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# Christian Legal Society v. Martinez: Legal Issues, Arguments and Analysis

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**CHRISTIAN LEGAL SOCIETY V. MARTINEZ:  
LEGAL ISSUES, ARGUMENTS AND ANALYSIS**

**ALICIA M. LENDON**

**INTRODUCTION**

One of the most universal and fundamental aspects of college life for students is the ability to join and participate in a variety of student organizations. Most schools provide specific guidelines for potential groups to follow in order to gain formal recognition from the school. Because these organizations are *de facto* extensions of, and representative of, the school with which they are affiliated, schools have an interest in the nature and composition of the organizations.

In recent years, government recognition and protection of gays and lesbians has grown through a variety of channels. While the United States Supreme Court's 2003 decision in *Lawrence v. Texas*<sup>1</sup> is widely considered the most progressive step in the gay rights' movement, it was the 1996 decision in *Romer v. Evans*<sup>2</sup> that initially cleared the way for widespread inclusion of "sexual orientation" as a protected classification in nondiscrimination policies. However, because of the sensitivity of the issue of homosexuality in many religions, new issues have arisen at the cross-section of First Amendment religious protections and nondiscrimination laws. "Several major religions in America teach that homosexuality is wrong by divine mandate and conclude that they

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<sup>1</sup> 539 U.S. 558 (2003). The Supreme Court overruled its previous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) and struck down Texas's (and similar laws in other states) anti-sodomy law as an unconstitutional violation of the Fourteenth Amendment's guarantee of substantive due process.

<sup>2</sup> 517 U.S. 620 (1996). The state of Colorado placed Amendment 2 on its ballot, which would have prevented any state or local agency from including sexual orientation in its nondiscrimination policies, or taking any actions recognizing homosexual persons as a protected class. The Supreme Court struck down the amendment as an unconstitutional violation of equal protection using only a rational basis standard.

cannot support social and legal trends favorable to homosexuals without ignoring the commands of the God they worship.”<sup>3</sup> With a growing number of state and local governments banning discrimination based on sexual orientation, a conflict arises. In particular, the United States Supreme Court has agreed to hear the case *Christian Legal Society v. Martinez*<sup>4</sup> to resolve some of the lingering issues surrounding the conflict between religion and sexual orientation.

This case touches on a variety of legal principles that overlap and intertwine with each other. Among them are First Amendment freedoms of speech and expressive association, the various “forums” that a government creates for the expression of speech, viewpoint-discrimination versus viewpoint-neutrality, and whether the government must subsidize constitutionally protected freedoms. This paper will explain these legal principles and provide each side’s legal arguments. Additionally, it will attempt to distinguish this particular situation from previous Supreme Court jurisprudence, and determine how the Court is likely to decide.

In Part I of this paper, it provides a historical background of the policies and events that this case evolved from. In Subsection A, it explains the process a group of students must go through to become a Registered Student Organization at the University of California-Hastings College of Law, and provides the text of the policies that must be adopted. In Subsection B, it describes the initial recognition and subsequent changes in the Hastings chapter of the Christian Legal Society that spurred this litigation, and in Subsection C it details the procedural history of the case.

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<sup>3</sup> J. Brady Brammer, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 B.Y.U. L. REV. 995, 1001 (2006).

<sup>4</sup> *Christian Legal Soc’y v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009), *cert. granted*, No. 08-1371 (U.S. Dec. 7, 2009).

Part II of the paper presents the different legal issues that this case entails, beginning with the Christian Legal Society’s positions in Part A. Part B lays out the positions of Respondents University of California-Hastings and Hastings Outlaw. Then, Part III, Subsection A sorts through both arguments and uses Supreme Court precedent to predict the outcome of the case. In Subsection B, the paper addresses some tangential areas of law this decision will likely affect, and concludes.

## I. BACKGROUND

### A. University of California-Hastings College of Law’s Registered Student Organizations

As do most law schools and universities, The University of California-Hastings College of Law (“Hastings”), has a procedure for allowing students to form extra-curricular organizations.<sup>5</sup> Purpose, size and interests of these groups vary greatly, but schools encourage students to participate to enhance their academic endeavors through additional social and educational opportunities.<sup>6</sup> Hastings provides certain benefits to officially recognized student organizations.<sup>7</sup> Such benefits include the ability to apply for funding from the school, use of school space for meetings and events, access to school-wide communication such as email listservs and bulletin boards, and recognition in

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<sup>5</sup> Brief of Hastings College of the Law Respondents at 3, *Christian Legal Soc’y v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter *Hastings*].

<sup>6</sup> Brief on the Merits for Respondent-Intervenor Hastings Outlaw at 2, *Christian Legal Soc’y v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter *Outlaws*].

<sup>7</sup> *Hastings*, *supra* note 5, at 3.

school publications.<sup>8</sup> However, limited access to some of these benefits is available to non-registered organizations as well.<sup>9</sup>

At Hastings, a registered student organization (RSO) must meet several basic requirements for its application to be approved: (1) it cannot be a commercial organization, (2) its membership must be limited to Hastings students, and (3) it must “agree to abide by [Hastings’] policies and regulations, including its longstanding nondiscrimination policy.”<sup>10</sup> The policy, which has been in place since 1990, states,

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 College’s policy on nondiscrimination is to comply fully with applicable law.

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.<sup>11</sup>

Hastings requires its nondiscrimination policy be included in each group’s bylaws or constitution, and actually goes above and beyond the stated policy by requiring that RSOs explicitly state all students must be welcomed as members of each RSO.<sup>12</sup> Specifically, the school “requires that [RSOs] allow any student to participate, become a member, or

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<sup>8</sup> Brief for Petitioner at 4, *Christian Legal Soc’y v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter *Christian Legal Society*].

