No. 08-1371

IN THE
Supreme Court of the United States

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

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR HASTINGS COLLEGE OF THE LAW RESPONDENTS

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QUESTION PRESENTED

Whether a public university law school may require student organizations, as a condition of granting such organizations access to school funding and other benefits, to comply with a viewpoint-neutral nondiscrimination policy.

LIST OF PARTIES

On July 1, 2009, Respondent Leo P. Martinez became the Acting Chancellor and Dean of the University of California, Hastings College of the Law; he is substituted for the former Chancellor and Dean, Nell Newton, pursuant to RULE 35.3. The remaining Respondents are Jacqueline Ortega, the Director of Student Services; and Donald Bradley, Tina Combs, Maureen Corcoran, Marci Dragun, Carin T. Fujisaki, Claes H. Lewenhaupt, James E. Mahoney, Brian D. Monaghan, and Bruce L. Simon, the members of the Board of Directors of the University of California, Hastings College of the Law, in their official capacities.

The University of California, Hastings College of the Law is a government entity.

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STATEMENT OF THE CASE

In its unpublished two-sentence memorandum disposition below, the court of appeals affirmed summary judgment for Respondents based on a factual record comprised principally of a lengthy joint stipulation of facts. Pet. App. 1a-3a; ER 335-425. The Petition contains an incomplete account of the pertinent undisputed facts.

A. Hastings' Registration of Student Groups And The Policy On Nondiscrimination.

Respondents are the Chancellor and Dean, Director of the Office of Student Services, and individual members of the Board of Directors of Hastings College of the Law ("Hastings" or the "College"), a public law school in San Francisco that is part of the University of California. Pet. App. 6a-7a. Like many public universities, Hastings permits students to "register" student organizations with its Office of Student Services. *Id.* at 7a. To be a registered student group, the group must be a "non-commercial organization whose membership is limited to Hastings students." *Id.* at 83a.

Student organizations must be registered to obtain various benefits provided by the law school, including use of the Hastings name and logos, the use of certain means of communicating with Hastings students, access to particular law school facilities, and eligibility to apply for limited funds. *Id.* at 7a, 85a.[1] Hastings maintains this

1. Non-registered student organizations have access to bulletin boards and other means of communication with students and are also eligible to apply for permission to use rooms at the law school for meetings. ER 339 ¶¶10, 11, 348 ¶61.

registration system to provide its law students with opportunities to pursue academic and social interests outside the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience. ER 518 ¶4.

Only student groups that agree to abide by the College's Policies and Regulations Applying to College Activities, Organizations and Students ("Policies and Regulations") are eligible for registration. Pet. App. 8a, 72a-98a. This includes the Policy on Nondiscrimination (the "Nondiscrimination Policy" or "Policy"). *Id.* at 8a, 88a. The Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. . . .
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

Id. at 8a-9a, 88a.

As Petitioner Christian Legal Society ("CLS") acknowledges (Pet. 2), during the 2004-2005 academic year, when the instant dispute arose, Hastings recognized approximately sixty registered student organizations, including groups devoted to various academic, political, religious, cultural and athletic topics or pursuits. Pet. App. 109a-150a (bylaws of selected organizations).[2]

The parties stipulated, and the district court found, that Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs. *Id.* at 9a. As the Ninth Circuit observed,

> The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group.

Id. at 2a. Hastings has concluded that this policy helps ensure that those groups to which it provides funding and other benefits are furthering the general purposes of Hastings' registration system and that the educational and social opportunities these groups offer are available to all students. ER 518 ¶5. The Policy thereby encourages tolerance, cooperation, and learning

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2. Those groups included three religious organizations: the Hastings Association of Muslim Law Students, the Hastings Jewish Law Students Association, and Hastings Koinonia. ER 355, 357.

among students of different backgrounds and viewpoints. *Id.*

CLS asserts that "Hastings has recognized many groups whose constitutions provide that their officers and voting members should agree with their organizations' missions and viewpoints." Pet. 5. However, the record establishes that in their constitutions or bylaws, every other registered student organization expressly adopted the Nondiscrimination Policy and opened its membership to "any" or "all" Hastings students.[3] While some of those bylaws refer to the groups' interests or objectives, Hastings has always interpreted those references as informational only, not as authorizing those organizations to deny membership to any Hastings student interested in joining. Pet. App. 65a. In fact, the district court found that none of these bylaw provisions was ever used as a basis for denying membership to any interested student. *Id.* at 64a-66a.

CLS correctly contends that it is "the only group from which Hastings has ever withheld recognition." Pet. 3. No other student organization had ever refused to comply with Hastings' Nondiscrimination Policy, and none has a membership policy like CLS's, which explicitly prevents Hastings students from joining on the basis of their religion, sexual orientation or any other protected

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3. *See* Pet. App. 109a, 110a (Association of Trial Lawyers of America at Hastings); *id.* at 118a (Hastings Democratic Caucus); *id.* at 127a, 129a (Hastings Health Law Journal Development Team); *id.* at 132a (Hastings Motorcycle Riders Club); *id.* at 136a-137a, 141a (Outlaw); *id.* at 142a (Silenced Right – National Alliance Pro-Life Group); *id.* at 147a (Vietnamese American Law Society).

status. Hastings has never received a complaint that any registered student organization discriminates on the basis of religion or sexual orientation. ER 341 ¶19. Since the Nondiscrimination Policy was adopted, no student organization at Hastings other than CLS has ever sought to be exempted from complying with it. ER 340 ¶16.

