICE SCALIA: Yes, but -- but the latter,
12 the nondiscrimination policy, you assert is -- is not
13 viewpoint neutral, that it has a particular impact upon
14 a religious organization; whereas, the other policy, the
15 all-comers policy, applies to everybody, and that
16 argument is not available to you.

17 MR. McCONNELL: Justice Scalia, our
18 argument -- there are two policies. They have invoked
19 both. We believe both are unconstitutional, but for
20 slightly different reasons. The written policy is
21 unconstitutional because it is overtly viewpoint
22 discrimination, but discriminatory and thus violating
23 the principles of cases like *Rosenberger* and *Widmar*.

24 The all-comers --

25 JUSTICE GINSBURG: But, Mr. McConnell,

1 Justice Scalia just made the point that the all-comers
2 policy overwhelms the other, so that I would like you to
3 deal up front with the all-comers policy that the Dean
4 in her deposition said loud and clear: "Our policy is
5 all-comers. Yes, Republicans have to be admitted to the
6 Democratic group and vice versa." So unless you are
7 challenging the veracity of the Dean after stipulating,
8 as you did, that all-comers is the policy, I don't see
9 how we can listen to your argument about the so-called
10 written policy?

11 MR. McCONNELL: Both policies we contend are
12 unconstitutional. Let's begin with the all-comers
13 policy, and when you conclude that it is
14 unconstitutional we will also need to deal with the
15 other since they have two arrow in their quiver.

16 JUSTICE KENNEDY: You can do that, but it's
17 a much different case if Hastings treats the CLS
18 differently than it treats the Democratic and Republican
19 Club. Those are much different. Frankly it's a much
20 easier case for you. But it's -- it's frustrating for
21 us not to know what kind of case we have in front of us.

22 MR. McCONNELL: Your Honor, it's a case
23 where the -- where Hastings has put forward two quite
24 different justifications for denying our right and both
25 of them are unconstitutional.

1 Let's begin with the all-comers policy.

2 JUSTICE ALITO: Mr. McConnell, when I
3 read -- when I read the papers that Hastings submitted
4 to the district court at the same time that the joint
5 stipulation was submitted, I saw one reference after
6 another to an allegation that Hastings was applying its
7 policy in a discriminatory manner, that it was not in
8 fact insisting that all registered student organizations
9 admit all applicants. And when I read their brief in
10 the Ninth Circuit I saw that point reiterated again and
11 again.

12 So that led me to believe that what was
13 stipulated was not that in fact they had a policy which
14 they enforced under which anybody who applied to any
15 group would be admitted, but that this was what Dean
16 Cane had announced. That was the stated policy, but not
17 necessarily the actual policy that was employed. And
18 that was the argument it seemed to me that CLS was
19 making; isn't that correct?

20 MR. McCONNELL: That's entirely correct,
21 Justice -- Justice Alito.

22 JUSTICE SCALIA: Well, if that was it you
23 should have brought in some -- some evidence of -- of
24 different treatment of other groups. And as --

25 MR. McCONNELL: Justice --

1 JUSTICE SCALIA: There is none of that
2 except your citation of the bylaws of two groups in your
3 brief.

4 MR. McCONNELL: Well, that is in fact the
5 evidence.

6 JUSTICE GINSBURG: But Mr. McConnell, here
7 is a statement, a stipulation. It's a stipulation for
8 summary judgment. It says: District judge, you take
9 this to be the facts: Hastings requires that registered
10 student organizations allow any student to participate,
11 become a member, seek leadership positions in the
12 organization. That is not qualified. It says:
13 District judge, here are the facts that we stipulate.
14 It doesn't say this is what the Dean says, but it's not
15 really enforced. It's not qualified at all.

16 MR. McCONNELL: Justice Ginsburg, we -- we
17 stipulated that this was their policy. That stipulation
18 contains nothing about the historical facts as to how
19 Hastings has actually applied it. But let's talk about
20 the policy, because it is unconstitutional --

21 JUSTICE SCALIA: I wish you would. You are
22 going to waste your whole time just discussing this
23 stipulation point. Let's assume -- let's assume that
24 the latter is the policy.

25 MR. McCONNELL: Yes, because the policy is I

1 think blatantly unconstitutional. It is manifestly
2 overbroad with respect to any purposes stated. And of
3 course, in Healy v. James this Court held that any
4 restriction on a student speech forum may be no more
5 extensive than is required by its purposes. It is also
6 a frontal assault on freedom of association. Freedom of
7 association is the right to form around shared beliefs.
8 To say that groups may not form around shared beliefs --

9 JUSTICE SOTOMAYOR: So is this an exception
10 that you want to talk about as it is applied to
11 religious groups, or are you suggesting that if a group
12 wanted to exclude all black people, all women, all
13 handicapped persons, whatever other form of
14 discrimination a group wants to practice, that a school
15 has to accept that group and recognize it, give it funds
16 and otherwise lend it space?

17 MR. McCONNELL: Not at all, Justice
18 Sotomayor.

19 JUSTICE SOTOMAYOR: So what is wrong with
20 the purpose of a school to say, we don't wish any group
21 that doesn't -- that discriminates?

22 MR. McCONNELL: The stipulation is that they
23 may not exclude based on status or beliefs. We have
24 only challenged the beliefs, not status. Race, any
25 other status basis Hastings is able to enforce. But

1 they may not tell a group --

2 JUSTICE STEVENS: What if the beliefs --

3 MR. McCONNELL: -- that we don't have to let
4 you in if we don't agree with you.

5 JUSTICE STEVENS: What if the belief is that
6 African Americans are inferior?

7 MR. McCONNELL: Again, I think they can
8 discriminate on the basis of belief, but not on the
9 basis of status. So that if there were racist
10 organizations --

11 JUSTICE SCALIA: You can have a student
12 organization, I suppose, of that type. It wouldn't
13 include many people. But if there were such an
14 organization, I assume that they would have that -- that
15 belief required, right?

16 MR. McCONNELL: That's right, but they could
17 not go the next step and exclude someone on the basis of
18 status.

19 JUSTICE BREYER: Isn't this just the
20 opposite? You have to let anybody in, anybody,
21 regardless of their status or beliefs. So you can't
22 discriminate on the basis of status or belief. That's
23 what the policy says I just read. It doesn't say you
24 can, it says that you can't.

25 MR. McCONNELL: It's that the group may not

1 confine its leadership based upon its beliefs.

2 JUSTICE BREYER: That's what you say, but
3 that's not what the policy says. The policy says that
4 you have to let everybody in, regardless of their status
5 or belief.

6 MR. McCONNELL: Right.

7 JUSTICE BREYER: You cannot discriminate on
8 the basis --

9 MR. McCONNELL: And our view is the status
10 half of that is perfectly constitutional and the belief
11 half of that is not.

12 JUSTICE BREYER: That is, you have to, you
13 have to let these organizations discriminate on the
14 basis of belief. And they say: No, we don't want to;
15 that's too complicated for us to figure out which ones
16 we should, which one we shouldn't. We'd rather let them
17 work off-campus. We just don't want to get into this
18 business. It's not just against religion. It might be
19 against a Turkish-speaking society that thinks Turkish
20 is extremely important to speak or a chess club that
21 thinks the same. It could be a lot of people.

22 Now, why do you -- what's wrong with us, a First
23 Amendment -- an organization itself affected with First
24 Amendment interests, saying we just don't want to have
25 those on campus organizations, too much trouble.

1 MR. McCONNELL: What is wrong with that is
2 that restrictions on a designated public forum must be
3 reasonable in light of the purposes of the forum. The
4 purpose of the forum is set forth in joint stipulation
5 number 8. It is to promote a diversity of viewpoints
6 among registered student organizations. If the student
7 organizations are not allowed to have a coherent set of
8 beliefs, there can be no diversity among them.