<sup>9</sup> *Outlaws*, *supra* note 6, at 4.

<sup>10</sup> *Hastings*, *supra* note 5, at 4.

<sup>11</sup> *Id.* The policy is also written in *Christian Legal Society*, *supra* note 8, at 9.

<sup>12</sup> *Outlaws*, *supra* note 6, at 6.

seek leadership positions in the organization, regardless of their status and beliefs.”<sup>13</sup>

Some, limited circumstances allow for membership limitations, but only if the requirements are completely neutral, and the initial opportunity is available to all students.<sup>14</sup> Such acceptable circumstances include attendance requirements or baseline academic criteria.<sup>15</sup>

At the time this lawsuit was filed, Hastings had approximately 60 RSOs.<sup>16</sup> The types of groups granted RSO status varied widely, including political groups, academic groups, social groups, athletic groups and professional groups.<sup>17</sup> Additionally, there were three religious groups at the time that the Christian Legal Society filed its petition to become an RSO, the Muslim Law Students, the Jewish Law Students, and Hastings Koinonia.<sup>18</sup> Each of the described groups had open membership policies and included Hastings’ nondiscrimination policy in its bylaws.<sup>19</sup>

Hastings’ nondiscrimination policy is standard, and similar policies are in place at law schools throughout the United States. The Association of American Law Schools (“AALS”), which is comprised of 171 schools,<sup>20</sup> encourages member schools to “provide equality of opportunity in legal education for all,” and Bylaw §6-3(a) of AALS contains the group’s sexual orientation-inclusive nondiscrimination policy.<sup>21</sup> Each member school

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<sup>13</sup> Hastings, *supra* note 5, at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* This is also mentioned in Christian Legal Society, *supra* note 8, at 3.

<sup>17</sup> Hastings, *supra* note 5, at 5. See also Outlaws, *supra* note 6, at 3, and Christian Legal Society, *supra* note 8, at 3.

<sup>18</sup> Hastings, *supra* note 5, at 5.

<sup>19</sup> *Id.*

<sup>20</sup> Brief of *Amicus Curiae* Association of American Law Schools in Support of Respondents at 1, Christian Legal Soc’y v. Martinez, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter AALS].

<sup>21</sup> *Id.* at 2. The policy does include an exception for religiously affiliated schools; however, because Hastings is a public, secular institution, it is not relevant to the discussion at hand.

is free to make its own determination in how to apply this standard to its student organizations.<sup>22</sup> Similarly, the American Bar Association (“ABA”), a legal professional organization of over 400,000, encourages its group members to prohibit discrimination on a variety of grounds.<sup>23</sup> Its bylaws read, “[t]he Division shall not discriminate on the basis of ancestry, color, or race; cultural or ethnic background; economic disadvantage; ideological, philosophical or political belief or affiliation; marital or parental status; national or regional origin; physical disability; religion, or religious or denominational affiliation; sex; sexual orientation; or age.”<sup>24</sup> Further, the ABA encourages its members to prohibit use of facilities or gatherings to organizations that discriminate on any of these bases.<sup>25</sup>

At the time this lawsuit was filed, Christian Legal Society was the only group at Hastings whose petition to become an RSO had been denied.<sup>26</sup> However, the Christian Legal Society was also the only group to ever seek to exclude Hastings’ nondiscrimination policy from its bylaws and to preclude certain persons from obtaining full membership status on the basis of identity or beliefs.<sup>27</sup>

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<sup>22</sup> AALS, *supra* note 20, at 2.

<sup>23</sup> Brief for *Amicus Curiae* American Bar Association in Support of Respondents at 2, *Christian Legal Soc’y v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter ABA].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Christian Legal Society*, *supra* note 8, at 4.

<sup>27</sup> *Outlaws*, *supra* note 6, at 7.

## B. History of the Christian Legal Society at Hastings

The Christian Legal Society is a national organization, founded in 1961, that allows a variety of persons in the legal profession to engage in fellowship and gain “moral and spiritual guidance.”<sup>28</sup> The Christian Legal Society has chapters at law schools throughout the country.<sup>29</sup> From the Fall 1994 semester until the Spring 2002 semester, there was an RSO called the Hastings Christian Legal Society; however, it was not affiliated with the national organization,<sup>30</sup> and it abided by all Hastings’ rules and regulations.<sup>31</sup> In 2002, the group changed its name to Hastings Christian Fellowship.<sup>32</sup> At that time it had a policy that explicitly stated that “all students” were welcome as leaders and voting members.<sup>33</sup> In fact, during the 2003-2004 school year, an openly gay female student was a voting member of the Hastings Christian Fellowship.<sup>34</sup>

At the beginning of the 2004-2005 academic year, Hastings Christian Fellowship again became the Christian Legal Society, and sought to become an affiliated chapter of the national Christian Legal Society.<sup>35</sup> In order to be recognized by the national chapter, the organization was required to adopt the national organization’s policies and bylaws.<sup>36</sup> One particular policy that the national Christian Legal Society requires is that all students sign a “Statement of Faith” to be a fully recognized member.<sup>37</sup> Any student that does not sign, or abide by, the Christian Legal Society’s Statement of Faith would not be allowed

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<sup>28</sup> Christian Legal Society, *supra* note 8, at 4-5.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> Hastings, *supra* note 5, at 5-6.

<sup>32</sup> Christian Legal Society, *supra* note 8, at 8.

<sup>33</sup> Hastings, *supra* note 5, at 6.

<sup>34</sup> Christian Legal Society, *supra* note 8, at 8.

<sup>35</sup> *Id.* See also Hastings, *supra* note 6 at 6.

<sup>36</sup> Christian Legal Society, *supra* note 8, at 8. See also Outlaws, *supra* note 6, at 9.