B. For Ten Years Prior To 2004-2005, CLS Did Not Restrict Eligibility For Membership Or Leadership Positions.

CLS's Petition does not address the district court's findings, based on the parties' detailed stipulation of facts, regarding CLS's history at Hastings. For ten years, from 1994-1995 through 2003-2004, a student group known as Hastings Christian Legal Society or Hastings Christian Fellowship ("HCF") was a registered student organization at Hastings. *Id.* at 9a.[4] Through the 2001-2002 academic year, these groups used bylaws sent to student chapters throughout the years by the national Christian Legal Society ("CLS National"), an association of Christian lawyers, law students, law professors, and judges that maintains attorney and law student chapters across the country. Those bylaws provided that the group would comply with Hastings'

4. In pre-filing correspondence and verified pleadings, CLS alleged that it was identical to or affiliated with these predecessor student groups. Thus, CLS referred to itself in the complaint as "Plaintiff Hastings Christian Fellowship" and "a/k/a HCF." ER 72 ¶1.1, 73-74 ¶¶2.1, 3.3; *see also* ER 404 (CLS letter asserting that Hastings' chapter of CLS "has been affiliated with the national Christian Legal Society since at least 1989").

Policies and Regulations. *Id.* In the 2002-2003 and 2003-2004 academic years, the group used a different set of bylaws that stated that all students were welcome to become members. *Id.* at 10a ("HCF welcomes all students of the University of California, Hastings College of Law"). These groups did not bar gay and lesbian or non-Christian students from membership or leadership positions. *Id.*

During the 2003-2004 academic year—the year immediately before CLS filed this litigation—HCF welcomed an openly lesbian student as a regular participant in its meetings, which included group prayers and Bible studies, and at least two participants held beliefs inconsistent with what CLS considers to be "orthodox" Christianity. *Id.* at 10a. Dina Haddad, an HCF member who the following year became CLS's Vice President, did not regard the lesbian student's presence or participation as inconsistent in any way with the group's tenets and faith; to the contrary, she testified, "It was a joy to have her." ER 447:25-448:3. Likewise, at oral argument before the district court, CLS's counsel expressly conceded that the student's participation in HCF did not burden its message in any way:

> But the point is not that that student changed the contents of the organization's expression by her participation. She did not. She simply exchanged views. They learned from each other as students in any club should. They respect one another. But *the contents and expression of CLS at Hastings was not changed in any way nor could it have been.*

ER 663:24-664:4 (emphasis added).

C. In 2004-2005, CLS Changes Its Bylaws And Refuses To Comply With Hastings' Nondiscrimination Policy.

At the close of the 2003-2004 academic year, three students—Isaac Fong (President), Dina Haddad (Vice President), and Julie Chan (Treasurer)—assumed leadership of Hastings Christian Fellowship. Pet. App. 11a. During the summer of 2004, they decided to formally affiliate the group with CLS National. *Id.*

CLS-National required CLS to adopt a specific set of bylaws to become a formal student chapter. *Id.*; *id.* at 99a-108a (constitution of CLS chapter). The bylaws require any student who wants to become a member to sign a "Statement of Faith" which provides:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son and Holy Spirit.
> - God the Father Almighty, Maker of heaven and earth.
> - The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> - The presence and power of the Holy Spirit in the work of regeneration.
> - The Bible as the inspired Word of God.

Id. at 11a, 100a-101a.

CLS will not permit students who do not sign the Statement of Faith to become members or officers. *Id.* at 12a. In addition, CLS interprets the Statement of Faith as barring gay and lesbian students from becoming members or officers of the group. *Id.*; ER 75 ¶3.8, 344 ¶¶34-35, 404 ("A person who engages in homosexual conduct . . . would not be permitted to become a member or serve as [a CLS] officer").[5]

CLS's bylaws commit the chapter not to discriminate in all aspects of its activities, including membership, "on the basis of age, disability, color, national origin, race, sex, or veteran status" – but they do not bar discrimination on the basis of religion or sexual orientation. *Id.* at 101a. Accordingly, when CLS submitted its bylaws to Hastings at the beginning of the 2004-2005 academic year, Hastings requested that CLS change them to conform with the Nondiscrimination Policy, and specifically to affirm that CLS would not discriminate on the basis of religion or sexual orientation. *Id.* at 12a. Hastings informed CLS that to become a recognized student organization, CLS would

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5. CLS admits that "[a] person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership." Pet. 8. However, it asserts that a person's "mere experience of same-sex or opposite-sex sexual attraction" is not determinative. *Id.* The district court found this to be "a distinction without a difference." Pet. App. 22a (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (rejecting attempt to distinguish statute discriminating against "homosexual conduct" from one discriminating on the basis of sexual orientation)).

have to open its membership to all students irrespective of their religion or sexual orientation. *Id.* When CLS refused, Hastings informed CLS that it could not become a registered student group, and withheld certain travel funds previously set aside for CLS's officers to attend CLS-National's annual conference. *Id.* at 6a, 12a-13a.[6] However, Hastings informed CLS that it nevertheless could use Hastings' facilities for its meetings and activities. *Id.* at 8a; *see also* ER 348 ¶61, 422. CLS never requested to use such facilities for its chapter meetings during the 2004-2005 academic year. *Id.*

D. CLS's Activities During The 2004-2005 Academic Year.

Although it was not a registered student organization, at the beginning of the 2004-2005 academic year CLS participated in the annual Student Organizations Faire on campus. ER 346 ¶45. During the year, it held weekly Bible-study meetings, and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities. Pet. App. 13a. CLS also invited Hastings students to attend Good Friday and Easter Sunday church services with the organization. *Id.* The Bible studies were led by one of CLS's officers, but any attendee or member was welcome to lead the group in prayer, share prayer requests, and otherwise participate in prayer. *Id.* CLS made no distinction in that regard between "members" of CLS who had signed the Statement of Faith and "attendees" who had not.