9 JUSTICE SOTOMAYOR: But this sounds like a
10 debate over whether the policy as the school believes it
11 should be implemented is not a good one. But isn't that
12 their choice? Don't we give deference to an educational
13 institution in terms of the choices it makes about
14 affecting its purposes? And the purpose here is we
15 don't want our students to discriminate.

16 MR. McCONNELL: There is a stipulation as to
17 what the purpose is, and the purpose is to promote a
18 diversity of viewpoints among registered student
19 organizations.

20 JUSTICE BREYER: That's their way of doing
21 that.

22 JUSTICE GINSBURG: That stipulation -- but
23 Hastings takes the position that it's all in favor of
24 diversity, not only among the groups but within the
25 groups. So --

1 MR. McCONNELL: Which is not the joint
2 stipulation. The stipulation is that the purpose of the
3 forum is diversity among groups. Their policy is not --
4 it's not only just unreasonable in light of it, it is
5 contrary to it. It defeats the purpose of the forum.

6 JUSTICE GINSBURG: It is that they -- they
7 say, yes, we believe in diversity among groups, but we
8 also believe in diversity within the group; that's a
9 good thing. They are not backing off from: We think
10 diversity among groups is fine.

11 MR. McCONNELL: They say that in their
12 brief, but that is not the stipulation of facts in the
13 case.

14 JUSTICE BREYER: Let me make an imaginary
15 example.

16 JUSTICE SCALIA: Where -- where is the
17 stipulation?

18 MR. McCONNELL: It's page 216 in the Joint
19 Appendix, Joint Stipulation No. 8. It is the only
20 stipulation in the case having to do with what the
21 purpose is of the RSO forum.

22 JUSTICE SCALIA: Wait a minute now. A
23 diversity --

24 MR. McCONNELL: "Hastings seeks to promote a
25 diversity of viewpoints among registered student

1 organizations."

2 And note how destructive an all-comers
3 policy directed on belief is toward -- toward that.
4 That means that if, for example, there is an NAACP
5 chapter, it would have to allow a -- a racist skinhead
6 to sit on -- in on its planning meetings. That means
7 that if there is an environmentalist club that has a
8 demonstration in Sacramento in favor of cap-and-trade
9 legislation, they would have to allow --

10 JUSTICE GINSBURG: It may be --

11 MR. McCONNELL: -- a global warming skeptic
12 to --

13 JUSTICE GINSBURG: It may be an ill-advised
14 policy, but the school says: It's our policy, it's
15 working fine, and all the -- the hypotheticals about
16 sabotage, takeover, they haven't happened.

17 MR. McCONNELL: They haven't happened
18 because this policy came into being -- was announced for
19 the first time in 2005, so there couldn't possibly be
20 any -- any record of that.

21 JUSTICE SCALIA: This -- this was not the
22 policy on the basis of which CLS was excluded; is that
23 correct?

24 MR. McCONNELL: That's correct, it was not.

25 JUSTICE SCALIA: It -- when they were

1 refused participation in the -- in the student
2 organization program, they were not told about the
3 all-comers policy.

4 MR. McCONNELL: That's correct. Joint
5 Stipulation No. 40 states clearly that the -- that the
6 -- that they were informed, and I quote: "They were
7 informed that CLS bylaws were not compliant with the
8 religion and sexual orientation provisions of the
9 Nondiscrimination Policy."

10 JUSTICE ALITO: And was there any written
11 document memorializing this policy prior to the time
12 when the former dean gave her deposition?

13 MR. McCONNELL: Never.

14 JUSTICE ALITO: And is the -- is the policy
15 as articulated by the dean in her deposition the same as
16 the policy that Hastings now claims it has in its brief?

17 MR. McCONNELL: I don't think so. Every
18 time the policy is mentioned, it seems to morph into
19 something else. When the dean announced in the
20 depositions, she said all students may participate on
21 the -- in all activities, period, full stop. Now we
22 find out in their brief, well, their -- groups can have
23 conduct limitations, they can require dues, they can
24 have attendance requirements, they can have competitive
25 contests to see whether they get in.

1 This -- this policy is -- it changes with
2 every wind.

3 And -- but the fundamental problem with
4 this -- with this is what -- what this Court stated in
5 *Velazquez v. Legal Services Corporation*, that you cannot
6 allow -- you cannot allow the terms of the policy just
7 to say that whatever their policy is, that that
8 determines the contours of the program, because that
9 would render the First Amendment a -- a nullity.

10 JUSTICE KENNEDY: Of course, that is not a
11 religion case. Your argument at its most fundamental
12 level is that religious organizations are different
13 because religion is all about belief. But at that point
14 don't we also have a tradition of separation? That's
15 the whole reason why church and state for many purposes
16 are kept separate, so that States are not implicated
17 with religious beliefs.

18 And it -- it -- it seems to me we have to
19 consider that when we are considering your argument.
20 Now you can cite *Rosenberger*, but -- but I think this is
21 different from that.

22 MR. McCONNELL: The separation is between
23 church and State, but this Court has held over and over
24 again that speech forums -- that people participating in
25 a speech forum are not the State. The State is

1 Hastings. We are perfectly private. There is nothing
2 wrong with a religious organization, even on public --

3 JUSTICE SOTOMAYOR: You are not --

4 JUSTICE SCALIA: Anyway, as I understand
5 your argument on the all-comers policy, it is not an
6 argument that -- that is based upon the religious nature
7 of CLS. You would make the same argument of
8 unconstitutionality with respect to the student
9 Republican Club, wouldn't you?

10 MR. McCONNELL: We would. Now, we do --
11 there is in addition of free exercise argument, but I
12 don't -- but in this case what the free exercise clause
13 protects is exactly what the associational freedom test
14 would protect for everyone.

15 JUSTICE KENNEDY: I had thought that an
16 important part of the case, of your case, is that belief
17 is inherent to the idea of religious expression and must
18 be protected. But if the protection causes problems
19 within the school for other policies, then doesn't the
20 separation policy come into play? That's -- that's what
21 I'm asking.

22 MR. McCONNELL: Again, separation does not
23 apply to private parties when they are operating, even
24 on government property.

25 JUSTICE GINSBURG: Mr. McConnell, let's say

1 it is the belief of this group, based on their reading
2 of the Bible, that only white men can lead the Bible
3 studies, can become officers of the group, and that's
4 based on their fundamental belief that that's what the
5 Bible instructs. On your view, must Hastings give this
6 organization status as a recognized student
7 organization?

8 MR. McCONNELL: No, Justice Ginsburg. Our
9 position is it is unconstitutional to -- to prohibit
10 groups to form around beliefs but not around status.

11 JUSTICE GINSBURG: But the belief is -- this
12 is the belief.

13 MR. McCONNELL: They can insist that -- that
14 everyone who participates in the group have that belief,
15 and that, as Justice Scalia said, may mean it's going to
16 be a very small group. But they cannot discriminate on
17 the basis of status. But belief -- as this Court said
18 in *Cantwell v. Connecticut*, belief, the freedom to
19 believe, is absolute --

20 JUSTICE GINSBURG: So, they -- would have to
21 negate their belief in their practice. They could
22 believe this, but they couldn't implement it?

23 MR. McCONNELL: Well, it's not unusual to
24 say people -- people can believe in all kinds of things
25 that are illegal. That doesn't mean that they can do

1 them. It's not a -- it's not an unfamiliar distinction
2 in our law. But let's look at --

3 JUSTICE SCALIA: This was the basis -- your
4 distinction between status and belief was the basis for
5 your saying that the original policy, whatever --
6 whatever we call it, what is the name of it?