<sup>37</sup> Hastings, *supra* note 5, at 6. See also Outlaws, *supra* note 6, at 9.



to vote for, or become, leaders within the organization.<sup>38</sup> The relevant portion of the Statement of Faith, in conflict with Hastings' nondiscrimination policy, says that,

[i]n view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.<sup>39</sup>

After being notified by Hastings Director of Student Services of the school's requirements to become an RSO,<sup>40</sup> the Christian Legal Society filed an application for recognition.<sup>41</sup> The constitution the Christian Legal Society submitted did not include religion or sexual orientation in its nondiscrimination policy, and the school notified the group that it was not in compliance with Hastings' requirements to become an RSO.<sup>42</sup> The group refused to make the requested changes to its constitution, and asked the school for an exemption from the policy through a letter written by the national Christian Legal Society organization.<sup>43</sup> The Christian Legal Society was then formally denied its application to become an RSO, but was notified by the school that it would still be allowed to use Hastings facilities for its meetings, and could advertise its events on classroom chalkboards and general bulletin boards.<sup>44</sup> The Christian Legal Society did not request to use Hastings facilities during the 2004-2005 year.<sup>45</sup> Subsequent to the

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<sup>38</sup> Outlaws, *supra* note 6, at 9.

<sup>39</sup> Petition for Writ of Certiorari at 8, *Christian Legal Soc'y v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter *Petition for Writ*].

<sup>40</sup> *Christian Legal Society*, *supra* note 8, at 8.

<sup>41</sup> Outlaws, *supra* note 6, at 9.

<sup>42</sup> *Christian Legal Society*, *supra* note 8, at 11. *See also* Outlaws, *supra* note 6, at 10. and Hastings, *supra* note 5, at 6.

<sup>43</sup> Outlaws, *supra* note 6, at 10. *See also* *Christian Legal Society*, *supra* note 8 at 11.

<sup>44</sup> Outlaws, *supra* note 6 at 11-12.

<sup>45</sup> *Id.* at 11.

decision, Hastings revoked a \$250 grant of travel funds it had previously approved for the group.<sup>46</sup>

### C. The Case's Procedural History

The Christian Legal Society filed this lawsuit in the United States District Court for the Northern District of California shortly after it was formally denied its RSO petition.<sup>47</sup> The Christian Legal Society's complaint alleged that its First Amendment rights to free association, free speech, free exercise of religion, and its right to equal protection had been violated.<sup>48</sup> After an amended complaint was filed, another RSO—Hastings Outlaw—successfully petitioned the court to become an Intervenor-Respondent.<sup>49</sup> Outlaw's mission in intervening is to “protect the interests of its members and of other gay, lesbian and bisexual students who wish to attend law school in an environment free from discrimination and who wish to have an equal opportunity to become members of any registered student organization without regard to sexual orientation.”<sup>50</sup>

Both sides filed motions for summary judgment, and the District Court ruled in favor of the Respondents, finding that the Christian Legal Society's First Amendment rights were not violated.<sup>51</sup> The District Court found that Hastings' nondiscrimination policy did not violate the Christian Legal Society's right to free speech because it

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<sup>46</sup> Hastings, *supra* note 5, at 6.

<sup>47</sup> Outlaws, *supra* note 6, at 12. *See also* Hastings, *supra* note 5, at 13.

<sup>48</sup> Outlaws, *supra* note 6, at 12. *See also* Hastings, *supra* note 5, at 13.

<sup>49</sup> Christian Legal Society, *supra* note 8, at 15.

<sup>50</sup> Outlaws, *supra* note 6, at 12-13.

<sup>51</sup> Christian Legal Society, *supra* note 8, at 15. *See also* Hastings, *supra* note 5, at 14 and Outlaws, *supra* note 6, at 13.

regulated conduct, not speech.<sup>52</sup> Additionally, the Court determined that, even if the policy directly prohibited particular speech, Hastings had created a “limited public forum,” and because the policy is both reasonable and viewpoint neutral, it does not infringe on the Christian Legal Society’s rights.<sup>53</sup>

On its claim of infringement on its right to free association, the District Court determined that official recognition by Hastings was not required for the group to function and associate fully, as evidenced by its existence during the 2004-2005 school year.<sup>54</sup> The group’s right to exclude any persons from its group had not been infringed upon. Rather, Hastings has simply created a set of requirements to gain school funds.<sup>55</sup> The Christian Legal Society claimed that the group was denied RSO status specifically because of its religious beliefs; however, the District Court found that evidence supported the exact opposite conclusion.<sup>56</sup> Previously, for ten years, the school had recognized this exact group; the school did not refuse recognition until failed to adopt Hastings’ nondiscrimination policy.<sup>57</sup>

The Christian Legal Society appealed the District Court’s decision to the Ninth Circuit, where the court affirmed the decision in a two-sentence, unpublished opinion.<sup>58</sup> Citing a recent Ninth Circuit decision,<sup>59</sup> the Court held that the conditions for recognition

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<sup>52</sup> Christian Legal Soc’y v. Kane, 2006 U.S. Dist. LEXIS 27347, at 17.

<sup>53</sup> *Id.* at 34-45.

<sup>54</sup> Kane, 2006 U.S. Dist. LEXIS 27341 at 51.

<sup>55</sup> Outlaws, *supra* note 6, at 14.

<sup>56</sup> Kane, 2006 U.S. Dist. LEXIS 27341 at 42.

<sup>57</sup> *Id.* at 43.

<sup>58</sup> Christian Legal Soc’y v. Kane, 319 Fed. Appx. 645 (9th Cir. 2009).

