No. 08-1371

IN THE

Supreme Court of the United States

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

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS.

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

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND THIRTEEN OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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AMICI ON THIS BRIEF

American Council on Education

American Association of Community Colleges

American Association of State Colleges and Universities

American College Personnel Association

American Dental Education Association

American Indian Higher Education Consortium

Association of American Universities

Association of Jesuit Colleges and Universities

Association of Public and Land-grant Universities

Association of Research Libraries

Council of Graduate Schools

Hispanic Association of Colleges and Universities

NASPA—Student Affairs Administrators in Higher Education

National Association for College Admission Counseling

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STATEMENT OF INTEREST[1]

The American Council on Education, The American Association of Community Colleges, The American Association of State Colleges and Universities, The American College Personnel Association, The American Dental Education Association, The American Indian Higher Education Consortium, The Association of American Universities, The Association of Jesuit Colleges and Universities, The Association of Public and Land-grant Universities, The Association of Research Libraries, The Council of Graduate Schools, The Hispanic Association of Colleges and Universities, NASPA—Student Affairs Administrators in Higher Education, and The National Association for College Admission Counseling respectfully submit this brief as *amici curiae* in support of respondents.

Founded in 1918, The American Council on Education (ACE) is the nation's unifying voice for higher education. Its more than 1,800 members include a substantial majority of colleges and universities in the United States. ACE represents all sectors of American higher education—public and private, large and small, denominational and nondenominational. It serves as a consensus leader on key issues and seeks to influence public policy through advocacy, research, and program initiatives.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici* certify that no part of this brief was authored by counsel for any party, and no person or entity other than *amici* or their members made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges at the national level. The AACC works closely with directors of state offices to inform and affect state policy. Founded in 1920, the AACC represents nearly 1,200 two-year, associate degree-granting institutions and more than 11 million students.

The American Association of State Colleges and Universities (AASCU) represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, which is roughly 55 percent of the enrollment at all public four-year institutions.

The American College Personnel Association (ACPA) is the leading comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. Founded in 1924, ACPA has nearly 8,500 members representing 1,500 private and public institutions from across the United States and around the world. Members include organizations and companies that are engaged in the campus marketplace. Members also include graduate and undergraduate students enrolled in student affairs/higher education administration programs, faculty, and student affairs professionals, from entry level to senior student affairs officers.

The American Dental Education Association (ADEA) is the voice of dental education. Its members include all U.S. dental institutions and many allied and postdoctoral dental education programs, corporations, faculty, and students. The mission of

ADEA is to lead the dental education community to address contemporary issues influencing education, research, and the delivery of oral health care for the health of the public. ADEA's activities encompass a wide range of research, advocacy, faculty development, meetings, and communications, including the Journal of Dental Education.

The American Indian Higher Education Consortium (AIHEC), established in 1972, consists of 36 Tribal Colleges and Universities in 14 states and one in Canada. These tribally-chartered institutions were established to addressed the unmet education needs of American Indians, many of whom live on rural Indian reservations. AIHEC provides leadership and influences public policy on American Indian higher education issues through advocacy, research, and program initiatives. AIHEC also promotes and strengthens Native American languages, cultures, communities, and tribal nations.

The Association of American Universities (AAU) is an organization of leading research universities devoted to maintaining a strong system of academic research and education. It consists of 60 U.S. universities and two Canadian universities, divided about evenly between public and private. AAU member universities are on the leading edge of innovation, scholarship, and problem-solving, contributing significant value to the nation's economy, security, and culture.

The Association of Jesuit Colleges and Universities (AJCU) is a voluntary federation of the 28 Jesuit institutions of higher education in the United States. Formed in 1970, AJCU seeks to improve the educational effectiveness of the institutions; articulate the

mission and characteristics of Jesuit higher education and implement them in policy and practice; collaborate with national and international organizations; provide an educational forum for the exchange of experiences; and help members participate in federal and other programs.

The Association of Public and Land-grant Universities (A·P·L·U) is an association of 186 public research universities and 27 state university systems, including 74 land-grant institutions. Founded in 1887, and formerly known as the National Association of State Universities and Land-Grant Colleges, A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

The Association of Research Libraries (ARL) is a nonprofit organization of 124 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

The Council of Graduate Schools (CGS) is the only national organization in the United States dedicated solely to the advancement of graduate education and research. CGS works to promote an environment that cultivates rigorous scholarship. CGS members include more than 500 universities in the United States and Canada and 16 universities outside North America. Collectively, CGS institutions annually

award more than 95 percent of all U.S. doctorates and over 78 percent of all U.S. master's degrees.

The Hispanic Association of Colleges and Universities (HACU), founded in 1986, represents more than 400 colleges and universities committed to Hispanic higher education success in the U.S. and Puerto Rico. Hispanics are the nation's youngest and fastest-growing population. HACU is the only national educational association that represents Hispanic-Serving Institutions (HSIs). Today HSIs represent less than 8 percent of all higher education institutions nationwide, but enroll more than fifty percent of all Hispanics in postsecondary education.