7 MR. McCONNELL: The written policy?

8 JUSTICE SCALIA: The written policy -- when
9 it forbids discrimination on the basis of sexual
10 orientation was complied with by CLS because it would
11 not discriminate on the basis of orientation, only on
12 the basis of belief.

13 MR. McCONNELL: That's correct.

14 JUSTICE BREYER: If -- if a homosexual
15 person said, I want to belong to this club, and I
16 believe in its principles, I don't believe in sexual
17 relationships before marriage, and that's why I want to
18 work for homosexual marriage, which I do, so my
19 consistency there, is that person -- I am consistent in
20 what I work for, what I believe, and on -- as far as
21 premarital sex is concerned, it's totally 100 percent
22 with your organization that you are representing; would
23 they admit that person or not?

24 MR. McCONNELL: Yes. There is a joint
25 stipulation to that effect, No. 34.

1 JUSTICE SCALIA: CLS doesn't have any -- any
2 belief that marriage is between a man and a woman?

3 MR. McCONNELL: It -- it does. I thought
4 that Justice Breyer posited the case of a person of
5 homosexual orientation who shares that belief.

6 JUSTICE SCALIA: No, no, no, no.

7 JUSTICE BREYER: He shares the belief that
8 there should be no premarital sex --

9 JUSTICE SCALIA: But he wants to marry --

10 JUSTICE BREYER: -- and he says that's why I
11 am working for Proposition 8 or whatever the
12 proposition, or against it --

13 MR. McCONNELL: Oh, oh, I'm sorry,
14 Justice Breyer --

15 JUSTICE BREYER: I'm working to legalize
16 homosexual marriage.

17 MR. McCONNELL: I'm sorry. I misunderstood
18 your question. This is a religious group. Their
19 understanding of marriage is based upon --

20 JUSTICE BREYER: But the answer is no, that
21 person --

22 MR. McCONNELL: Not if that person was
23 engaging in sexual conduct that is contrary to the --

24 JUSTICE BREYER: No, he's not, because his
25 sexual conduct --

1 MR. McCONNELL: -- or, I'm sorry --

2 JUSTICE BREYER: -- until marriage is made
3 lawful, at which point he intends to engage in sexual
4 conduct.

5 MR. McCONNELL: That's right. If the
6 person --

7 JUSTICE BREYER: That person.

8 MR. McCONNELL: Regardless of what he
9 intends to do, if he does not agree with the -- the
10 organization on the point of -- of marriage, then he can
11 be -- he can be excluded from leadership in the group.

12 Again, he's able to attend all the
13 activities. CLS has all of its activities entirely open
14 to everyone. And what it objects to is having -- is
15 being run by non-Christians, because after all, this is
16 a group whose very purpose is --

17 JUSTICE SOTOMAYOR: You keep talking about
18 being forced to let people in. And this is where I'm a
19 little bit confused by your yellow brief.

20 The school has taken the position that any
21 group can apply to use its facilities; priority and
22 funding, et cetera, will only go to recognized student
23 groups. But your group is not being excluded or
24 ostracized completely from the school. Presumably you
25 can meet in the cafeteria, you can meet in open spaces

1 in the school. You can apply like everyone else, any
2 other nonstudent group, recognized student group. But
3 you have been saying repeatedly in your presentation
4 that you're barred from the campus. And so I'm a little
5 confused as to exactly --

6 MR. McCONNELL: What I -- Justice Sotomayor,
7 I believe what we consistently say is that we have been
8 denied the right to meet on campus and that is
9 completely true. Look -- if you would look at Joint
10 Stipulation No. 10, at the top of page 219 it provides
11 that CLS, although not currently registered, is eligible
12 to apply for permission for rooms. But there is no
13 stipulation that that will ever be granted, and the
14 record shows that every time CLS has requested
15 permission to meet they have gotten a complete
16 run-around. They have been told: Well, you have to
17 apply through your lawyer, and then their -- they don't
18 get an answer on time and when they get an answer it's:
19 Well, because you are not a registered student group --

20 JUSTICE SOTOMAYOR: Let's --

21 MR. McCONNELL: -- there is not room for
22 you.

23 JUSTICE SOTOMAYOR: Could we -- let's --
24 let's assume, because I'm not quite sure what the record
25 is on these issues -- I'm somewhat confused on the

1 factual assumptions underlying this case. But let's
2 assume two things: One, that in fact you have the
3 option of applying for use of the space and that,
4 assuming there are no conflicts and other things that --
5 that are in the normal course would preclude your use,
6 that you would be granted use. Is your argument
7 different in that situation?

8 MR. McCONNELL: Justice Sotomayor, even the
9 access to campus communications is absolutely essential,
10 as this Court said in the -- in Healy v. James. We are
11 barred from access to the -- to Hastings' e-mail system;
12 we can't post notices on the usual bulletin board; we
13 are left out of the weekly --

14 JUSTICE SOTOMAYOR: There are bulletin
15 boards. There are other ones.

16 MR. McCONNELL: There -- there is -- there
17 are ones for the -- for campus and student groups, and
18 then there is another one for community groups. We are
19 allowed to post on the community group, but we are not
20 allowed to post on the boards that -- that students look
21 to for where student activities occur.

22 We are left out of the -- a very important
23 point -- the student organization fair at the beginning
24 of the year where groups introduce themselves to the
25 1L's as they -- as they come in.

1 JUSTICE SOTOMAYOR: Are you disputing that
2 this is --

3 MR. McCONNELL: We're -- we're barred from
4 that.

5 JUSTICE SOTOMAYOR: Are you disputing this
6 is a limited forum, public forum?

7 MR. McCONNELL: No, it's definitely a
8 limited designated public forum.

9 JUSTICE KENNEDY: But that's different from
10 Cantwell? Cantwell is where the Jehovah's Witness
11 placed the record on the -- on the street. And --

12 MR. McCONNELL: I only cite Cantwell for the
13 proposition that belief is absolute.

14 JUSTICE KENNEDY: No. No. And Cantwell
15 said that belief is central to -- to religions and that
16 people would disagree. But that's precisely why
17 Hastings might argue to us that -- that this is
18 inconsistent with their idea of what this forum is. And
19 if -- will you just address that, please?

20 MR. McCONNELL: I would address it. The
21 forum -- the purposes of the forum are undisputed. They
22 are to provide a diversity of expression among student
23 groups. Their policy disserves the purpose of the forum
24 and therefore cannot be regarded as reasonable in light
25 of that. And what is more, what they have done is --

1 it's also not reasonable because it's independently
2 unconstitutional. What they have done is they've said
3 you may not have fundamental freedom of association or
4 if you do we will withdraw an otherwise available
5 benefit from you.

6 As recently as the unanimous decision of
7 this Court in FAIR v. Rumsfeld, the Court reiterated the
8 -- the now I think 100-year old principle that
9 constitutional rights may not be penalized by the
10 withdrawal of benefits any more than they can by -- by
11 direct prohibition.

12 I see that my white light is up and I would
13 like to reserve the remainder of my time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 McConnell.

16 Mr. Garre.

17 ORAL ARGUMENT OF GREGORY G. GARRE

18 ON BEHALF OF THE RESPONDENTS

19 MR. GARRE: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 This case was decided by both courts below
22 on the premise, which is not dispute in any point in the
23 petition for certiorari, that Hastings reserves the
24 funding and benefits that go to student groups that
25 obtain school recognition to groups that choose to admit

1 all students regardless of the status or their beliefs.

2 CHIEF JUSTICE ROBERTS: Well, then why do
3 you have -- why do you have a policy, a written
4 policy -- you don't have a written policy that says
5 anything about all-comers. You have got a written
6 policy that says you can -- you can't discriminate on
7 the basis of only one type of belief, religious belief.