<sup>59</sup> Truth v. Kent Sch. Dist., 542 F.3d 634 (9th Cir. 2008). In this case, a group of Christian students wished to form a chartered club at Kentridge High School called “Truth.” Truth filed several charters with the Associated Student Body (“ASB”) for approval; they were all either denied or not acted upon. When the third and final charter was denied, the ASB gave four reasons for denying the charter: 1) the name “Truth” indicated that the ASB believed that group’s

were both viewpoint neutral and reasonable, and did not violate the Christian Legal Society's First Amendment rights.<sup>60</sup> Subsequently, the Christian Legal Society petitioned the Supreme Court of the United States, and the *writ of certiorari* was granted.<sup>61</sup>

## II. THE LEGAL ISSUES AND POSITIONS FACING THE COURT

### A. Christian Legal Society's Arguments before the Supreme Court

In The Christian Legal Society's Petition to the Supreme Court for Writ of Certiorari,<sup>62</sup> they relied heavily on the notion that the Ninth Circuit's decision<sup>63</sup> created a circuit split.<sup>64</sup> The Christian Legal Society contends that in *Christian Legal Society v. Walker*,<sup>65</sup> the Seventh Circuit came to a "diametrically opposite result" from the decision

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religion was the only accurate one, 2) the group could not require students to sign a Statement of Faith prior to gaining voting privileges within the group, 3) the group's divided membership classifications did not comply with school policy, and 4) the ASB feared that approving a religious club in school would violate the "separation of church and state." After it was denied, the group filed a lawsuit in the District Court for the Western District of Washington. Though the court did not come to a decision on several of Truth's claims, the court held that Truth's First Amendment rights were not violated by the school's actions. The school's enforcement of its nondiscrimination policy, by not allowing the group to discriminate based on religion in shaping its membership, was constitutionally permissible.

<sup>60</sup> Hastings, *supra* note 5, at 15.

<sup>61</sup> Christian Legal Society, *supra* note 8 at 17.

<sup>62</sup> Petition for Writ, *supra* note 39.

<sup>63</sup> Christian Legal Soc'y v. Kane, 319 Fed. Appx. 645.

<sup>64</sup> Petition for Writ, *supra* note 39, at 18.

<sup>65</sup> 453 F.3d 853 (7<sup>th</sup> Cir. 2006). Southern Illinois University School of Law revoked official student organization status from the Christian Legal Society after determining that it was not in compliance with the school's nondiscrimination policy. Specifically, the group required students to agree to abide by a statement of faith to become voting members or leaders within the group. Included in the statement of faith is a disavowment of certain sexual practices, which ultimately excluded homosexual students from obtaining full membership status in the group. The Christian Legal Society filed suit in the District Court for the Southern District of Illinois, and the District Court denied the group's request for a preliminary injunction, requiring the school to grant them recognition. The Seventh Circuit, however, overturned the District Court and found for the Christian Legal Society, holding that enforcement of the school's nondiscrimination policy was a violation of the Christian Legal Society's First Amendment rights.

reached in the lower court of this case.<sup>66</sup> It is the Christian Legal Society's contention that "*Walker* is on all fours with this case," and thus, the Ninth Circuit erred in finding for Hastings.<sup>67</sup>

Additionally, much of The Christian Legal Society's arguments are based upon three cases from the Supreme Court, *Healy v. James*,<sup>68</sup> *Rosenberger v. Rector of the University of Virginia*,<sup>69</sup> and *Boy Scouts of America v. Dale*.<sup>70</sup> The Christian Legal Society contends that its RSO denial severely burdens its ability to freely express its religious beliefs, and violates its First Amendment right of freedom of association and speech.<sup>71</sup> Largely dependent on the belief that Hastings' nondiscrimination policy is

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<sup>66</sup> Petition for Writ, *supra* note 39, at 18.

<sup>67</sup> *Id.* at 19-20.

<sup>68</sup> 408 U.S. 169 (1972). Students sought to form a chapter of Students for a Democratic Society ("SDS") at Central Connecticut State College, and were denied official recognition. Recognition would allow the group access to school facilities and advertisement methods. The school stated that they group had not been able to provide enough evidence they were independent of the national SDS group, which often engaged in disruptive and violent behavior. After the District Court held that the denial did not violate the students' freedom of association rights, the Court of Appeals affirmed. The Supreme Court, however, reversed, holding that the petitioners had a valid First Amendment right to freely associate, and that the burden for restricting this right was on the school to prove its justification was compelling and necessary.

<sup>69</sup> 515 U.S. 819 (1995). *Rosenberger*, a student, requested funds from the University of Virginia for printing costs of a Christian-focused newspaper. After the school denied the requests and the District Court and Court of Appeals affirmed the school's decision, the Supreme Court reversed. The Court held that because the University funded other newspapers, including some with religious content, that this denial constituted viewpoint discrimination, and violated *Rosenberger's* First Amendment right to free speech. The school was free to deny publication funding based on content, but not based on viewpoint.

<sup>70</sup> 530 U.S. 640 (2000). After the Boy Scouts of America revoked a scoutmaster's (*Dale's*) membership because of his homosexuality, *Dale* filed suit, and the New Jersey Supreme Court held that New Jersey public accommodation law required the Boy Scouts to include homosexuals in its group. The New Jersey courts held that *Dale's* inclusion did not violate the Scouts' First Amendment right to freedom of association because it did not affect the group's purpose, and it did not require the group endorse any particular message. The Supreme Court of the United States reversed, and held for the Boy Scouts, stating that the group had a legitimate reason to support a specific moral code that did not include homosexual activity, and to force the group to accept open homosexuals as troop leaders sent a message contrary to the one it wished to proffer. This violated the group's right to freedom of association.