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6. The withheld funds totaled $250.00. ER 344-46 ¶¶37, 42.

Between nine and fifteen Hastings students regularly attended CLS's meetings and activities during the 2004-2005 academic year. *Id.* Other than CLS's three officers, only one other student signed the Statement of Faith and thereby became a member of CLS. *Id.* No known non-Christian, gay, lesbian, or bisexual students sought to join CLS as a member or officer, or to attend any of its meetings during the 2004-2005 academic year. *Id.* Other than its officers, CLS did not identify to the public who was or was not a "member" or authorize any member or officer to speak for it. ER 478-79. Aside from requiring that members or officers sign the Statement of Faith, CLS did not have any procedure for ensuring that its members or officers are not gay or non-Christian or engaging in conduct it views as inconsistent with that Statement. ER 457:12-458:5.

E. Proceedings in the District Court.

Shortly after Hastings informed it that to become a registered student organization, CLS would have to open its membership to all students, CLS filed suit, alleging that "[b]y enacting and enforcing the Policy on Nondiscrimination forbidding [CLS] to discriminate on the basis of religion and sexual orientation," Hastings had violated its constitutional rights. ER 80 ¶¶5.2, 6.2, 7.2, 81 ¶9.2; *see also* ER 78 ¶4.2, 79 ¶4.9 (asserting that CLS "would still consider religion and sexual orientation in the selection of officers and members," and objecting to Policy's requirement that CLS open membership and leadership positions to all students). CLS asserted claims for violation of its rights to freedom of expressive association and free speech pursuant to the First Amendment, the Establishment and Free Exercise

Clauses of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. App. 14a. The district court dismissed CLS's establishment, due process, and equal protection claims, with leave to amend the equal protection claim. *Id.*

On cross-motions for summary judgment, the district court denied CLS's motion and granted the motions filed by Hastings and Hastings Outlaw, a lesbian and gay student group that had intervened in the action. *Id.* at 5a. The district court first rejected CLS's claim that Hastings' Nondiscrimination Policy violates its right to free speech, holding that both on its face and as applied to CLS, that Policy regulates conduct, not speech. *Id.* at 16a-24a. The court reasoned that like similar state nondiscrimination laws, "the Nondiscrimination Policy regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization – not engage in discrimination – not what CLS may or may not *say* regarding its beliefs on non-orthodox Christianity or homosexuality." *Id.* at 21a. The court found further that the evidence, including the history of CLS's predecessor organizations at Hastings, "does not show that CLS has been precluded from expressing any particular idea or viewpoint," or that the Policy "targets speech as opposed to conduct." *Id.* at 23a.

The district court held that Hastings' enforcement of the Nondiscrimination Policy did not unconstitutionally infringe CLS's freedom of speech under the standard in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* at 24a-27a. Alternatively, the court found that even if the Nondiscrimination Policy may be construed as regulating speech directly, it passes constitutional muster under this

Court's forum analysis. *Id.* at 27a-38a. In particular, the court held that by restricting registration to non-commercial student groups that comply with its policies and open their membership to all students, and by making funds available to such organizations, Hastings created a limited public forum. *Id.* at 30a. Restrictions on access to such a forum are permissible so long as they are viewpoint-neutral and reasonable. *Id.*

The district court found both factors satisfied. Hastings' Nondiscrimination Policy is viewpoint-neutral: "Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations." *Id.* at 32a. The district court found "there is no evidence in the record to support CLS's argument that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective. In fact, the evidence in the record demonstrates otherwise." *Id.* at 35a-36a. Hastings' requirement that registered student organizations comply with its Nondiscrimination Policy is consistent with and furthers Hastings' educational mission, and therefore is reasonable in light of the purpose of the forum, which is "to further students' education and participation in the law school environment and to foster students' interest and connections with their fellow students." *Id.* at 36a-38a.

Next, the district court rejected CLS's claim that the requirement that it comply with the Nondiscrimination Policy violated its First Amendment right of expressive association. *Id.* at 38a-62a. The court explained that "Hastings is not directly ordering CLS

to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations." *Id.* at 42a. "If CLS wishes to participate in the forum and be eligible to receive funds, it must comply with Hastings' Nondiscrimination Policy." *Id.* If not, it nonetheless "may continue to meet as the group of its choice on campus, excluding any students they wish, and may continue to communicate its beliefs as it did all through the 2004-2005 academic year." *Id.*

The court also found that "CLS has not demonstrated that its ability to express its views would be significantly impaired by complying" with the Policy. *Id.* at 54a. "CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, so that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission." *Id.* at 56a-57a. Likewise, the district court found that "the evidence in the record does not support CLS's argument" that if it complied with the Nondiscrimination Policy, "it would be stripped of its Christian beliefs and cease to exist." *Id.* at 58a. In short, "there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become a member or officer, and thus, by their presence alone, would impair CLS's ability to convey its beliefs." *Id.* at 59a.