8 MR. GARRE: Mr. Chief Justice, first of all,
9 this is a case about injunctive relief. As a matter of
10 law, the only policy that is relevant is the current
11 policy, and that's the one that --

12 CHIEF JUSTICE ROBERTS: Is this
13 nondiscrimination policy no longer on the books?

14 MR. GARRE: No. It -- it's the way in which
15 Hastings implements the nondiscrimination policy in this
16 particular forum. And again, look at the Ninth Circuit
17 decision in this case.

18 JUSTICE SCALIA: That is not an
19 implementation of the nondiscrimination policy. I mean,
20 the two policies are quite different. Now, are you
21 telling us that the written policy is no longer
22 operative?

23 MR. GARRE: No, it -- Justice Scalia --

24 JUSTICE SCALIA: No, what? No, it's not
25 operative or no, you are not telling me that?

1 (Laughter.)

2 MR. GARRE: It is operative. This
3 all-comers policy is how it's implemented in this
4 context. And the written policy applies not only to the
5 enumerated characteristics, it applies to any arbitrary
6 unreasonable discrimination, and the law school --

7 CHIEF JUSTICE ROBERTS: Well, it doesn't --
8 it doesn't say that.

9 MR. GARRE: It does, Your Honor. It says in
10 the first paragraph on -- this is on page 220 --

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. GARRE: -- of the Joint Appendix: The
13 college is committed to a policy against legally
14 impermissible, arbitrary, or unreasonable discriminatory
15 practices. And then it also goes on and enumerates
16 specific factors. And this is spelled out, I believe in
17 page --

18 CHIEF JUSTICE ROBERTS: So they -- so you
19 are saying that the second paragraph is totally
20 unnecessary. You say the first paragraph says you can't
21 discriminate on any basis; and the second paragraph
22 spells out the bases. So why do you do have the second
23 paragraph?

24 MR. GARRE: I think it provides additional
25 guidance. But -- but again, there shouldn't be any

1 debate about what policy is at issue here. The Ninth
2 Circuit's decision in this case is two-sentence long.
3 The first sentence describes the policy at issue in this
4 case. And it says: "The parties stipulate" --

5 JUSTICE ALITO: Do you think this case
6 deserved a two-sentence decision in the Ninth Circuit?

7 MR. GARRE: Justice Alito, it was decided in
8 the wake of the Ninth Circuit's decision in Truth, which
9 had not only garnered a substantial panel decision but
10 had garnered serious consideration on -- on rehearing.

11 So this case, the Ninth Circuit properly concluded, was
12 controlled by the Truth decision. So in that respect --

13 JUSTICE ALITO: The answer is yes, this case
14 which is before us has produced hundreds and hundreds of
15 pages of amicus briefs, deserved two sentences in the
16 court of appeals?

17 MR. GARRE: In the -- in the sense that it
18 was backed up by the Truth decision, yes. But look at
19 the petition for certiorari in this case. Nowhere did
20 -- did Petitioners challenge the Ninth Circuit's
21 characterization of the policy at issue. The petition
22 says on page 2 that "There are no disputed issues of
23 material fact."

24 JUSTICE ALITO: But hasn't it been -- hasn't
25 it been CLS's position from the very beginning of this

1 case that Hastings has not in fact required every group
2 to admit any student who applies? Don't they say that
3 over and over again in their district court papers, in
4 the court of appeals briefs, and in the cert petition?

5 MR. GARRE: If -- if they believe that that
6 caused the school to adopt a different policy, they
7 shouldn't have stipulated to the policy that they did.
8 And they should have challenged at a minimum --

9 JUSTICE SCALIA: Well, they stipulated that
10 the policy exists. They didn't stipulate that it is --
11 is being faithfully applied by Hastings. What do you do
12 about the -- the -- the two organizations' bylaws set --
13 referred to in the -- in the Petitioner's brief, which
14 clearly do -- conflict with the so-called all-comers
15 policy?

16 MR. GARRE: All of the bylaws that they've
17 pointed to, Justice Scalia --

18 JUSTICE SCALIA: All of the bylaws --

19 MR. GARRE: -- that they have pointed to in
20 this brief --

21 JUSTICE SCALIA: Yes.

22 MR. GARRE: -- Justice Scalia, either,
23 number one, explicitly say that the organization will
24 comply with the rules and regulations of the school, or
25 say that they will admit all students. That includes

1 all the bylaws.

2 Now, they have pointed to various things
3 from the bylaws, and this evolves as they have tried to
4 create material factual issues in this Court. One of
5 the things they've pointed to is the bylaws saying, like
6 the outlaw bylaw, that says that students who are
7 members of a group can be expelled if they -- expelled
8 if they engage in disruptive or gross misconduct. There
9 is nothing inconsistent about that with the school's
10 policy. The school's interest is not in allowing
11 students to disrupt the activities of students'
12 groups --

13 CHIEF JUSTICE ROBERTS: Well, they -- they
14 quite -- quote the bylaws of the National Lawyers Guild,
15 which says: "Any member must agree with the objectives
16 of the organization as set forth herein." That's not
17 all-comers. That's a bylaw that restricts an
18 organization according to its -- members can't join
19 unless they sign on the dotted line that they believe in
20 objectives of the organization.

21 MR. GARRE: There is a fundamental
22 difference between a group that says people of a
23 particular sexual orientation are not allowed to become
24 members --

25 CHIEF JUSTICE ROBERTS: It has nothing to

1 do with --

2 JUSTICE SCALIA: They don't say that.

3 CHIEF JUSTICE ROBERTS: It's got nothing to
4 do with sexual -- well, I don't know the National
5 Lawyers Guild, but they say you have got to agree with
6 the objectives of the organization.

7 MR. GARRE: Justice Scalia, the district
8 court made a -- may I?

9 CHIEF JUSTICE ROBERTS: No, start with mine.

10 MR. GARRE: Okay.

11 (Laughter.)

12 MR. GARRE: Mr. Chief Justice, as -- as
13 Dean -- as director of student services testified, the
14 fact that the bylaws may say we want students who are
15 interested in our activities doesn't mean that the
16 bylaws are excluding students who want to join. And
17 there is a fundamental difference, again, between saying
18 students that have these particular beliefs or status
19 cannot become members in the group --

20 CHIEF JUSTICE ROBERTS: It seems to me that
21 your position is continually evolving wherever the First
22 Amendment pressure comes. You have got a written
23 nondiscrimination policy. And then you say: Well, yes,
24 but we use an all-comers policy. You have got an
25 all-comers policy and then groups don't actually follow

1 the all-comers policy, and you have another answer to
2 that. It seems to me that we should go with -- why
3 shouldn't we go with the written policy and the written
4 bylaws?

5 MR. GARRE: Well, with respect, Your Honor,
6 I think it's my friend's position that is evolving. You
7 have joint stipulations before you as to what the policy
8 is. You have the decisions of both courts below
9 describing that policy consistently with the joint
10 stipulations, and you have the petition for certiorari
11 that never challenges that the all-comers policy is at
12 issue.

13 JUSTICE SOTOMAYOR: What do we do with the
14 selective application argument, which is what
15 Justice Alito referred to and Justice Scalia, which is:
16 It is troubling that some of these bylaws do limit their
17 groups. La Raza limited it to people of Hispanic
18 descent, and the Lawyers' Guild to people who adopt its
19 -- its beliefs. What are we going to do with this
20 selective application argument? It's in the case, isn't
21 it? And if it is, what does it do to your policy?

22 MR. GARRE: Justice Sotomayor, this case
23 wasn't litigated as a pretext case. If you look at the
24 briefs in this case, the first time that the word
25 "pretext" is used is in the reply brief in this Court.