<sup>71</sup> Christian Legal Society, *supra* note 8, at 2.

viewpoint discriminatory, the Christian Legal Society contends that Hastings does not further a compelling government interest, and that it is unconstitutional.<sup>72</sup> Additionally, the Christian Legal Society asserts that Hastings' nondiscrimination policy is counterintuitive to the school's overarching goals, and especially burdensome on small or religiously affiliated student organizations.<sup>73</sup>

The Christian Legal Society disputes the Ninth Circuit's conclusion that Hastings' policy affects only conduct, rather than speech, and that the policy indeed violates the group's First Amendment right to freedom of speech.<sup>74</sup> In order to deny a group access to a speech forum, it contends, the school bears the burden<sup>75</sup> and must prove that the denial is narrowly applied and serves a "compelling state interest."<sup>76</sup> While it would, indeed, be in the school's interest to not violate the First Amendment principles prohibiting the government from establishing a religion, Hastings need not worry about this, as it explicitly requires RSOs to acknowledge that they are independent of the college and are not sponsored by Hastings.<sup>77</sup> Additionally, Christian Legal Society proffers that the school's own policy states that it should "ensure an ongoing opportunity for the expression of a variety of viewpoints... in accordance with the highest standards

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<sup>72</sup> *Id.* at 42-43.

<sup>73</sup> *Id.* at 53.

<sup>74</sup> Christian Legal Society, *supra* note 8, at 35.

<sup>75</sup> *Id.* at 21.

<sup>76</sup> *Id.*, quoting *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). The University of Missouri revoked the right of a Christian group—Cornerstone—to use school rooms for worship and other meetings, on the grounds that it violated the First Amendment's Establishment Clause. The Supreme Court held that the University had created a "limited public forum," and thus, could not infringe on the group's right to freedom of speech and association. In this case, those rights outweighed the establishment clause. The Court held that in a limited public forum, a school may not discriminate based on protected classifications of persons and identities, and that only content-based discrimination, rather than viewpoint discrimination, was permissible.

<sup>77</sup> Christian Legal Society, *supra* note 8, at 23.

of... freedom of expression.”<sup>78</sup> By requiring the Christian Legal Society to accept members that did not comport with its religious convictions, its right to freedom of expression, speech, and association was being violated.<sup>79</sup>

While the District Court found that the Christian Legal Society’s continued existence served as evidence that its rights to freedom of association had not been violated,<sup>80</sup> the Christian Legal Society argues that these restrictions are indeed burdensome on the group’s First Amendment rights.<sup>81</sup> As the Supreme Court noted in *Healy*, official recognition is “vital” to a student group’s ability to function properly,<sup>82</sup> and the group’s ability to access traditional forms of student communication is a substantial need to be an effective group.<sup>83</sup> Further, a group’s ability to find alternate meeting locations and engage in its expressive conduct elsewhere does not alleviate Hastings’ violations of the First Amendment.<sup>84</sup> According to the Christian Legal Society, because Hastings’ policy is viewpoint discriminatory and burdensome on Christian Legal Society, the school must prove that its limitations are reasonable and are the “least restrictive means” of proving its purpose.<sup>85</sup> It is the Christian Legal Society’s position that Hastings does not have a compelling interest in enforcing its nondiscrimination

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<sup>78</sup> *Id.* at 2-3.

<sup>79</sup> *Id.* at 27-29.

<sup>80</sup> Kane, 2006 U.S. Dist. LEXIS 27347, at 58-59.

<sup>81</sup> Christian Legal Society, *supra* note 8, at 23.

<sup>82</sup> *Id.* See also *Healy v. James*, 408 U.S. 169, 181 (1972).

<sup>83</sup> Christian Legal Society, *supra* note 8, at 24.

<sup>84</sup> *Id.* See also *Healy*, 408 U.S. at 182-183; *Widmar*, 464 U.S. at 288; and *Board of Education v. Mergens*, 496 U.S. 226, 247 (1990).

<sup>85</sup> Christian Legal Society, *supra* note 8, at 26.

policy against the Christian Legal Society, but that even if it did, it is overly restrictive and, therefore, unconstitutional.<sup>86</sup>

The Christian Legal Society argues that its freedom of association is infringed upon because, if it expresses it fully, the University withholds benefits it would otherwise be entitled to.<sup>87</sup> Additionally, it claims that Hastings' policy "interfere[s] with the internal organization."<sup>88</sup> The Christian Legal Society states that, particularly for religious and other small student organizations, to mandate that an RSO open its leadership positions to any member of the student body dilutes the group's ability to express its message and create an environment where its own religious beliefs can be adequately discussed and taught.<sup>89</sup> If Christian Legal Society is forced to allow any person, without regard to religious beliefs, become a leader in the group, it will not be able to ensure that the message comports with the original intention of the group.<sup>90</sup> Small groups, such as the Christian Legal Society, are especially susceptible to a "takeover" by students who disagree with its religious beliefs, because a smaller number of students would be necessary to ensure that rogue students are selected to leadership positions.<sup>91</sup>

If the controlling Hastings policy is that of the written nondiscrimination policy, then religious groups—such as the Christian Legal Society—are the only groups required

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<sup>86</sup> *Id.* at 21.

<sup>87</sup> *Id.* at 26.

<sup>88</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-623 (1984). The United States Jaycees limited full membership opportunities to men between the ages of 18 and 35. After two chapters began admitted women in accordance with a local nondiscrimination law, the national organization revoked their charters, and the chapters sued. The Supreme Court found that the organization was not of the kind usually afforded First Amendment protection for freedom of association. However, even if were, the members' rights were not sufficiently infringed upon, and the State's compelling justification for enforcing its nondiscrimination laws prevailed.

<sup>89</sup> *Christian Legal Society*, *supra* note 8, at 27-30.

<sup>90</sup> *Id.* at 30.