NASPA—Student Affairs Administrators in Higher Education (NASPA) is the leading voice for student affairs administration, policy, and practice. With more than 11,000 members at 1,400 campuses in 29 countries, NASPA is the foremost professional association for student affairs administrators, faculty, and graduate and undergraduate students. NASPA members are committed to serving college students by embracing the core values of diversity, learning, integrity, collaboration, access, service, fellowship, and the spirit of inquiry.

The National Association for College Admission Counseling (NACAC) is an Arlington, Virginia-based education association of more than 11,000 secondary school counselors, independent counselors, college admission and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education. The association, founded in 1937, is committed to maintaining high standards that foster ethical and social responsibility among those involved in the transition process.

Amici have a strong interest in this case—and in affirmance of the decision below—because petitioner's proposed rule would strip our member institutions of the discretion to make important academic judgments. Registered student organization (RSO) programs exist to enhance the educational process. In deciding how best to maximize the educational value of RSOs, some institutions have judged that every RSO should be open to all students, so that students may experience the broadest diversity of ideas. Others have permitted certain RSOs—such as those formed around a particular religious faith—to limit membership to students who share the views of the organization. Still others have taken a middle ground by requiring open-access as to general membership positions but permitting an RSO to restrict its leadership positions to students who share the views of the organization. But no matter which approach a school chooses, it does so quite deliberately, with the conviction that its choice best suits its educational mission. The First Amendment provides colleges and universities the discretion to make those sorts of academic judgments.

SUMMARY OF ARGUMENT

A college or university may condition a student group's voluntary decision to apply for and receive RSO status, and the benefits that come with that status, on the group's agreement to comply with nondiscrimination and/or open-access policies because such policies are reasonable, generally applicable, and viewpoint neutral regulations of on-campus conduct that further a school's educational mission.

A reasonableness test applies to nondiscrimination

and open-access policies, whether the Court views such policies under the rubric of *Healy* and *Widmar*, as "reasonable rule[s] governing conduct"; or under the rubric of *O'Brien*, as viewpoint-neutral rules with an incidental effect on speech; or under *FAIR*, as conditional subsidies. And such policies—which are in place at colleges and universities nationwide—are reasonable. Studies demonstrate that students learn better and faster, and mature more rapidly, when they participate in extracurricular student groups and are exposed to new and different views. In light of that body of knowledge, an institution is entitled to make the educational judgment that its students are best served by policies prohibiting discrimination in membership by RSOs and making such student groups open to all comers.

The judgment of a college or university that a non-discrimination and/or open-access policy will further the educational mission of its RSO program is a judgment protected by an institution's First Amendment right of academic freedom. While the Christian Legal Society (CLS) makes much of its own First Amendment associational rights, it gives short shrift to the concomitant academic-freedom rights enjoyed by colleges and universities to decide how they can best educate their students. That latter right requires that federal courts exercise great caution before invalidating an institution's educational judgment. And in this circumstance, it requires the conclusion that policies such as those in place at Hastings College of the Law (Hastings)—eminently reasonable even absent discretionary review—comport with the First Amendment.

ARGUMENT

I. THE FIRST AMENDMENT GIVES COLLEGES AND UNIVERSITIES LEEWAY IN STRUCTURING THEIR REGISTERED STUDENT ORGANIZATION PROGRAMS.

Colleges and universities, including *amici*'s member institutions, have adopted varying approaches when it comes to designing programs for the official recognition or registration of student groups. Many institutions have programs, similar to the Hastings program, that require RSOs to comply with nondiscrimination and/or open-access policies. Others exempt religious RSOs from prohibitions against discrimination on the basis of religion when it comes to membership. Still others have adopted different approaches. A college or university is free to choose how it will structure its RSO program—or to have no program at all. The First Amendment does not require one approach. On the contrary, this Court has made clear that the First Amendment provides colleges and universities with the leeway to structure programs to suit their needs and educational mission.

1. A primary mission of colleges and universities is the education of their students. Because that education occurs not only in the classroom but in extracurricular settings as well, many colleges and universities encourage the formation of recognized student organizations. *See*, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 265 (1981) ("It is the stated policy of the [university] to encourage the activities of student organizations.") (footnote omitted). Indeed, this Court has recognized that a university "may determine that its mission is well served if students have the means to

engage in dynamic discussion of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 233 (2000); *see also Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie County* v. *Earls*, 536 U.S. 822, 831 n.4 (2002) (participation in extracurricular activities, including student organizations, "is a significant contributor to the breadth and quality of the educational experience"); *Beta Upsilon Chi Upsilon Chapter* v. *Machen*, 586 F.3d 908, 911-912 (11th Cir. 2009) (quoting the University of Florida's student handbook: "[s]tudent organizations are an essential part of the University of Florida community and are an integral part of the total academic program. Such organizations foster valuable experiences for students that lead to significant learning and development and create a sense of belonging.").