1 It was litigated as a challenge, which is a serious
2 challenge, to the constitutionality of an all-comers
3 policy in this particular --

4 JUSTICE SCALIA: The two are connected,
5 though, Mr. Garre. Frankly, one reason why I am
6 inclined to think this is pretextual is that it is so
7 weird to require the -- the campus Republican Club to
8 admit Democrats, not just to membership, but to
9 officership. To require this Christian society to allow
10 atheists not just to join, but to conduct Bible classes,
11 right? That's crazy.

12 (Laughter.)

13 JUSTICE SCALIA: And is there any other
14 university in the country that has this kind of a
15 policy?

16 MR. GARRE: There absolutely is, Justice
17 Scalia.

18 JUSTICE SCALIA: Where is that?

19 MR. GARRE: It's explained -- it's explained
20 in the amicus brief for the American Council of
21 Education and explained in the State University --

22 JUSTICE KENNEDY: Well, there are very few
23 universities. But why doesn't this just all work out?
24 If the Christian Legal Society has these beliefs, I am
25 not so sure why people that don't agree with them want

1 to belong to them. What -- doesn't this all just work
2 out?

3 MR. GARRE: Justice Scalia --

4 JUSTICE KENNEDY: Doesn't it work out that
5 the Democrats, they don't want to go to the Republican
6 club and run for officership anyway. So why -- what --
7 what interest does this -- does the school have in this
8 policing mechanism that it's imposing?

9 MR. GARRE: A number of things,
10 Justice Kennedy. The first is the line-drawing issue
11 that has been made clear during the first part of the
12 argument this morning. If you're going -- they appear
13 to take off the table race, and what they say, other
14 status considerations. I'm not sure why that excludes
15 sexual orientation.

16 But if you are going to allow religious
17 groups, or any group, to draw exceptions for some
18 people, then you have to determine where to draw the
19 line. And I think a school can reasonably say: We
20 don't want to get into this business at all; we want to
21 allow all comers for all school-subsidized --

22 JUSTICE ALITO: But you now say -- you now
23 say in your brief that it is okay for a group to impose
24 membership requirements that are neutral and not based
25 on beliefs. Isn't that right?

1 MR. GARRE: That doesn't go to status or
2 belief. If you are talking about attendance
3 requirements or competition, those are merits-based
4 requirements.

5 CHIEF JUSTICE ROBERTS: No, you are talking
6 about La Raza background. As I understand it, the La
7 Raza organization says you have to be of La Raza
8 background to be a policy member of the organization.

9 MR. GARRE: The La Raza bylaws -- first of
10 all, they did explicitly say that groups could not
11 exclude members on the basis of sexual orientation.

12 Now, they -- there was some confusion about
13 how La Raza had interpreted their bylaws. The school
14 went back to La Raza and said: Are you excluding
15 members? La Raza said: No, we are not; we are open to
16 all. And to eliminate any doubt, they amended their
17 bylaws. That's the one example they've come up in the
18 20-year history of this policy. And what does it show?
19 If you want to look at --

20 JUSTICE SCALIA: Wait, wait, wait. 20
21 years? Do you have any evidence that this policy, the
22 one we are arguing about now, that is to say, the
23 all-comers policy, existed before CLS brought this
24 litigation? As I recall, the only evidence in the
25 record is a letter from the Dean describing this policy

1 after the litigation began.

2 MR. GARRE: Justice Scalia, it's based on
3 the sworn deposition testimony on the former Dean, who
4 had been at the school since 1993, the director of
5 student services, who had been there at least since
6 1999, as this is how they had implemented the
7 nondiscrimination policy. I don't think there is any
8 basis for this Court to overturn that sworn testimony.

9 JUSTICE BREYER: What we have is a rule, a
10 stipulation. And as I read it, to try to make sense out
11 of it, it does seem to discriminate against
12 organizations in respect to which intellectual purity
13 would be important. You are going to have a harder
14 time. The ones that don't care that much will have an
15 easier time.

16 Now, in trying to judge the
17 constitutionality of that, I first have no idea which
18 these organizations are. You've got one of them, but
19 there may be a lot of others. I don't know if the
20 Democratic club is or is not. I don't know how big the
21 tent they want. I don't know whether the Turkish
22 Society even exists. I don't know how the chess club
23 feels about players of tiddlywinks.

24 So I have an absolute void in this record,
25 which in turn I think would be important to fill that

1 void. Because their justification is they don't want to
2 get into this, it's too complicated, and we are not
3 doing that much harm to them because they can meet
4 off-campus, and it's a big, disruptive influence, all of
5 these things.

6 And then sneaking in here is this anti-gay
7 bias issue, and -- and they want to say: That isn't
8 much, because that isn't really the point here, and
9 that's what we think, anyway. It's just an example of
10 something.

11 So with that great unclarity, asked to
12 decide a constitutional issue where I feel I need more
13 facts and I don't have them, the more justification to
14 know what it really is, which I don't have, what should
15 I do?

16 MR. GARRE: If the Court believes that,
17 respectfully, we think it should dismiss the writ as
18 improvidently granted. This case was litigated based on
19 stipulations to avoid precisely these factual issues
20 that we are now talking about for this first time before
21 this Court.

22 Now, I think it is common ground --

23 JUSTICE GINSBURG: You do -- Mr. Garre, you
24 did say that the evidence is the Dean's deposition.
25 There is no prior evidence. But there are schools,

1 including law schools, that have this policy. Is that
2 not so?

3 MR. GARRE: That's true. Georgetown Law
4 School does. Columbia Law School. Look, there is an
5 amicus brief filed by 13 educational organizations
6 representing thousands of colleges and universities
7 across the country, including the association of Jesuit
8 colleges and universities, saying that this is a
9 not-uncommon and a reasonable policy. We are not saying
10 it's the only approach that colleges can take in
11 balancing the competing interests here. We are saying
12 that the Constitution --

13 JUSTICE ALITO: Well, let's explore the
14 constitutional implications of this policy. Suppose at
15 a particular campus there is a great deal of anti-Muslim
16 animus. And there is a small Muslim group; it has ten
17 students. If the group is required to accept anybody
18 who applies for membership, and 50 students who hate
19 Muslims show up and they want to take over that group,
20 you say: First Amendment allows that?

21 MR. GARRE: Justice Alito, that is the
22 claim, obviously, that the other side is making. And
23 with respect, this example has never happened at
24 Hastings in 20 years. It has really never happened in
25 the history of American education. If you look at cases

1 like the Voter I.D. case, the Partial-Birth Abortion
2 case --

3 CHIEF JUSTICE ROBERTS: So if you have a law
4 that says every newspaper that is published in the
5 United States must be reviewed every day by the
6 government's censor board, and the fact that the
7 government's censor board decides not to do it, then
8 that law is okay?

9 MR. GARRE: I think this Court would
10 ordinarily take into account the likelihood that
11 something would happen, and if you're dealing where the
12 only --

13 CHIEF JUSTICE ROBERTS: A newspaper sues,
14 saying that law is constitutional. And we say: That's
15 all right; it has never been applied.

16 MR. GARRE: Of course this Court is going to
17 examine that. But just like in the Voter I.D. case,
18 where you had had people saying this was going to and,
19 on secondhand accounts, did exclude people from getting
20 to valid access, this Court said: Look, that might
21 happen, but it's not a basis to invalidate this law
22 across the board. Come back with an --

23 CHIEF JUSTICE ROBERTS: That was because
24 they might adopt a different policy. We are not dealing
25 with a future different policy in this case.

1 MR. GARRE: And there's -- as to the
2 takeover hypothetical, there is no evidence that it has
3 happened. Groups can take measures to prevent it. They
4 can require attendance requirements before people become
5 members. They can instruct --

6 CHIEF JUSTICE ROBERTS: That's not going to
7 help if you have the 50 anti-Muslim students who want to
8 take over the group.