<sup>91</sup> *Id.* at 29.



to allow persons who hold fundamentally different beliefs to partake fully in the organization.<sup>92</sup> The Christian Legal Society uses the Hastings Democratic Caucus as an example of a group that *can* discriminate against persons that hold beliefs that contradict the goals of the mission.<sup>93</sup> Under the written policy, discrimination based on political affiliation is not one of the enumerated prohibitions.<sup>94</sup> Therefore, religious groups' associations are required to abide by a limitation that no other type of group faces: the insistence that it accept voting members who do not comport with the underlying objective in creating the group.<sup>95</sup> This is viewpoint discrimination.<sup>96</sup>

Hastings denied Christian Legal Society's application on the basis that it discriminated on both religion and sexual orientation.<sup>97</sup> The Christian Legal Society claims that the sexual orientation provision is equally discriminatory based on viewpoint.<sup>98</sup> The Christian Legal Society's Statement of Faith that is in contradiction with Hastings' policy requires that all persons disavow any sexual activity outside of marriage.<sup>99</sup> Because the Christian Legal Society's restriction is not merely based on conduct or attraction, but rather conduct combined with a specific belief that the behavior is morally acceptable, the Christian Legal Society alleges that the policy infringes on the

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<sup>92</sup> *Id.* at 36-37.

<sup>93</sup> *Id.* at 28.

<sup>94</sup> Hastings, *supra* note 5, at 4.

<sup>95</sup> Christian Legal Society, *supra* note 8, at 37.

<sup>96</sup> *Id.* at 36.

<sup>97</sup> *Id.* at 11.

<sup>98</sup> *Id.* at 39.

<sup>99</sup> *Id.* at 7.

group's First Amendment right to freedom of expression.<sup>100</sup> No other type of group is prohibited from ensuring its leadership comports with its beliefs and principles.<sup>101</sup>

The final primary argument for the Christian Legal Society addresses Hastings' alternative interpretation of its RSO requirement: that organizations abide by an "all-comers" policy.<sup>102</sup> Hastings' written policy lists specific groups of persons that cannot be discriminated against in the membership or leadership decisions of an RSO.<sup>103</sup> However, Hastings maintains that, once put into effect, the school provides that its nondiscrimination policy is actually broader than the written enumeration of definable characteristics. Rather, all RSOs are required to admit any student to all levels of its membership.<sup>104</sup> According to the Christian Legal Society, there are two policies: 1) the official, written policy, and 2) the unofficial interpretation the school has applied.<sup>105</sup> To the Christian Legal Society, the broader policy is even more counterintuitive and unconstitutional than Hastings' written policy.<sup>106</sup> Even if the Court finds that the policy is viewpoint neutral, it cannot be said to be reasonable.<sup>107</sup> Further, such a policy would prove contrary to Hastings' stated goals of recognizing and fostering a variety of student groups. "Free association, including the right to exclude, better facilitates the goal of

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<sup>100</sup> *Id.* at 39-40.

<sup>101</sup> *Id.* at 30.

<sup>102</sup> *Id.* at 47.

<sup>103</sup> For text of this policy, *supra* Part I, Subsection A, page 4.

<sup>104</sup> Hastings, *supra* note 5, at 1.

<sup>105</sup> Christian Legal Society, *supra* note 8, at 47. Hastings, however, maintains that it has one policy regarding students' ability to fully participate in RSOs. "To be clear, Hastings has *one* policy: every student group wishing to become an RSO must admit "any student ... regardless of their status or beliefs." Hastings refers to that policy as the open-membership or all-comers policy. That policy is how Hastings ensures compliance with the written nondiscrimination provision in the School's RSO program and its legal obligations under state law." *See* Hastings, *supra* note 5, at 20-21.

<sup>106</sup> Christian Legal Society, *supra* note 8, at 49.

<sup>107</sup> *Id.*

promoting an exchange of ideas; it protects the seedbeds where ideas emerge and mature in the first place. There can be diversity of viewpoints in a forum if groups are not permitted to form around viewpoints.”<sup>108</sup> Not only would students with diametrically opposite views have the opportunity to sabotage groups with opposing opinions, indeed, organizations would simply merge into broad topics, and would “defeat[] the very purpose of recognizing any group *as a group* in the first place.”<sup>109</sup>

The Christian Legal Society argues that denial of official recognition by Hastings has placed a severe burden on the Christian Legal Society’s First Amendment freedoms. By denying the Christian Legal Society generally available funds and methods of communication, Hastings has unconstitutionally discriminated against the Christian Legal Society because of its students’ religious and moral beliefs. The group further claims that because the school is a public forum and it does not provide a compelling justification, it must grant the Christian Legal Society recognition.

#### **B. Hastings’ and the Hastings Outlaw’s Arguments Before the Supreme Court**

In response to the Christian Legal Society’s claims against Hastings, the school and Respondent Intervenor Hastings Outlaw (“Outlaw”) maintain that Hastings’ open-membership policy for recognizing RSOs is a constitutional pre-requisite for certain school benefits.<sup>110</sup> Specifically, because Hastings has created a limited public forum, it must only prove that its stipulations are viewpoint-neutral, reasonable given the purpose of the public forum, and non-coercive.<sup>111</sup> While the Christian Legal Society contends

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<sup>108</sup> *Id.* at 50.

<sup>109</sup> *Id.* at 53.

<sup>110</sup> Hastings, *supra* note 5, at 16-17.