The court also found that even if compliance with the Policy infringed in some way on CLS's ability to express itself, such an effect would be justified by Hastings' compelling interest in prohibiting discrimination on its campus. Pet. App. 59a-62a.

Finally, the district court rejected CLS's claims that the Policy violated its rights to free exercise of religion or to equal protection. Pet. App. 62a-69a.

F. Proceedings in the Court of Appeals.

In its two-sentence unsigned memorandum disposition, the Ninth Circuit affirmed. Pet. App. 1a-3a. The court of appeals emphasized Hastings' open membership policy: "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." *Id.* at 2a. On that basis, the court found that the conditions on recognition are viewpoint neutral and reasonable, citing its decision in *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, No. 08-1130 (June 29, 2009).

REASONS FOR DENYING THE PETITION

This Court recently denied certiorari in *Truth*, the sole decision cited in the court of appeals' unreported memorandum disposition below. The Ninth Circuit's published decision in *Truth* contained an extensive discussion and analysis of the issues, including a separate concurring opinion by two judges. The unsigned decision below, in contrast, contains almost no reasoned discussion, is unreported, and does not constitute precedent even within the Ninth Circuit. Even if it were a proper vehicle to review the question presented, the decision below does not squarely conflict with any decision of another court of appeals or of this Court, and the court of appeals correctly decided the issue presented.

I.

THE BRIEF UNREPORTED MEMORANDUM ORDER BELOW DOES NOT MERIT CERTIORARI.

The Ninth Circuit issued a brief unreported memorandum disposition that consists in its entirety of two sentences of discussion, followed by a citation to the court's decision in *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *re'hg en banc denied*, 551 F.3d 850 (9th Cir. 2008), in which this Court recently denied certiorari. No. 08-1130 (June 29, 2009). Contrary to amici's unsupported assertion, this case is not an appropriate vehicle to resolve the issue presented and does not merit certiorari.

In its order below, the court of appeals found controlling its decision in *Truth*, which presented an issue essentially indistinguishable from that raised here. The petitioner in *Truth*, like CLS, had contended that the Ninth Circuit's decision in that case presented a square conflict with the Seventh Circuit's decision in *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). *Truth v. Kent Sch. Dist.*, No. 08-1130, Pet. for Writ of Certiorari 29-31. Indeed, the petition in this case acknowledges that "the court below based its ruling solely on the *Truth* decision" (Pet. 12), which it discusses at length, and CLS expressly urged the Court to grant review in both cases. *Id.* at 12-15, 17-18, 39-41. Having denied the petition for certiorari in *Truth*, this Court should deny certiorari in the instant case as well.

The brief unreported order below is an inappropriate vehicle to review the constitutional issue presented in the Petition. To the extent that the order extended the Ninth Circuit's holding in *Truth*, as CLS contends (Pet. 40), the order does not address the factual differences between the two cases or their effect on the legal analysis. Moreover, as CLS describes at some length (Pet. 32-39), the same issue is pending in a number of other lower courts, including courts in the Seventh, Ninth and Eleventh Circuits. One or more of those courts is likely to decide the issue by a fully reasoned opinion that provides this Court with a detailed exposition of the pertinent facts and law, which is lacking here. Indeed, such a decision may be forthcoming from the Ninth Circuit itself, in which at least two such cases are pending. The decision below does not constitute binding precedent even in that Circuit, as the court of appeals expressly directed that its memorandum

disposition "is not appropriate for publication and is not precedent," except for limited purposes not present here. Pet. App. 1a (citing 9TH CIR. R. 36-3).[7] This Court should not grant certiorari until and unless the issues have been fully aired in the lower courts and a square conflict has emerged.

II.

THERE IS NO CONFLICT AMONG THE LOWER COURTS WARRANTING CERTIORARI.

Petitioner's primary contention is that the court of appeals' decision below creates a circuit split with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). However, that contention is belied by the important factual and procedural distinctions between the two cases. Petitioner's further assertion that the decision conflicts with the Second Circuit's decision in *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996) is groundless.

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7. Under the Ninth Circuit's rules, a written disposition shall be designated as a published opinion only if it "establishes, alters, modifies or clarifies a rule of law"; "[c]alls attention to a rule of law which appears to have been generally overlooked"; "[c]riticizes existing law"; or "[i]nvolves a legal or factual issue of unique interest or substantial public importance," among other grounds. 9TH CIR. R. 36-2. Thus, in the judgment of the panel below, none of these standards was met.

A. The Seventh Circuit's Decision in *Christian Legal Society v. Walker*.

Petitioner asserts that although *Walker* involved "identical material facts and legal claims," the Seventh Circuit reached a "diametrically opposite result" from that reached by the court of appeals below. Pet. 18. As the Ninth Circuit correctly concluded in *Truth*,[8] that assertion cannot withstand scrutiny of the two opinions, which differ in numerous important respects, both factually and procedurally.