9 MR. GARRE: People have to be -- attend a
10 certain number of meetings before they can join --

11 CHIEF JUSTICE ROBERTS: Okay. They take
12 over the group and the first thing they do is say: We
13 are abolishing the attendance policy.

14 MR. GARRE: They can have in their -- they
15 can -- sure. I mean, we can entertain the
16 hypotheticals. But they can have in their bylaws a
17 provision just like the Constitution of the United
18 States, that amendments can only be made by a majority
19 --

20 JUSTICE ALITO: Well, CLS obviously thinks
21 this is a real threat. Now, what do you propose that
22 they do? Suppose that you win the case, and then when
23 the case -- and then when this all-applicants policy is
24 administered, then precisely what they fear begins to
25 take place. Do they have any recourse?

1 MR. GARRE: I think if that started to take
2 place, the college would reconsider its policy. It
3 could bring a First Amendment challenge saying that --

4 JUSTICE ALITO: Do they have any recourse?

5 MR. GARRE: I think at that point --

6 JUSTICE ALITO: If they have ten members,
7 and eight who are completely hostile to the organization
8 sign up?

9 MR. GARRE: I think obviously the members
10 would rejoin and form another group, Your Honor. I
11 mean, we are not dealing with this in a factual vacuum.
12 CLS's predecessor existed at the schools for 10 years
13 in --

14 JUSTICE ALITO: I understand the answer to
15 that question. So, if -- if hostile members take over,
16 former members of CLS can form CLS 2?

17 (Laughter.)

18 MR. GARRE: If that happens Your Honor. I
19 mean, this has never happened ever in -- in the history
20 of --

21 JUSTICE GINSBURG: It's also the --

22 MR. GARRE: -- education.

23 JUSTICE GINSBURG: -- the university's
24 across the board rules for all student conduct against
25 disruption, against incivility, the list would certainly

1 carry over.

2 MR. GARRE: Absolutely. And CLS, like any
3 group, can have a rule that disruptive members should be
4 expelled.

5 JUSTICE KENNEDY: It's also never happened
6 from, what I can tell, that someone who disagrees with
7 this group has applied for membership.

8 MR. GARRE: Well, Your Honor, the record
9 does show that --

10 JUSTICE KENNEDY: I mean, that's -- that's
11 what so puzzling about the -- the case.

12 MR. GARRE: The record does show, Your
13 Honor, that there was a gay student who was a member of
14 the group. And that's -- let me give you --

15 JUSTICE GINSBURG: That was a predecessor
16 group.

17 JUSTICE KENNEDY: A predecessor group, and
18 obviously uncomfortable with their position, so he or
19 she left.

20 MR. GARRE: Well, actually --

21 JUSTICE KENNEDY: That's the way it works.

22 MR. GARRE: -- what the record shows is that
23 she participated in discussions that the officer of the
24 group said it was a joy to have her and that both sides
25 learned.

1 I think CLS's position depends on the dark
2 notion that students who would not have any interest in
3 joining a group with different viewpoints on certain
4 issues except to disrupt that group. And I think that
5 greatly undersells the intellectual curiosity of
6 students. It greatly undersells the fact that groups
7 have many different interests and perspectives.

8 The church has a stance in homosexuality,
9 but it has stances on many other issues, too. And if a
10 student, even if he or she disagrees with the stance on
11 homosexuality, they may agree with many other aspects of
12 the groups, and they may want to join of fellowship of
13 that group, they want to take advantage of intangible
14 benefits like not --

15 JUSTICE SCALIA: Teach bible classes?
16 Right?

17 MR. GARRE: Your Honor --

18 JUSTICE SCALIA: You have to let them teach
19 bible classes, too, right?

20 MR. GARRE: In fact, the record in the
21 show -- case shows that only officers teach Bible
22 classes, and the groups are perfectly free to structure
23 their organization like that. They can have
24 requirements that people attend certain meetings before
25 they do that. CLS isn't forced to have anyone lead

1 Bible classes.

2 JUSTICE ALITO: If an orthodox -- if an
3 orthodox Jewish group or a Muslim group applied for
4 recognition and the group said part of our beliefs is --
5 one of our beliefs is that men and women should sit
6 separately at religious services, would Hastings deny
7 registration to that group?

8 MR. GARRE: If it was excluding students
9 from that group on the basis of their beliefs or their
10 status, then, yes, it would.

11 Hastings isn't in the business of
12 second-guessing the -- the beliefs of -- of individual
13 groups, and the whole point of the policy really is to
14 stay out of this, to just have a blanket that is equally
15 neutral.

16 JUSTICE ALITO: We have two amicus briefs
17 from two orthodox Jewish groups and a brief from a
18 Muslim group. So, your answer is that they could not be
19 recognized under a Hastings' policy because of their
20 religious beliefs regarding the way religious services
21 should be conducted?

22 MR. GARRE: Your Honor, I think even my
23 friend recognizes that a group could not exclude an
24 individual on the basis of their gender or their
25 beliefs -- on the basis of their gender or race.

1 Remember the Bob Jones case --

2 CHIEF JUSTICE ROBERTS: But that's because
3 gender or race is fundamentally different from religious
4 brief. Gender and race is a status. Religious belief,
5 it has to be based on the fundamental notion that we are
6 not open to everybody. We have beliefs, you have to
7 subscribe to them. And we have always regarded that as
8 a good thing. That type of exclusion is supported in --
9 in the Constitution. The other types of exclusion are
10 not.

11 MR. GARRE: But not at all costs,
12 Mr. Chief Justice. In the Bob Jones case, the claim was
13 from a -- a small private religious school that has
14 sincere religious belief that people who believed in
15 interracial dating should not become members of their
16 school. And this Court, nevertheless, held that that
17 belief, sincere as it was, did not trump a statute that
18 denied education -- denied Federal financial assistance
19 on a viewpoint neutral basis to schools that
20 discriminated on the basis of religion.

21 Here we have a -- a group that wants to
22 exclude members on the basis of sexual orientation. We
23 can -- CLS has tried to change that --

24 CHIEF JUSTICE ROBERTS: You phrase it that
25 way. It's a group that wants to exclude a religious

1 group, a religious-oriented group that wants to exclude
2 people who do not subscribe to their religious beliefs.

3 MR. GARRE: They -- there is a binding
4 judicial admission. And again, this gets back to the
5 Bob Jones example. I think --

6 JUSTICE SCALIA: Let's get back to this
7 homosexual orientation. You say that that's established
8 in the case.

9 MR. GARRE: Look at page -- J.A., page 460,
10 which is where the district court said that the CLS made
11 a binding judicial admission that they wanted to
12 discriminate on the basis of sexual orientation. Keep
13 in mind that this case began because CLS came back to
14 the law school and said we are happy to say we won't
15 discriminate on some grounds, but we are not going to
16 say we won't exclude students on the basis of sexual
17 orientation.

18 JUSTICE BREYER: What is supposed to happen?
19 I don't know the answer to this. Hastings, let's say,
20 or Berkeley has four or five or six different religious
21 chapels for services on Sunday or Saturday, and they say
22 we are open to all branches of religion, orthodox Jews,
23 conservative, and reformed. And then the orthodox say
24 we want men and women to sit separately.

25 Now, can Hastings say or Berkeley, no, we

1 will let the reform come, we will let the conservatives
2 come, but not the -- not the orthodox Jews. They can't
3 have their service. Would -- would that be
4 constitutional?