2. Many colleges and universities, like Hastings, require their student organizations to comply with nondiscrimination and/or open-access policies.[2] Indiana University's RSO policy, for example, provides that "[p]articipation in the proposed organization and prerogatives of membership must be without regard to arbitrary consideration of such characteristics as age, color, disability, ethnicity, gender, marital status, national origin, race, religion, sexual

[2] The characterizations we offer of specific colleges' and universities' RSO policies constitute solely *amici*'s interpretations. The institutions in question have not reviewed or endorsed *amici*'s characterizations. Nor have we inquired into how the cited institutions apply their policies on campus.

orientation, or veteran status."[3] Likewise, San Jose State University's policy provides that "[m]embership in the [student] organization will not be denied to anyone on the basis of" the same list of characteristics, including "religion."[4] Additional examples are too numerous to list, but they include both colleges and universities, and public and private institutions, nationwide.

Other institutions, meanwhile, have chosen—either of their own accord or in the face of objections from affected groups—to offer religious and other exemptions from their policies. At Florida State University, for example, the RSO nondiscrimination policy contains nearly identical language to those quoted above. However, the Student Organization Handbook elsewhere explains: "In cases where the nondiscrimination policy conflicts with the organization's religious beliefs, tenets, or doctrines * * * the organization may request in writing an exemption from the part of the policy that is in conflict."[5] Similarly, at Wright State University, the Student Handbook explains:

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[3] Indiana Univ., *Registered Student Organization Policies available at* http://studentlink.iupui.edu/Community?action=downloadDocument&docID=1805&hash=(last checked Mar. 5, 2010).

[4] San Jose State Univ., *University Policies & Expectations for Student Organizations*, http://www.sjsu.edu/getinvolved/soal/org_recognition/starting/University_Policies_and_Procedures_for_Student_Organizations.pdf (last checked Mar. 5, 2010).

[5] Florida State Univ., *Student Organization Handbook* 11, 21 (2009), *available online at* http://union.fsu.edu/sac/sos/wp-content/themes/student_organizations/pdfs/RSO_Handbook_v9.pdf (last checked Mar. 5, 2010).

> An organization that excludes persons from membership on the basis of criteria relating to their [list of characteristics, including religion] is considered to be in conflict with university policy * * * . However, it is understood that some organizations may be created for the purpose of deepening the religious faith of students within the context of a denominational or interdenominational grouping or for the purpose of perpetuating a national cultural tradition. These purposes are consistent with university policy * * * .[6]

See also Alpha Iota Omega Christian Fraternity v. *Moeser*, No. 04-765, 2006 WL 1286186, at *3 n.8 (M.D.N.C. May 4, 2006) (quoting the policy of the University of North Carolina at Chapel Hill, which provides in part that "[s]tudent organizations that select their members on the basis of commitment to a set of beliefs (*e.g.*, religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs").

An institution may also take an intermediate approach and prohibit discrimination by an RSO with respect to its general members but allow an RSO to require that its leaders share the views of the organization. *See*, *e.g.*, *Beta Upsilon Chi*, 587 F.3d at 912 (noting that, under the University of Florida's nondiscrimination policy, "when an RSO selects its leaders it may consider whether the views of an

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[6] Wright State Univ., *2009-2010 Student Handbook* 116-17, *available at* http://www.wright.edu/students/handbook/documents/Handbook2009-20109.23.09.pdf (last checked Mar. 5, 2010).

officer candidate reflect those of the organization.").[7]

3. That different institutions have chosen different approaches to RSO membership simply reflects the fact that each makes its own educational judgments. There is no reason to foreclose such judgments by forcing colleges and universities nationwide to adopt a one-size-fits-all approach to RSO membership. *See Board of Ed. of Westside Cmty. Schools (Dist. 66)* v. *Mergens*, 496 U.S. 226, 240 (1990) (schools retain "a significant measure of authority over the type of officially recognized activities in which their students participate"). The question, instead, should be whether any particular institution's educational judgments are reasonable.

That is so not just because of the tests this Court has articulated, *see* Part II, *infra*, but because the First Amendment provides colleges and universities breathing room for their educational judgments. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *see also Southworth*, 529 U.S. at 237 n.3 (Souter, J., concurring in the judgment) ("We have long recognized the constitutional importance of academic freedom."); *Healy*

[7] The University of Florida's policy was subsequently revised. It now states: "A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy." *Beta Upsilon Chi*, 586 F.3d at 915 (quoting the revised policy).

v. *James*, 408 U.S. 169, 180-181 (1972); *Keyishian* v. *Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

Academic freedom means "[t]he freedom of a university to make its own judgments as to education." *Bakke*, 438 U.S. at 312. *See Widmar*, 454 U.S. at 276 (university has a right to make "academic judgments" about how it can best educate its students and allocate scarce resources). It includes "the idea that universities and schools should have the freedom to make decisions about how and what to teach." *Southworth*, 529 U.S. at 237 (Souter, J., concurring in the judgment). "Academic freedom thrives * * * on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 n.12 (1985). This Court has referred to its "responsibility to safeguard th[e] academic freedom" of educational institutions. *Id.* at 226.