In *Walker*, the dean of the Southern Illinois University School of Law ("SIU") declined to recognize a local chapter of the Christian Legal Society as an official student organization because he concluded that CLS's membership policies, which preclude membership to students who engage in or affirm homosexual conduct, violated SIU's nondiscrimination policies. The district court denied CLS's motion for a preliminary injunction to compel SIU to restore its official status, and a divided Seventh Circuit reversed, holding that CLS had shown a likelihood of success on the merits.[9]

The *Walker* majority rested its decision principally on a threshold factual ground not present here or in

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8. *See* 542 F.3d at 652 n.1 (Fisher, J., concurring) (distinguishing *Walker*); 551 F.3d at 851 (Wardlaw & Fisher, JJ., concurring in denial of rehearing en banc) (rejecting claim of circuit split and concluding that holdings are "entirely consonant").

9. One judge dissented. 453 F.3d at 867-76 (Wood, J., dissenting).

Truth: that it was "doubtful" that CLS had even violated any applicable university policy, the stated basis for the university's refusal to recognize it. 453 F.3d at 860-61. SIU had cited a policy requiring student organizations to adhere to all federal and state laws concerning nondiscrimination and equal opportunity, but never identified which federal or state law it believed CLS violated. *Id.* at 860. Likewise, the *Walker* court was "skeptical" that CLS had violated SIU's Affirmative Action/EEO policy, which by its terms applies to the university, not to student organizations. *Id.* at 860-61. *Walker* found that factual ground, by itself, was "enough to carry CLS's burden." *Id.* at 859. Here, in contrast, it is uncontroverted that CLS refused to comply with Hastings' Nondiscrimination Policy which, unlike SIU's policy, explicitly applies to student organizations. *See* pp. 2-3, 8-10, *supra*.

While the Seventh Circuit did go on to say that CLS had shown a likelihood of success on its expressive association and free speech claims (453 F.3d at 861-67), its discussion of those issues represented only alternative grounds for its decision, the significance of which is further diminished by the court's inability on the limited record before it to resolve a number of key issues. For several reasons, the decision below does not present any square conflict with *Walker*.

First, *Walker* did not squarely reach CLS's constitutional claims, but held only that CLS was reasonably likely to succeed on the merits of those claims, and remanded the case to the district court with directions to enter a preliminary injunction against the university. It is therefore only an interlocutory ruling, not a final decision on the merits.

Second, the Seventh Circuit's narrow holding was reached on the basis of an extremely limited record that was silent as to many important facts. *See Walker*, 453 F.3d at 867 (characterizing the record as "spartan"); *see also id.* at 869 ("Because of the procedural posture of the case, including the fact that SIU has not yet submitted any evidence, many critical questions remain unexplored") (Wood, J., dissenting); *id.* ("When the time comes for permanent relief, solid answers to the following questions, among others, will be essential"). While the majority may have been persuaded that the answers to those questions ultimately would favor CLS, its opinion properly acknowledged that answering them "will require further factual development, and that is a task properly left for the district court." *Id.* at 866.

Third, despite the limited factual record, the Seventh Circuit found "strong evidence" that SIU's policy, although viewpoint neutral on its face, had not been applied in a viewpoint neutral fashion. *Id.* at 866. In particular, the court cited evidence that other recognized student organizations discriminated in their membership requirements on grounds prohibited by SIU's policy, including organizations that explicitly restricted membership on the basis of religion and gender. *Id.* Here, in contrast, there was no such evidence; to the contrary, Hastings has an open membership rule that requires all student groups to accept all interested students as members. Pet. App. 2a, 9a; ER 341 ¶18.[10]

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10. There are additional factual distinctions between the two cases. As a result of SIU's refusal to recognize it, CLS was

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Fourth, as a result of the procedural posture of the case and the sparse factual record, the Seventh Circuit did not reach or resolve key legal issues that are undisputed here. Thus, the *Walker* court was unable to determine the nature of the forum involved, which it said was "an inquiry that will require further factual development" on remand to the district court. 453 F.3d at 866. Further, the court could not address whether SIU's policy was reasonable in light of the purposes served by the forum, a subject on which SIU apparently had not presented any evidence. *Id.* at 867. Here, in contrast, the district court explicitly found on undisputed evidence both that Hastings had created a limited public forum and that the Nondiscrimination Policy was reasonable in light of the purposes of that forum.

In short, the decision below does not present a square conflict with *Walker*, which addressed the issues presented here only as alternative grounds for an interlocutory ruling on a limited record that nevertheless presented key factual distinctions between the two cases.

(Cont'd)

no longer able to reserve law school rooms for private meetings. 453 F.3d at 858. In *Healy v. James*, 408 U.S. 169 (1972), similarly, the college not only refused to recognize the student group, but prevented it from meeting on campus. *Id.* at 176 & n.6. Here, in contrast, Hastings told CLS that it was welcome to continue to meet on campus and to use other law school facilities, but CLS chose not to do so. Pet. App. 48a. Thus, the burden on the group's speech and association rights from non-recognition was far greater in *Walker* than here.

B. The Second Circuit's Equal Access Act Decision.

CLS's further contention that the Ninth Circuit panel's decision conflicts with the Second Circuit's decision in *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996) (Pet. 20-22) is readily answered: in that case, as CLS concedes, "the Second Circuit based its decision on the Equal Access Act rather than the First Amendment." Pet. 22. *Hsu* was decided under the Equal Access Act, 20 U.S.C. §§4071-4074, a federal statute that applies to certain federally-funded public secondary schools, and did not present or decide any constitutional issue. *See* 85 F.3d at 856 (*Hurley* "does not control this case because . . . it concerns free speech rights under the Constitution, not a federal statute"); *id.* at 858 (observing that Court's freedom of association cases "are analytically distinct from this case, because they involve constitutional rights, not statutory ones"); *see Truth*, 542 F.3d at 647 (concluding that holding is not inconsistent with *Hsu*, which focused on the term "speech" in the Act). Thus, that decision raises issues of federal statutory interpretation that are distinct from the constitutional issue presented here, and cannot give rise to a cognizable conflict warranting certiorari.