5 MR. GARRE: Your Honor, I think it would be
6 a much different case.

7 JUSTICE BREYER: But what is your opinion?

8 MR. GARRE: I -- I think if the school is
9 regulating outside of the purposes of a limited forum,
10 public forum for recognized groups, then I doubt it
11 could go in --

12 JUSTICE BREYER: So if, in fact, the --
13 the -- the -- they have clubs and they are not services,
14 and what they do is they discuss -- they discuss the --
15 the -- the nature of the service, and there can they
16 have separate discussions --

17 MR. GARRE: Where -- where --

18 JUSTICE BREYER: -- men from -- men and
19 women?

20 MR. GARRE: Where the rule operates on a
21 viewpoint neutral basis. Here what the -- the school is
22 doing, is it is publicly subsidizing --

23 JUSTICE BREYER: I guess your answer to that
24 is that the orthodox Jews cannot? They cannot have
25 separate women's groups in their organization, which is

1 an after school religious organization.

2 MR. GARRE: They can exist separately --

3 JUSTICE BREYER: Outside of the university,
4 et cetera.

5 MR. GARRE: In fact, Your Honor, it's not --

6 JUSTICE BREYER: That's their problem here.

7 MR. GARRE: -- unusual for schools to have
8 all male or all women clubs. These are not recognized
9 parts of the community. These -- these are activities
10 that are subsidized by the students themselves for the
11 mandatory student activity.

12 JUSTICE BREYER: And their reason to put in
13 a sentence as to why they don't want these orthodox Jews
14 to meet separately on the campus, men in one group and
15 women in another, and discuss the religious service,
16 they want none like that, and their reason for wanting
17 none like that is?

18 MR. GARRE: Well, I think that's a much
19 different example in this case.

20 JUSTICE BREYER: I'm trying to make it as
21 close as possible.

22 MR. GARRE: Well, I -- I may have
23 misunderstood the hypothetical. I mean, I think it's
24 much different --

25 JUSTICE BREYER: They have a small orthodox

1 club.

2 MR. GARRE: The reason why the school has a
3 policy that all groups that it subsidizes must admit
4 all-comers is that, number one, it ensures that all
5 students enjoy equal access to all school subsidized and
6 school recognized activities.

7 Number two, it avoids the line drawing
8 problems that we have discussed early this morning I
9 think are necessarily arise and also create strife in
10 small educational communities.

11 Number three, it allows --

12 JUSTICE SCALIA: Can I ask about number 2,
13 the -- the so-called line-drawing problem? Aren't you
14 just letting yourself into even more line drawing
15 problems?

16 MR. GARRE: Not with the all-comers rule.

17 JUSTICE SCALIA: I mean, the other is -- is
18 whether you were discriminating on the basis of one of
19 the forbidden bases. But now you are saying you can't
20 discriminate on any basis, which means there are going
21 to be even more lines to have to draw. Why does it
22 solve your problem?

23 MR. GARRE: I don't think it -- that
24 happens, at all Justice Scalia. I think when you have
25 the policy that all students have to become members,

1 regardless of their status or belief, that gets the
2 school out of the business of determining whether,
3 number one, people are discriminating on the basis of an
4 essential belief, which is, is the way the Petitioner
5 describes his -- their rule.

6 JUSTICE ALITO: As I understood the
7 position -- your latest position in your brief, you
8 really don't say you have an all-comers policy. There
9 are certain criteria that can be applied, like interest,
10 knowledge; is that correct?

11 MR. GARRE: Competitive-based, merit-based
12 requirements are not excluded. It -- it -- they are
13 not --

14 JUSTICE ALITO: Could a -- well, could a
15 group, consistent with your revised all-comers policy,
16 require that members who want -- anyone who wants to
17 become a member show a particular level of knowledge
18 about the subject of the group?

19 MR. GARRE: Yes.

20 JUSTICE ALITO: So if the CLS required
21 anybody who wanted to become a member to pass a test on
22 the Bible, that would be okay?

23 MR. GARRE: If it were truly an objective
24 knowledge test, it would be okay. It would be no
25 different than the law argues. These are merits-based

1 determinations. There is a fundamental difference
2 between excluding people on the basis of merit and
3 excluding people on the basis of status or belief that
4 has no connection to merit. That -- that, I think, is a
5 longstanding understanding of discrimination.

6 CHIEF JUSTICE ROBERTS: Well, that --
7 that -- that's pretty tough. That has no connection to
8 merit. I assume there are groups that think subscribing
9 to their beliefs is evidence of merit, particularly
10 religious groups. So, how can you have a -- a test that
11 allows distinctions based on merit but not -- not
12 beliefs?

13 MR. GARRE: I think it goes to the nature of
14 whether it's discrimination under the school's policy,
15 and I think status or belief. People understand, that's
16 why we are talking about things like race or gender or
17 sexual orientation, disability, military status, any
18 number of these things. And I think the school's policy
19 avoids having to draw lines as to whether or not a group
20 has a sufficient enough belief that military members
21 should become a member of the amnesty international club
22 because they disagree with the war, that disabled
23 members should be -- disabled students should be a
24 member of a particular group and the school's policy
25 avoids these line drawings.

1 JUSTICE ALITO: Does the school adopt an
2 all-comers policy --

3 JUSTICE STEVENS: May I ask this question,
4 Mr. Garre?

5 JUSTICE ALITO: -- for the purpose --

6 JUSTICE STEVENS: May I ask one question?
7 I'd like you to answer, and your opponent, too, do you
8 think that in order to decide this case, we have to pass
9 on the constitutionality of an all-comers policy?

10 MR. GARRE: Yes, that's the policy before
11 this Court.

12 JUSTICE STEVENS: We must do that to decide
13 the case? I want to ask your opponent the same
14 question.

15 MR. GARRE: I believe you have to do that,
16 because that is the policy before --

17 JUSTICE STEVENS: So they're all -- there
18 may be a lot of other things we can decide, but in all
19 events we must decide that much?

20 MR. GARRE: Absolutely. Absolutely. If I
21 could just discuss briefly --

22 JUSTICE ALITO: Well, could I just ask one
23 quick question relating to that?

24 If -- if an all-comers policy is adopted for
25 the purpose of discriminating on the basis of viewpoint,

1 does it violate the First Amendment?

2 MR. GARRE: If it's pretextual in the Church
3 of Lukumi Babalu sense, yes. No -- no school can
4 purposely discriminate at a group no matter what policy
5 it adopts.

6 JUSTICE KENNEDY: And what if we think that
7 the policy has not been evenhandedly applied? Can't we
8 decide the case on that basis, and then we just could
9 assume arguendo Justice -- the answer to justice
10 Stevens' question.

11 MR. GARRE: I don't think so, Justice --
12 Justice Kennedy, because that's --

13 JUSTICE GINSBURG: Is -- was there any proof
14 in this record? I mean there is stipulation for summary
15 judgment. Was there any proof showing that it wasn't
16 evenly applied?

17 MR. GARRE: No. And I get back to the
18 petition for certiorari. On Page 2 of the petition, the
19 petition --

20 JUSTICE KENNEDY: Let me just say, suppose
21 it were shown that it were not applied evenhandedly, you
22 have no problem with us saying that it is then
23 unconstitutional.

24 MR. GARRE: It -- yes. We don't think that
25 that's the case here. But if a policy is applied

1 evenhandedly -- unevenhandedly, in a viewpoint-neutral
2 way and it burdens religious groups, then there is
3 common ground that that policy violates the
4 Constitution. Of course --

5 JUSTICE ALITO: If this were an employment
6 case, and when an employee is denied promotion the
7 employee said it's for reason A, and then after
8 litigation begin the employer says, well, no, it really
9 wasn't for reason A, it was for reason B because of a
10 policy that we have long had, but there is never --
11 there is no written documentation of this new policy;
12 and then at a later point in the litigation the employer
13 says, well, it really wasn't for reason A or reason B,
14 it was for reason C; do you think that a summary
15 judgment could be granted in favor of the employer on
16 the issue of pretext?