4. A policy that all students should have access to all RSOs—which is the policy of Hastings and many other institutions—is a "decision[ ] about how and what to teach." *Southworth*, 529 U.S. at 237 (Souter, J., concurring in the judgment). Moreover, the decision is an eminently reasonable one: The conclusions that student activities enhance learning, and that exposure to varied viewpoints is crucial for students' development, are supported by decades of empirical study.

As one recent academic paper observed: "[E]xtracurricular activities are considered to be valuable student experiences * * * . [R]esearch provides theoretical and empirical support for the argument that extracurricular engagement positively affects even more narrowly defined academic goals and

formal standards of educational achievement." M. Klimmek & A. Richter, *Extracurricular Activities & Academic Performance in Business Education* (Feb. 23, 2007) (citing studies).[8] *Accord* A. Astin, *Student Involvement: A Developmental Theory for Higher Education,* p. 518 (J. of College Student Development, Sept./Oct. 1999) ("[S]tudents who * * * participate in extracurricular activities of almost any type are less likely to drop out"). And exposure to new and different views is a key part of the benefit: "[A]pproaches [encouraging involvement in student activities] are linked with * * * outcomes such as promoting openness to diversity, social tolerance, and personal and interpersonal development." C. Zhao & G. Kuh, *Adding Value: Learning Communities and Student Engagement*, p. 119 (Research in Higher Education 2004).[9]

The understanding that nondiscrimination and open-access policies effectively foster learning undergirds such policies nationwide. At Grand Valley State University, for example, the RSO Handbook states that the mission of the RSO program is "[t]o enhance student development through involvement

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[8] Accepted for presentation at the 9th Workshop der Kommission Hochschulmanagement des Verbandes der Hochschullehrer für Betriebswirtschaft, University of Münster, Germany. Abstract *available online* at http://www.wiwi.uni-muenster.de/27/wk-hsm//Tagungsprogramm%202007/Klimmek%20Richter%20Abstract.pdf (last checked Mar. 4, 2010).

[9] Abstract *available online* at http://nsse.iub.edu/pdf/research_papers/Zhao_Kuh_Learning_Communities.pdf (last checked Mar. 4, 2010).

in diverse experiences."[10] The University of the Pacific, McGeorge School of Law's policy likewise states that the institution is "committed to maintaining an inclusive environment in which all people are respected and diversity is celebrated in all of its forms," and that that commitment "is an essential part of providing a high quality education that prepares graduates for the administration of justice in a multicultural world and for professional participation in a legal community that represents the interests of a diverse society."[11] Additional examples abound. *See*, *e.g.*, Kent State Univ., Student Organization Manual, *Policies and Procedures* (stating that the mission of the school's Center for Student Involvement is "to foster student growth and development through leadership, civic, cultural, and involvement opportunities," and that it does so through "mutual respect, which encompasses civility, and the acceptance of all individuals, inclusive of all beliefs, cultures, and differences").[12]

In short, student organizations are not the only ones with First Amendment rights at stake in this case. Hastings and many other institutions have made an academic judgment that membership in RSOs is an important opportunity for learning and

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[10] Grand Valley State Univ., RSO Handbook, *Mission, Values, & Beliefs*, *available at* http://www.gvsu.edu/rsohandbook/mission-values-beliefs-61.htm (last checked Mar. 4, 2010).

[11] McGeorge School of Law, *Statement of Diversity & Inclusion*, *available at* http://www.mcgeorge.edu/About_McGeorge/Diversity_and_Inclusion/Statement_of_Diversity_and_Inclusion.htm (last checked Mar. 11, 2010).

[12] *Available at* http://dept.kent.edu/csi/StudentOrganizations/forms/student_org_manual_06.pdf (last checked Mar. 4, 2010).

that this opportunity—created and funded with that specific purpose in mind—should be available to all. "Judgments of this kind should be made by academicians, not by federal judges." *Widmar*, 454 U.S. at 279 (Stevens, J., concurring in the judgment).

II. NONDISCRIMINATION AND OPEN-ACCESS POLICIES DO NOT VIOLATE THE FIRST AMENDMENT.

A. Such Policies Pass Muster Under *Healy* and *Widmar* as Reasonable Regulations of Conduct on Campus That Further a School's Educational Mission.