CLS contends that the Equal Access Act extended free speech rights recognized by this Court in the college setting to secondary school student groups. Pet. 22. However, while the Act "extended the reasoning of Widmar to public secondary schools," this Court has explicitly recognized that Congress did not intend to incorporate the Court's free speech jurisprudence verbatim, but rather that "it intended to establish a standard different from the one established by our free

speech cases." *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 235, 242 (1990). The loose analogy between the two cannot transform *Hsu* into a constitutional rather than a statutory ruling.

In any event, *Hsu* is fundamentally consistent with the decision below. The *Hsu* court found that "a religious test for membership or attendance" in a Christian student group would be "plainly insupportable" under the Equal Access Act, observing that "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." 85 F.3d at 858 & n.17. It also flatly rejected the club's contention – identical to CLS's here – that it could properly exclude non-Christians from all officer positions. *Id.* at 857-58. The court went on to rule that under the Act, the club could impose a religious test for certain leadership positions, but only "to the extent that there is an integral connection between the exclusionary leadership policy and the 'religious speech' at their meetings," narrowly limiting its holding to those specific positions whose duties "consist of leading Christian prayers and devotions and safeguarding the 'spiritual content' of the meetings." *Id.* at 858.[11]

Here, it is undisputed that CLS did not look solely to its officers to perform such duties, but in fact allowed

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11. The Second Circuit is the only Circuit to have so read the Act. In a later case, that court squarely held that the government may condition access to a nonpublic forum on compliance with a reasonable, viewpoint-neutral nondiscrimination policy, a holding that is entirely consistent with the Ninth Circuit's analysis in this case. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-98 (2d Cir. 2003).

members and even "attendees" (non-members) to lead the group in prayer. Pet. App. 13a. As a result, there is no "integral connection" between CLS's exclusionary membership and leadership policies and the "religious speech" at its meetings, and its associational interest in enforcing those policies is far weaker. Likewise, there is no integral connection between CLS's exclusion of gay and lesbian students as members and officers and the speech at its meetings, particularly given its history of admitting such students as active participants. In view of those critical factual differences, there would be no conflict between the decision below and *Hsu* even if the latter had reached the constitutional issue.

III.

THE COURT OF APPEALS' REJECTION OF PETITIONER'S CHALLENGE TO THE COLLEGE'S NONDISCRIMINATION POLICY IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

CLS also contends that the court of appeals' memorandum disposition conflicts with this Court's expressive association decisions and undermines its decisions protecting the equal access rights of religious student groups. Pet. 23-27, 28-30. To the contrary, the Ninth Circuit's decision upholding Hastings' uniform application of its reasonable, viewpoint-neutral nondiscrimination policy is entirely consistent with this Court's decisions in both areas.

A. Expressive Association.

CLS argues that the Ninth Circuit's ruling conflicts with this Court's decisions regarding the First Amendment right of expressive association. Pet. 23-27. However, CLS is constrained to acknowledge that the court of appeals' brief memorandum disposition below did not actually address its expressive association claim. *Id.* at 25-26. Instead, CLS directs its argument entirely at the *district court's* analysis of the issue. *Id.* at 26-27. The Ninth Circuit did not adopt that analysis, but instead relied on its prior decision in *Truth*, which this Court has already determined does not warrant certiorari.

In any event, CLS fails to establish any conflict between the district court's expressive association analysis and this Court's decisions in that area. CLS relies primarily on the decisions in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). However, neither case addressed (much less resolved) the issue presented here: whether the government may condition access to a limited public forum or to government financial subsidies on compliance with a viewpoint-neutral nondiscrimination policy.

This case is entirely unlike *Dale*, which involved the direct application of state law to compel a private organization to admit a member whose presence would have interfered with its message. In *Dale*, New Jersey sought to apply its public accommodations law to compel the Boy Scouts, a private organization that "engaged in instilling its system of values in young people," to

reinstate Dale, "an avowed homosexual and gay rights activist," as an adult scout leader. 530 U.S. at 644. The Court found that "the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints" (*id.* at 650) and therefore violated the Boy Scouts' First Amendment right of expressive association. In particular, the Court found that the Boy Scouts viewed homosexual conduct as "not morally straight" (*id.* at 650-51), and that scoutmasters played an important role as role models and adult leaders who "inculcate [youth members] with the Boy Scouts' values—both expressly and by example." *Id.* at 649-50. Emphasizing Dale's background as "the copresident of a gay and lesbian organization at college [who] remains a gay rights activist," the Court concluded that his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

Dale recognized that government action may unconstitutionally burden associational freedom when it constitutes an "intrusion into the internal structure or affairs of an association," such as a "regulation that forces the group to accept members it does not desire." *Id.* at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). This case, in contrast, does not involve any such direct legal compulsion. As the district court found, "CLS is not being forced, as a private entity, to include certain members or officers." Pet. App. 40a. "Rather, Hastings has merely placed conditions on using aspects of its campus as a forum

and providing subsidies to organizations." *Id.* at 42a.[12] Thus, CLS (like all other student organizations) had a choice: if it wished to participate in Hastings' forum, thereby gaining access to eligibility for funding and certain law school resources, it could agree to comply with the law school's nondiscrimination policy. If not, it could continue to meet on campus and to exclude whichever students it chose. *Id.* at 42a, 54a. *Cf. Rumsfeld v. FAIR*, 547 U.S. 47, 58 (2006) ("The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds").