<sup>111</sup> *Id.* at 27.

that the RSO forum is an “open speech forum,”<sup>112</sup> the Outlaws argue that the forum is indeed limited in its very nature.<sup>113</sup> Because the law school is offering otherwise inaccessible resources to persons that meet a particular set of criteria for “a particular purpose,” they have created a constitutional limited forum.<sup>114</sup>

The Christian Legal Society offers two interpretations of the exact policy Hastings proffers for RSO memberships: the written policy, which enumerates qualities that may not be used as a basis for discrimination, and the “spoken” policy, which requires an “open membership” to all students.<sup>115</sup> Hastings argues that, regardless of the precise interpretation of the policy, it is viewpoint-neutral.<sup>116</sup> The school’s open-membership, or all-comers, policy is “quintessentially viewpoint-neutral” because it applies uniformly as a prerequisite for obtaining RSO status.<sup>117</sup> The grant of RSO status to many religious organizations, including the Christian Legal Society prior to its adoption of new bylaws, underscores Hastings’ neutrality in enforcing its non-discrimination policy.<sup>118</sup> Though the Christian Legal Society’s religious beliefs do not comport with Hastings’ non-discrimination policy, and this led to the denial of its RSO application, Hastings had not violated the Christian Legal Society’s First Amendment rights. The school is not obligated to subsidize the Christian Legal Society’s discriminatory conduct excluding gays and lesbians from leadership positions of

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<sup>112</sup> Christian Legal Society, *supra* note 8, at 2.

<sup>113</sup> Outlaws, *supra* note 6, at 27.

<sup>114</sup> *Id.* at 27-28. *See also* Rosenberger, 515 U.S. at 829.

<sup>115</sup> Christian Legal Society, *supra* note 8 at 47.

<sup>116</sup> Hastings, *supra* note 5, at 28-29.

<sup>117</sup> *Id.* at 28.

<sup>118</sup> *Id.* at 29..

discrimination if its non-discrimination policy is uniformly applied.<sup>119</sup> However, if the court applies the “written” non-discrimination policy, it is equally viewpoint-neutral.<sup>120</sup>

Further, Hastings and Outlaw argue that the policy is reasonable in light of the goals and intent in creating the limited public forum.<sup>121</sup> Hastings’ goal in fostering many RSOs is to ensure that all students have access to a wide variety of groups that develop educational, leadership and social skills.<sup>122</sup> Here, the money allocated to RSOs comes from a student activity fund that all students pay into.<sup>123</sup> Because all Hastings students contribute, it follows that it is a reasonable requirement that all activities the funds are used for are open to all students.<sup>124</sup> Further, California state law mandates that public universities abide by a nondiscrimination policy<sup>125</sup> that includes both religion and sexual orientation for all activities using public funds or facilities.<sup>126</sup> In opposition to the Christian Legal Society’s suggestion that an open-membership policy will result in “hostile takeovers” from persons that share views or beliefs inapposite, Outlaw points out that the version of the Christian Legal Society that was an RSO for ten years had no such experience with its open-membership policy; further, in the twenty-plus years Hastings has had RSOs with open-membership requirements, nothing of this sort has taken

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<sup>119</sup> Outlaws, *supra* note 6, at 30. *See also* Widmar, 454 U.S. at 277.

<sup>120</sup> Hastings, *supra* note 5 at 30.

<sup>121</sup> *Id.* at 32. *See also* Outlaws, *supra* note 6, at 35.

<sup>122</sup> Hastings, *supra* note 5, at 32. *See also* Outlaws, *supra* note 6, at 36.

<sup>123</sup> Hastings, *supra* note 5, at 3.

<sup>124</sup> *Id.* at 33.

<sup>125</sup> CAL. EDUC. CODE §66270. It is important to note that the policy does have an exemption for religiously affiliated schools. However, as Hastings is a public, secular law school, this exemption is not triggered in the instant case.

<sup>126</sup> Hastings, *supra* note 5, at 33-34.

place.<sup>127</sup> Thus, Hastings' insistence that RSOs comply with the same policy is reasonable.

Hastings argues that once a limited forum is established, the Supreme Court of the United States established first in *Grove City College v. Bell*<sup>128</sup> that First Amendment rights are not infringed upon through limits in a government program if the restrictions on participation are reasonable in light of the purpose of the program, and the choice offered is non-coercive.<sup>129</sup> The Christian Legal Society's choice here is almost identical: in order to receive funds from the government, the private group must comply with the state's non-discrimination policies. In this case, Hastings is neither forcing the Christian Legal Society to accept particular members nor forcing it to endorse beliefs that it would not otherwise endorse.<sup>130</sup> Rather, the Hastings policy makes certain benefits available to the Christian Legal Society, if they comply with a standard, viewpoint-neutral nondiscrimination policy; the Christian Legal Society has complete authority to choose to forgo the modest benefits if it does not wish to comply with the conditions imposed.<sup>131</sup>

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<sup>127</sup> Outlaws, *supra* note 6, at 39.

<sup>128</sup> 465 U.S. 555 (1984). Though the private college had consistently refused government funds in order to resist compliance with Title IX, the school's acceptance of federal funds through student scholarships and grants triggered Title IX and required compliance. The Supreme Court held that requiring the school to institute a comprehensive non-discrimination policy did not infringe on its First Amendment rights because it had a reasonable alternative choice in refusing the federal assistance.

<sup>129</sup> Hastings, *supra* note 5, at 25.

<sup>130</sup> *Id.* at 42.

<sup>131</sup> *Id.* at 25.