This Court has frequently explained that "First Amendment rights must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U.S. at 268 n.5 (internal quotation marks omitted). *See also*, *e.g.*, *Morse* v. *Frederick*, 551 U.S. 393, 397, 403, 405, 406 n.2 (2007); *Healy*, 408 U.S. at 180, 189; *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This principle applies to "all First Amendment rights accorded to students." *Board of Ed., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 868 (1982) (plurality).

Healy and *Widmar* foreclose CLS's First Amendment claims because those cases hold that a student group seeking official recognition enjoys no constitutional right to violate "reasonable school rules governing conduct." *Healy*, 408 U.S. at 191. Despite CLS's claims to the contrary, nondiscrimination and open-access policies are "school rules governing conduct," and they are reasonable.

1. In *Healy*, the Supreme Court explained that, given the special characteristics of the university environment, "associational activities need not be tolerated where they infringe reasonable campus rules." *Id.* at 189. Student groups are free to speak out regarding such rules; they may express their views on "any or all campus regulations. They may not, however, undertake to flout these rules." *Id.* at 192. "A college administration may impose a requirement * * * that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law." *Id.* at 193. That requirement, explained the Court, raises no First Amendment issues:

> Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Id. In short, *Healy* holds that a university "may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations." *Id.*[13] *See also id.* at 195 (Burger, C.J., concurring)

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[13] Notably, the student group in *Healy* "filed an application in conformity with the requirements" for recognition. 408 U.S. at 184. One of the requirements was that recognized groups "may not discriminate on the basis of race, religion or nationality." *Id.* at 183 n.11. CLS refuses to abide by a similar requirement.

("[S]tudent organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to all such organizations."); *Papish* v. *Board of Curators of Univ. of Mo.*, 410 U.S. 667, 669-670 (1973) (*Healy* "recogniz[ed] a state university's undoubted prerogative to enforce reasonable rules governing student conduct").

The *Healy* doctrine was reaffirmed in *Widmar*, a case involving the rights of registered student groups at a public university. This Court stated: "we affirm the continuing validity of cases, *e.g., Healy* v. *James*, 408 U.S., at 188-189, that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 276-277. The *Widmar* Court recognized that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* at 268 n.5. *See also Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 488 (1989) (recognizing the right of students to engage in on-campus "expressive activities that are not inconsistent with the educational mission of the university").[14]

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[14] The rule that a college or university may reasonably regulate student conduct to further its educational mission is not inconsistent with Justice Alito's separate opinion in *Morse* v. *Frederick*, 551 U.S. at 422 (Alito, J., joined by Kennedy, J., concurring). There, Justice Alito rejected the notion that "the First Amendment permits public school officials to censor any student speech that interferes with the school's 'educational mission.' " *Id.* at 423. This case does not involve any censorship of student speech. CLS is free to say what it wants; it may

2. Under *Healy* and *Widmar*, a college or university may require a student group seeking RSO status to comply with nondiscrimination and/or open-access policies as a condition of registration because such policies are reasonable, generally applicable, and viewpoint neutral regulations of student conduct that further a school's educational mission.

First, nondiscrimination and open-access policies regulate conduct rather than speech. *See Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006) (*FAIR*) (law requiring federally funded higher education institutions to give equal access to military recruiters "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.") (emphases in original). Such policies regulate the practice of selecting or excluding members on prohibited grounds—which is conduct. *See id*. at 62 (explaining that a ban on discrimination in hiring based on race is properly viewed as regulating an employer's conduct, not its speech). Nondiscrimination and open-access policies "neither limit[ ] what [RSOs] may say nor require[ ] them to say anything. [RSOs] remain free under [such policies] to express whatever views they may have." *Id*. at 60. Such policies would require CLS (if it chose to become registered) "to treat [non-Christian] students like [Christian students], but that regulation of conduct does not violate the First Amendment." *Id*. at 70. As the Court observed in *Hurley* v. *Irish-American Gay*

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express its Christian views whether it chooses to register or remain unregistered. The question here is whether CLS is entitled to RSO status *and* a special exemption from Hastings' nondiscrimination and open-access policies that would allow CLS to discriminate in membership based on religion.

Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), while discussing a state antidiscrimination law: "this statute * * * does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals * * * on the proscribed grounds." *Id*. at 572.

Second, nondiscrimination and open-access policies are reasonable because they further a school's educational mission. *See* Part I, *supra*. An institution need not register student groups, fund such groups, or make priority use of facilities available to them. Many nonetheless permit and, indeed, encourage the formation of RSOs because student membership in them contributes to the learning process. Nondiscrimination and open-access policies further an institution's educational mission by ensuring that students cannot be denied these opportunities for learning and membership outside of the classroom. These educational judgments are entitled to substantial deference.