Nor does the district court's analysis present any conflict with the Court's compelled-speech holding in *Hurley*. There, the Court held that Massachusetts could not apply its public accommodations act to force the private organizers of a St. Patrick's Day Parade to include an organization of gay, lesbian and bisexual Irish Americans. 515 U.S. at 572. The basis for the Court's holding, however, was not the sexual orientation of the organization's members, but the fact that they wished to march behind a banner identifying them as such ("GLIB"), thereby requiring the parade organizers to "alter the expressive content of their parade." *Id.* at 572-73 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member

12. Petitioner disputes the district court's finding on this point, asserting that *Dale* governs even where the effect on associational rights is only indirect. Pet. 26. However, by its terms, *Dale* applies only where the state law in question "*directly and immediately* affects . . . associational rights." 530 U.S. at 659 (emphasis added).

of any group that the Council has approved to march"); *see also Dale*, 530 U.S. at 653 ("We noted that the parade organizers *did not wish to exclude the GLIB members because of their sexual orientations*, but because they wanted to march behind a GLIB banner") (emphasis added). Here, again, the district court made an explicit factual finding that CLS had failed to present any evidence that complying with Hastings' Policy would alter its message or affect its ability to advocate its viewpoint in any way.

Neither *Dale* nor *Hurley* involved the validity of conditions on access to a public (or nonpublic) forum or to government financial subsidies, the issue presented here. Those cases are entirely distinct from this Court's public forum decisions, which hold that when a university creates a limited public forum for use by student groups, it is entitled to confine the forum to "the limited and legitimate purposes for which it was created," such as by "reserving it for certain groups or for the discussion of certain topics," so long as the restrictions are reasonable in light of the purpose served by the forum and viewpoint-neutral. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also*, *e.g.*, *Bd. of Regents v. Southworth*, 529 U.S. 217, 229-30, 234 (2000). The decision below merely applies these well-accepted principles by allowing Hastings to enforce uniform and reasonable nondiscrimination and open membership policies that benefit all students and further its educational mission.

The decision below is entirely consistent with this Court's government subsidy precedents, which hold that it is permissible to condition public funding on compliance with neutral nondiscrimination policies.

See Grove City College v. Bell, 465 U.S. 555, 575-76 (1984) ("Requiring [college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [tuition subsidy] program infringes no First Amendment rights of the College or its students"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (government may condition a subsidy created by tax exempt status on a lack of illegal racial discrimination by fundamentalist Christian schools); *see also Evans v. City of Berkeley*, 38 Cal. 4th 1, 10, 129 P.3d 394, 400 (2006) ("a government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy"). *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN L. REV. 1919, 1926 (2006) ("the government may decide not to subsidize such [student] groups: it may limit funding to those groups that discriminate neither in their choice of officers nor in their choice of members or attendees").

Finally, even if *Dale* applied here, CLS failed to meet its factual burden under that case to establish that complying with the Policy would significantly affect its ability to advocate public or private viewpoints. The district court expressly found that after it elected not to comply with the Policy, CLS was able to meet during the academic year without any significant impediment to its activities or its ability to communicate as a group – indeed, its membership actually *increased* after the law school declined to officially recognize it. *Id.* at 47a-49a. Although it did not have recognized status, CLS was permitted to participate in the student organization

fair, to reserve Hastings' rooms for meetings and events, and to post announcements about the organization and its activities. *Id.* Indeed, the district court found that CLS had failed to present *any* evidence that complying with the Nondiscrimination Policy would impair (or had impaired) its ability to convey its beliefs. *Id.* at 56a-59a.

CLS objects to that finding, citing this Court's direction to lower courts in *Dale* to "give deference to" an association's view of what would impair its expression. Pet. 26-27. However, while *Dale* mandated deference to associations' views, it did not wholly relieve them of the factual burden of establishing that the challenged government action "affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648; *see id.* at 649-53 (summarizing evidence). To the contrary, the Court specifically cautioned that its holding "is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653. This case falls squarely within that warning.[13]

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13. Petitioner also takes issue with the district court's finding that Hastings has a compelling interest in prohibiting discrimination on its campus. Pet. 27. However, that conclusion is not open to serious question. This Court has observed that state laws prohibiting discrimination in the provision of public accommodations "plainly serv[e] compelling state interests of the highest order." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (quoting *Roberts*, 468 U.S. at 624). Indeed, a state's interest in eradicating discrimination is particularly critical in institutions of higher education. *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003). Hastings' Nondiscrimination Policy is manifestly "unrelated to the

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B. Equal Access.

CLS contends that the court of appeals' decision "renders toothless" this Court's decisions in *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) and *Widmar v. Vincent*, 454 U.S. 263 (1981). Pet. 28-30. That contention fundamentally misconceives the holdings and rationale of those decisions, which hold that religious groups are entitled to *equal* access to public forums, not that they are entitled to be *exempted* from uniform viewpoint-neutral rules that apply to all forum participants. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (Free Exercise Clause does not exempt individuals from complying with valid and neutral laws of general applicability).