17 MR. GARRE: I think that that would create a
18 factual issue and that that issue might well be tried,
19 Justice Alito.

20 The one thing that is important to keep in
21 mind is this is a request for injunctive relief and not
22 damages. So the only policy that matters, and *Wilson v.*
23 *Austin* makes this clear, is the current policy; all
24 parties agree that the current policy is the all-comers
25 policy. That's the policy supported by the record in

1 this case.

2 CHIEF JUSTICE ROBERTS: No, I'm sorry. All
3 parties do not agree that the policy is the all-comers
4 policy. Your friend argued repeatedly that the policy
5 was the written discrimination policy.

6 MR. GARRE: I understood my friend's opening
7 brief to acknowledge at the least that that's the policy
8 the school has said it has, today. It is the school's
9 policy. It is supported by substantial history and
10 sworn deposition testimony.

11 JUSTICE GINSBURG: Mr. Garre, the -- the
12 so-called written policy, that has a -- that list has a
13 correspondence to the State's law, doesn't it?

14 MR. GARRE: It does.

15 JUSTICE GINSBURG: The categories that are
16 listed there are the categories that under California
17 law are proscribed bases for discrimination?

18 MR. GARRE: It does. And that is an
19 additional basis for the school's policy. Look at
20 California Education Code 66270. It explicitly
21 prohibits discrimination in -- in programs and
22 educational activities by public schools like Hastings.
23 Hastings has an obligation under State law to prohibit
24 discrimination on the basis of sexual orientation. The
25 reason why they are here today is because CLS insisted

1 on the right to discriminate, to exclude students on the
2 basis of their sexual orientation.

3 JUSTICE ALITO: Well, section 66270 applies
4 to programs conducted by a post-secondary educational
5 institution, and your position is that if -- if a
6 religious group complies with your policies and then it
7 conducts religious services, those religious services
8 are conducted by Hastings?

9 MR. GARRE: Our position is that the
10 registered student organization's program is a program
11 of the university; it is subsidized by the university'
12 it is recognized by the university and that all students
13 should be able to enjoy access to that program.

14 CHIEF JUSTICE ROBERTS: In your response to
15 Justice Ginsburg concerning California law, is it your
16 position that California law requires religious groups
17 to admit people who do not believe in their religious
18 beliefs and in fact to conduct services of that group?

19 MR. GARRE: Your Honor, our position is that
20 the provision that we've cited to, 66270, does not carve
21 out an exemption in this program for religious student
22 organization. On its face --

23 CHIEF JUSTICE ROBERTS: So the answer to my
24 question is "yes."

25 MR. GARRE: Yes. On its face it excludes --

1 it has an exemption for religious schools; it does not
2 include an exemption for religious organizations within
3 the context of this program. And we think that the
4 program is reasonable.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Garre.

7 MR. GARRE: Thank you very much.

8 CHIEF JUSTICE ROBERTS: Mr. McConnell, you
9 have four minutes remaining.

10 REBUTTAL ARGUMENT BY MICHAEL W. McCONNELL

11 ON BEHALF OF THE PETITIONER

12 MR. McCONNELL: Well, thank you,
13 Mr. Chief Justice.

14 First, in answer to Justice Stevens'
15 question, we do believe that the Court must -- needs to
16 reach the constitutionality of the all-comers policy as
17 applied to CLS in this case. We brought an only
18 as-applied challenge.

19 JUSTICE STEVENS: Put -- put that aside for
20 a moment. Forget the as-applied. Just take a -- a pure
21 all-comers policy. Must we decide the constitutionality
22 of that?

23 MR. McCONNELL: Not facially, but as applied
24 to CLS, yes. Several other points, I know --

25 JUSTICE SCALIA: You talk about -- I had

1 understood from your brief that CLS did not have a -- a
2 policy of excluding people with homosexual disposition,
3 but that it was only homosexual conduct.

4 MR. McCONNELL: That's correct and
5 stipulated to, undisputed.

6 JUSTICE SCALIA: Well, you -- but your
7 complaint said otherwise. Your -- your --

8 MR. McCONNELL: That's -- that's because we
9 -- the complaint is accepting the -- Hastings'
10 definition of sexual orientation. We were told that our
11 conduct rule, our nonmarital conduct rule violated their
12 sexual orientation provision, and therefore we sought
13 relief from their sexual orientation provision. It was
14 nothing more than that.

15 There -- it is -- it is stipulated in Joint
16 Stipulation 40, I believe it is, that -- that CLS's rule
17 is based on conduct, not orientation.

18 Several other points. My friend twice in
19 his presentation stated that the all-comers policy is
20 simply their way of implementing the nondiscrimination
21 policy. But if so, it is so absurdly overbroad as to be
22 unconstitutional. There is no reason to stop the
23 environmentalist club from leading -- from requiring its
24 leaders to share environmentalist views --

25 JUSTICE GINSBURG: Mr. McConnell --

1 MR. McCONNELL: -- in order to --

2 JUSTICE GINSBURG: Mr. McConnell, you don't
3 challenge that there are universities, including four
4 law schools, that have an all-comers policy?

5 MR. McCONNELL: So far as we have been able
6 to tell, there is no public university law school in the
7 country that has such a policy.

8 JUSTICE GINSBURG: There are private
9 universities.

10 MR. McCONNELL: There are some private
11 universities that according to the AALS have such a
12 policy. We know nothing about them. They are not in
13 the record, and frankly I would be a little bit
14 surprised, because the policy is so absurd.

15 Think of how it would apply to the law
16 school itself, and this policy does apply to the law
17 school itself. Does Hastings really mean to say it is
18 committing itself to an all-comers policy when it hires
19 faculty or admits students? Do they not care about the
20 belief of its dean of admissions about beliefs of --
21 about, say, affirmative action? The very idea of it is
22 preposterous.

23 JUSTICE BREYER: It's not totally, if -- but
24 it's imaginary, it's fantastical. You can imagine a
25 school in the '60s that said that we think the way to

1 advance learning is everyone gets together in a nice
2 discussion group and hugs each other and talks, all
3 right? Now that's a possible educational theory. It's
4 possible -- they say that we are going to apply that to
5 everybody because that's how we do it. And --

6 MR. McCONNELL: Yes, but Hastings --

7 JUSTICE BREYER: -- if there are any
8 ideological organizations that --

9 MR. McCONNELL: But Hastings has --

10 JUSTICE BREYER: -- so be it, but it's
11 fantastical.

12 MR. McCONNELL: Hastings has a perfectly
13 conventional RSO program just like the ones in Healy,
14 and Widmar and Rosenberger. They just have a policy
15 that is destructive of that --

16 JUSTICE BREYER: Well, my --

17 MR. McCONNELL: -- of that program.

18 JUSTICE BREYER: -- my question is, if I can
19 think of this policy -- but I tend to sympathize with
20 your view that it's so hard to believe that they really
21 hold it, maybe they do, I don't know about it -- what do
22 I do with this case?

23 How can I say whether this, let's call it
24 "hug your neighbor policy" is -- to put a label on it
25 that's catchy -- how do I -- how do I evaluate that?

1 MR. McCONNELL: What you can say is that
2 Healy v. James requires a substantial justification for
3 exclusion of a student group from a registered student
4 activity forum, and this is not a substantial
5 justification; it is a silly justification. If it is
6 silly, crazy and preposterous it is not even reasonable,
7 let alone compelling or substantial.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 McConnell.

10 The case is submitted.

11 (Whereupon, at 11:05 a.m., the case in the
12 above-entitled matter was submitted.)

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