3. CLS and its *amici* offer, as one of their central themes, that open-access policies are unwise because such policies "seek[ ] a manufactured 'diversity' of beliefs within a group at the cost of a true diversity of beliefs among groups." Br. of *Amici Curiae* Foundation for Individual Right in Educational *et al*. 13 (emphases in original) ("FIRE Br."); *see* Pet. Br. 50 ("There can be no diversity of viewpoints in a forum if groups are not permitted to form around viewpoints."). This argument relies on spurious factual assumptions. Open-access policies are not about "manufacturing diversity of beliefs"; they are about allowing students who so choose to experience the

activities and beliefs of people different from themselves. Moreover, open-access rules do not bar groups from "form[ing] around viewpoints"—*unless* the groups are subjected to "hostile takeover" by those with opposing views. But on that point the briefs of CLS and its *amici* are long on rhetoric and short on facts. FIRE's brief offers no examples of such hostile takeovers, anywhere in the nation. *See* FIRE Br. 8-10. Also, university student-affairs officials can be counted on to step in if, as a result of such a takeover attempt, like-minded students are unable to form a group of the students' choice. There is no record evidence to suggest, or any reason to believe, that students groups like CLS will be hijacked by students hostile to CLS's viewpoint. *See Boy Scout of Am.* v. *Dale*, 530 U.S. 640, 653 (2000) (an expressive association cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message"); *FAIR*, 547 U.S. at 69 (same); *cf. Roberts* v. *United States Jaycees*, 468 U.S. 609, 627 (1984) (finding "no basis in the record" for the claim that "admission of women as full voting members will impede the organization's ability to * * * disseminate its preferred views").[15]

The more important point, however, is that the argument advanced by CLS and its *amici* would require courts to parse the educational judgments of

[15] FIRE's assertion that Hastings' policy is *ultra vires* because "public universities may not exclude minority viewpoints," FIRE Br. 39, suffers from the same flaw. No minority viewpoint is "excluded" as a result of Hastings' policy, unless one accepts FIRE's alarmist premise that majority groups will necessarily use the open-access rule to destroy groups with which they disagree.

colleges and universities to promote open access and debate "*within* groups as well as *among* them." Hastings Br. 36 (emphases in original). But those judgments are entitled to great deference. *See Southworth*, 529 U.S. at 235 (recognizing "the discretion universities possess in deciding matters relating to their educational mission"); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) (university "must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission"); *cf. Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that [student body] diversity is essential to its educational mission is one to which we defer."). And even putting that deference to the side, the judgment Hastings has made here is certainly reasonable. CLS and its *amici* are entitled, if they wish, to assume that students will exploit open-access rules to destroy their fellow students' organizations. But experience shows that colleges and universities can expect better of their students, and they are entitled to build those higher expectations into their educational approach.

4. CLS argues that *Healy* and *Widmar* support its position because those cases referred to the nonrecognition of student groups as a "prior restraint." Pet. Br. 17 (quoting *Healy*, 408 U.S. at 180). But CLS's argument misconstrues *Healy* and *Widmar* in two fundamental ways.

First, CLS fails to recognize that the disability imposed on the student groups in *Healy* and *Widmar* was of a different order of magnitude than that present here. The student groups in both of those cases were categorically banned from meeting any-

where on campus. *Widmar*, 454 U.S. at 265; *Healy*, 408 U.S. at 176. In *Healy*, when the student group members tried to meet at the campus coffee shop, they "were disbanded on the President's order." 408 U.S. at 176. Two Deans presented them with a memorandum from the President stating that the meeting "may not take place" on campus because theirs "is not a duly recognized college organization," and the memorandum directed them "to cease and desist from meeting on college property." *Id.* Additionally, the *Healy* group's "members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper" and were precluded from using campus bulletin boards. *Id.* In the context of a college campus in 1972, denial of recognition "effectively excluded the [*Healy*] group from campus." Case Comment, *Christian Legal Society* v. *Walker*, 120 HARV. L. REV. 1112, 1117 (2007).

At Hastings, by contrast, non-registered groups like CLS may meet on campus, may use classrooms to conduct their meetings, and are given full access to the school's bulletin boards and chalkboards. *See* Hastings Br. 8. Non-registered groups have similar freedom at other colleges and universities as well. *See*, *e.g.*, *Beta Upsilon Chi*, 586 F.3d at 912 ("A student group may also choose to forgo the registration process and exist as a non-registered group. While not afforded the full range of benefits of an RSO, a non-registered group may nevertheless use campus facilities, distribute literature on campus, verbally express its views on campus, and recruit new members."); *Christian Legal Society* v. *Eck*, 625 F. Supp. 2d 1026, 1048 (D. Mont. 2009) ("With the exception of SBA funding, CLS-UM enjoys every

other benefit of recognition. CLS-UM is allowed to meet using the law school's facilities and has access to channels of communication with students, including the law school's website and bulletin boards."); *Iota Xi Chapter of Sigma Chi Fraternity* v. *Patterson*, 538 F. Supp. 2d 915, 932 (E.D. Va. 2008) (university's withdrawal of fraternity's official recognition did not deprive fraternity members of their right of expressive association: "Nothing in the University's sanction prevents the Chapter from continuing to exist. It may recruit current George Mason students as members, schedule meetings, and host social events."), *aff'd*, 566 F.3d 138 (4th Cir. 2009). We are not aware of any college or university—and CLS has cited none—that banishes non-recognized student organizations from campus or treats such groups essentially as *personae non gratae*.