This Court's decisions in *Widmar*, *Rosenberger* and their progeny stand for "the fundamental principle that a state regulation of speech should be content-neutral." *Widmar*, 454 U.S. at 277. Thus, in *Widmar*, the Court struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." The Court explained that the regulation constituted "discriminatory exclusion from a public forum based on

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suppression of ideas" and advancing those compelling interests "cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quotation omitted); *see, e.g.*, *Roberts*, 468 U.S. at 624 (state's objective of eliminating discrimination and assuring its citizens equal access to publicly available goods and services is "unrelated to the suppression of expression").

the religious content of a group's intended speech," and therefore could be justified only under the strict scrutiny standard applicable to such "content-based exclusion," which it found the university failed to satisfy. *Id.* at 269-70, 277.

Likewise, in *Rosenberger*, the Court held that the University of Virginia's denial of funding to a student newspaper because of its Christian editorial viewpoint when the school funded publications with other viewpoints was impermissible. 515 U.S. at 829, 832. The Court again grounded its decision on the "axiomatic" principle that "the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," the university ran afoul of this prohibition, thereby violating students' rights to free speech. *Id.* at 831.

This case stands in vivid contrast to *Widmar* and *Rosenberger*. Here, as the district court expressly found, Hastings did *not* decline to fund and officially recognize CLS based on either the religious content or viewpoint of its speech. Pet. App. 32a, 35a-36a. Rather, it did so because of CLS's explicit refusal to comply with Hastings' generally applicable, viewpoint-neutral Nondiscrimination Policy. *Id.* That Policy does not target or prohibit any particular viewpoint or draw any distinction between religious and non-religious speech, viewpoints or groups; instead, it applies equally to *all*

student groups, religious and non-religious alike, regardless of the content or viewpoint of their speech.[14]

Nothing in the Court's equal access decisions precludes a state university from adopting or enforcing such a policy, so long as it applies it even-handedly to all student organizations. This Court long has recognized that broad federal and state nondiscrimination laws closely similar to Hastings' Nondiscrimination Policy are both content and viewpoint neutral. *E.g.*, *Hurley*, 515 U.S. at 572 (state public accommodations law "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 in the provision of publicly available goods, privileges, and services on the proscribed grounds"); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (Title VII, which prohibits discrimination against an employee "because of such individual's race, color, religion, sex, or national origin," is a "permissible content-neutral regulation of conduct"); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549 (state law barring discrimination in public accommodations "makes no distinctions on the basis of the organization's viewpoint"); *Roberts*, 468 U.S. at 615, 623 (state human rights act "does not distinguish between prohibited and permitted activity on the basis of viewpoint"); *see also Evans*, 38 Cal. 4th at 14, 129 P.3d at 402 (city nondiscrimination policy "did not

14. That the Policy may disproportionately affect groups with a particular viewpoint, such as religious groups, "does not itself render the [Policy] content or viewpoint based." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994).

demand adherence to or renunciation of any idea or viewpoint"), *cert. denied*, 127 S. Ct. 434 (2006).[15]

As CLS acknowledges (Pet. 35), public universities across the nation long have maintained similar nondiscrimination policies.[16] The widespread adoption and enforcement of such policies by institutions of higher education falls comfortably within the Court's explicit recognition of "a university's authority to impose reasonable regulations compatible with that mission [of education] upon the use of its campus and facilities." *Widmar*, 454 U.S. at 268 n.5; *see also id.* at 276-77 ("we affirm the continuing validity of cases 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

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15. As Professor Volokh has observed,

> By any traditional First Amendment definition of content neutrality, . . . antidiscrimination rules are content-neutral. They do not treat expressive associations differently based on what the associations say. They are not justified by the content of the expressive associations' speech but by whether the associations let prospective members participate without regard to their race, religion, sex, and the like. Associations are covered whether they express racist views or antiracist views, religious views or atheist views, pro-gay-rights views or anti-gay-rights views.

Volokh, 58 STAN. L. REV. at 1930 (footnotes omitted).

16. Indeed, the Court noted in *Rosenberger* that in order to be eligible to participate in the University of Virginia's limited public forum, a student group was required to "pledge not to discriminate in its membership." 515 U.S. at 823.

students to obtain an education" (citation omitted) (citing *Healy v. James*, 408 U.S. 169, 188-89 (1972)).

CLS's suggestion, relying on an article by counsel for amici, that a university's uniform enforcement of nondiscrimination policies has the same effect as content or viewpoint-based exclusions, thereby "circumvent[ing]" *Widmar*'s holding (Pet. 30), is flawed. *Widmar* and *Rosenberger* stand for the principle of "equal access": *i.e.*, that religious student groups are entitled to access on university campuses on the *same* terms and conditions as other student organizations. *See Rosenberger*, 454 U.S. at 270-71 (referring to policy requiring university to "offer its facilities to religious groups and speakers on the terms available to other groups" as "an 'equal access' policy"). But Petitioner contends that religious student groups are constitutionally entitled to be *exempted* from viewpoint-neutral nondiscrimination policies – that is, that religious groups are entitled not to *equal* access, but to *superior* access, without being required to conform to policies that apply to all other groups. The novel position that religious groups should be uniquely entitled to a special exemption, not the Ninth Circuit's decision below upholding the legitimate application of viewpoint-neutral policies to all groups, diverges from this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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