Moreover, whether or not it chooses to be an RSO, CLS can reach out to students not only through in-person meetings on campus but also via text messaging, Facebook.com, and other social networking web sites—arguably more important communications media than email for the twenty-something generation. *See* Pew Internet & American Life Project, *Generations Online in 2009* (Jan. 28, 2009)[16] (finding email use declining and use of social networking sites on the rise among "Generation Y"). *See also* Case Comment, 120 HARV. L. REV. at 1118 (observing that today, "in a wired world, lack of access to campus bulletin boards is not anywhere near as paralyzing as it was in the Vietnam War era"). For example, in the *Beta Upsilon Chi* litigation, the record showed

[16] *Available online at* http://pewresearch.org/pubs/1093/generations-online (last checked Mar. 4, 2010).

that Beta Upsilon Chi—a Christian student group that excluded non-Christians from membership—used Facebook to identify Christian students at the University of Florida and to send targeted recruiting messages directly to those students. *See Beta Upsilon Chi*, 586 F.3d at 914; *Beta Upsilon Chi Upsilon Chapter* v. *Machen*, No. 07-135 (N.D. Fla.) (Doc. 109-3 at pp. 33, 54, 57-59, 103-121) (testimony of Beta Upsilon Chi's vice president and copies of Facebook messages).

These are exactly the sorts of opportunities for mass communication and assembly that the Court thought crucial in *Healy*. The Court there found that "[d]enial of official recognition posed serious problems for the organization's existence and growth" because, among other things, group members were "precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings." 408 U.S. at 176. Given that set of facts, the *Healy* Court's comment that "the College's denial of recognition was a form of prior restraint, *denying to petitioners' organization the range of associational activities described above*," *id.* at 184 (emphasis added), is quite inapposite to the case now presented.

Second, CLS's argument from *Healy* and *Widmar* fails to recognize the most important difference between those cases and this one: In both of those cases, the school engaged in viewpoint discrimination. *See Healy*, 408 U.S. at 175 (school found that "the organization's philosophy was antithetical to the school's policies"); *Widmar*, 454 U.S. at 265 (groups that engaged in "religious worship or religious teaching" were barred from using school property).

CLS, of course, argues that open-access policies are viewpoint discriminatory, but the Court's cases foreclose that argument. The Court has squarely held that statutes prohibiting discrimination "because of race, color, creed, religion, disability, national origin or sex" do "not distinguish between prohibited and permitted activity on the basis of viewpoint." *Roberts*, 468 U.S. at 614-615, 623. And in *Hurley*—another case on which CLS relies—the Court found a public accommodations law similar to Hastings' nondiscrimination policy to be entirely acceptable on its face. The *Hurley* Court explained that such nondiscrimination rules "do not, as a general matter, violate the First or Fourteenth Amendments," and that the statute at issue "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on *the act of discriminating*." 515 U.S. at 572 (emphasis added). Just so here.

It is useful to contrast CLS's claim of viewpoint discrimination with the finding of viewpoint discrimination in *Rosenberger*, 515 U.S. 819. There, the university denied funding to a student-run newspaper precisely because of the publication's Christian viewpoint. *See* 515 U.S. at 825 (school excluded from funding any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality") (alteration in *Rosenberger*). Hastings has done nothing of the sort here. Hastings has not denied registration or any benefit to CLS because of CLS's Christian views or speech. If the policy nonetheless affects CLS's speech, it does so only incidentally, despite the policy's neutrality. That is not viewpoint discrimination.

Notably, the student organization in *Rosenberger* had a status (called "CIO status") similar to RSO status that required it to "pledge not to discriminate in its membership." *Id.* at 823. To our knowledge, no one in the course of that litigation suggested that that rule was objectionable; certainly this Court did not. But CLS refuses to agree to the same reasonable rule. CLS is not similarly situated to the group in *Rosenberger*. It is CLS's *conduct*—its exclusion of members based on grounds prohibited by a nondiscrimination policy and in violation of an open-access policy—not CLS's Christian viewpoint, that has kept it from registering.

B. The Policies Likewise Meet the Test Articulated in *O'Brien*.

Even if a student organization's desire to bar would-be members constituted speech, as opposed to conduct, nondiscrimination and open-access policies would still easily pass muster under the test this Court has articulated.

1. As discussed above, nondiscrimination and open-access policies regulate conduct—namely, discrimination. They do not regulate speech. And CLS is not subject to those policies unless it chooses to become an RSO. However, if the policies have any effect at all on CLS's expression, that effect would be merely incidental to the policy's regulation of CLS's conduct and hence would be reviewed under the test announced by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See Healy*, 408 U.S. at 189 n.20 (explaining that *O'Brien* applies to a claimed restric-

tion of associational rights from non-recognition).[17]

In *O'Brien*, the Court explained that a governmental regulation of conduct that incidentally restricts expression is valid so long as (1) the regulation is within the government's constitutional power, (2) the regulation furthers an important or substantial government interest, (3) that interest is unrelated to the suppression of expression, and (4) the incidental restriction on expression is no greater than necessary to further that interest. 391 U.S. at 377. Hastings' policy passes that test with flying colors.

First, nondiscrimination and open-access policies "are well within" a state's power to enact. *Hurley*, 515 U.S. at 572; *see Roberts*, 468 U.S. at 625 ("A State enjoys broad authority to create rights of public access on behalf of its citizens."). And this Court "ha[s] never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div.* v. *Smith*, 494 U.S. 872, 878-879 (1990).

Second, nondiscrimination and open-access policies serve an interest that is not just "important" or "substantial," but compelling. This Court has explained that nondiscrimination policies "plainly serve[ ] compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. That makes sense, given that "the diffusion of knowledge and opportu-

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[17] *O'Brien* also applies because nondiscrimination and open-access policies do not "directly and immediately affect[ ] associational rights." *Dale*, 530 U.S. at 659. At Hastings and elsewhere, student groups are not required to register as RSOs, and the decision to apply for RSO status is entirely voluntary.

nity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity," *Grutter*, 539 U.S. at 331—or religion.

Third, the interests served by nondiscrimination and open-access policies are "unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624. As discussed above, such policies are aimed not at impairing expression but at achieving the school's educational mission. The policies apply to all RSOs and make "no distinctions on the basis of [an] organization's viewpoint." *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). And, of course, groups that do not fulfill a institution's educational mission can exist on campus without being registered.

A regulation satisfies the final *O'Brien* factor if the government's interest "would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67. Nondiscrimination policies are narrowly tailored: The least restrictive means of prohibiting discrimination in membership by RSOs is to prohibit discrimination in membership by RSOs. The same goes for open-access policies. Nor do these policies restrict any speech; an RSO and its members remain free to express their views. Finally, registration is completely voluntary. A student group need not be registered to exist, associate with whomever it pleases, and express its views on campus.

Nondiscrimination and open-access policies thus easily pass the *O'Brien* test. And although such policies are not subject to strict scrutiny, they would pass that test for the same reasons they pass the *O'Brien* test.

2. CLS relies upon *Dale*, 530 U.S. 640, and *Roberts*, 468 U.S. 609, for the proposition that open-access policies must meet strict scrutiny under the First Amendment. CLS fails to recognize that *Dale* and *Roberts* were forced-inclusion cases, not conditional funding cases.

Dale held that a state public accommodations law requiring the Boy Scouts to accept a gay-rights activist in a leadership position (scoutmaster) violated the First Amendment. But *Dale* reached that conclusion from the premise that "a regulation that *forces* the group to accept members it does not desire" is highly burdensome. *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623) (emphasis added; quotation marks omitted). And *Dale* concluded from that premise that "*forced inclusion* of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* (emphasis added). *Accord Roberts*, 468 U.S. at 623 (analyzing "a regulation that *forces* the group to accept members it does not desire") (emphasis added). The threshold trigger for *Dale* and *Roberts*—forced inclusion—is not present here. CLS, unlike the groups at issue in *Dale* and *Roberts*, need not choose between bowing to a jurisdiction's nondiscrimination policy or not existing in the jurisdiction at all. On the contrary, Hastings has merely conditioned CLS's registration—but not its on-campus existence or expression—upon its adherence to an open-access policy. If it does not wish to be registered, CLS is free to exist, go its own way, and avoid the requirements of the policy.

CLS's situation thus is vastly different from that of the Boy Scouts in *Dale* and the Jaycees in *Roberts*. And that is not even to mention that neither *Dale* nor *Roberts* arose in the university context, in which First Amendment claims "must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U.S. at 268 (internal quotation marks omitted). For all of these reasons, CLS's attempt to analogize to *Dale* and its progeny, as opposed to the conditional-funding cases, should be rejected. *Cf. Grove City College* v. *Bell*, 465 U.S. 555, 575-576 (1984) ("Requiring [a college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in [a federal financial assistance] program infringes no First Amendment rights of the [c]ollege or its students.").

CONCLUSION

For the foregoing reasons, as well as those stated in Respondents' briefs, the Court should affirm the decision below.

Respectfully submitted,

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