### III. ANALYSIS AND CONCLUSIONS

#### A. Analysis and Prediction

As stated in the Petitioner’s brief to the Supreme Court, the issue at hand is, “[w]hether the Constitution permits a public university law school to exclude a religious student organization from a forum of speech solely because the group requires its officers and voting members to share its core religious commitments.”<sup>132</sup> In granting *certiorari* for this case, the United Supreme Court will settle a split between the Seventh and Ninth Circuits. While the Ninth Circuit affirmed the District Court’s decision for Hastings in this case, the Seventh Circuit ruled in favor of the Christian Legal Society chapter at the Southern Illinois University School of Law (“SIU”) in a case almost identical to the one at bar.<sup>133</sup>

An important distinction between this case and *Christian Legal Society v. Walker* that the Christian Legal Society fails to acknowledge, however, is that SIU did not grant the group any access to school facilities or communication.<sup>134</sup> The Seventh Circuit discussed, at length, the similarities between *Walker* and *Healy v. James*,<sup>135</sup> because in both instances, the excluded groups were effectively “frozen out... of their universities.”<sup>136</sup> In the case at bar, it is already established—and acknowledged by the Christian Legal Society—that the school has continued to allow the group to meet on campus, and has provided several channels of communication to the group. The ultimate treatment of the groups on each campus was vastly different. Thus, the Christian Legal

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<sup>132</sup> Christian Legal Society, *supra* note 8, at Question Presented.

<sup>133</sup> Christian Legal Soc’y v. Walker, 453 F.3d 853 (2006).

<sup>134</sup> *Id.* at 864.

<sup>135</sup> 408 U.S. 169 (1972).

<sup>136</sup> Walker, 453 F.3d at 864.

Society’s contention that these two cases are identical and that these two Circuit court decisions are precisely in contrast with each other is not accurate.

Hastings has maintained that the group may exist, thrive, and have access to certain University facilities and communications, regardless of who it includes or excludes.<sup>137</sup> This is in direct conflict with the Christian Legal Society’s reliance on the *Healy* precedent, and its claim that denial of its application is “presumptively unconstitutional.”<sup>138</sup> As Hastings points out in its brief,

The Court’s use of the term “prior restraint” was explicitly tied to the fact that the college in that case had not just refused to recognize the student group at issue—it systematically sought to prevent the group from *existing* on campus, even going so far as to disband an informal meeting of the group in a “campus coffee shop.”<sup>139</sup>

Unlike in *Healy* and *Walker*, Hastings has not attempted to forbid the Christian Legal Society from existing and thriving on campus. Therefore, the denial of official recognition cannot be presumptively unconstitutional or a “prior restraint” on the group’s expression of its First Amendment rights.

The Ninth Circuit correctly applied the same legal reasoning in this case that it did in *Truth v. Kent*.<sup>140</sup> Though the school in *Truth* is a high school, as opposed to a public law school like Hastings, the legal issues are still comparable. As in *Truth*, Hastings requires that any group that receives RSO status welcome all students to vote

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<sup>137</sup> Hastings, *supra* note 5, at 12-13.

<sup>138</sup> Christian Legal Society, *supra* note 8, at 17-18.

<sup>139</sup> Hastings, *supra* note 8, at 44. *See also* Healy, 408 U.S. at 184.

<sup>140</sup> 542 F.3d 634. *See* note 59 for a brief summary of the case.



and fully participate. Kent School District had the same requirements, which the Ninth Circuit deemed viewpoint-neutral and reasonable.<sup>141</sup>

Returning to the various legal claims, the Court must ultimately determine the nature of the forum Hastings has created, whether enforcement of the policy is viewpoint-neutral or viewpoint-discriminatory, and whether, in the light of the answers to the first two questions, the student members of the Christian Legal Society have had their First Amendment rights unconstitutionally infringed upon.

The Christian Legal Society contends in its introduction that Hastings has created an “open public forum,” while simultaneously equating its current situation to the production of newspapers in *Rosenberger*. Unlike *Rosenberger*, Hastings is not systematically denying RSO applications for all religious groups. On the contrary, many groups—including the previous form of the Christian Legal Society—have enjoyed the rights and benefits of RSO status at Hastings for years. In *Rosenberger*, the school’s decision was inherently viewpoint-discriminatory because the school refused to provide the funds based solely on the fact that it was a religious newspaper, which constituted prohibited religious activity within the school’s definition.<sup>142</sup> On the contrary, Hastings’ denial of funds to the Christian Legal Society was based upon a policy that controls the conduct of every RSO. Hastings is not trying to regulate the content of the message the group, but rather its conduct in prohibiting certain students from fully participating in its organization.

Further, simply recognizing that the Christian Legal Society has a constitutional right to expressive association does not require that Hastings provide it funding. The

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<sup>141</sup> *Id.* See also *Christian Legal Soc’y v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009).

<sup>142</sup> See *Rosenberger*, 515 U.S. at 827.

United States Supreme Court upheld, in *Board of Regents v. Southworth*,<sup>143</sup> that it is constitutionally permissible for public schools to have mandatory student activity fees, used to fund official student organizations. However, the Court was very clear that it is only constitutional if neutrally applied.<sup>144</sup> Under the *Southworth* framework, if a school has a viewpoint-neutral policy for determining which student groups are eligible for funding, it is constitutionally permissible to both collect the funds, and distribute them to those groups who comport to the neutral standards the school sets forth.

Accordingly, the fact that Hastings provides funding for other, similar groups is not determinative in whether it must provide like funding for all groups. Having a constitutionally protected right to something does not then require that the government subsidize, or fund, that right. Though women have a constitutionally protected right to an abortion, public hospitals are not constitutionally required to offer the services, nor are the government required to “fund advocacy of abortion, even if it funds advocacy of other options for pregnant women.”<sup>145</sup> The only exception to this rule is in cases of traditionally public forums of speech.<sup>146</sup> Here, it is evident that the Court will hold that Hastings has created a limited public forum, and because its imposed requirements are

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<sup>143</sup> 529 U.S. 217 (2000). Three students sued the University of Wisconsin, claiming their First Amendment rights were violated by the mandatory student activity fee requirement. The students believed that their money should not fund political groups or cultural identity groups whose mission and policies they disagreed with. After losing in the lower courts, the school appealed the decision to the Supreme Court, who reversed the lower courts’ decisions, holding that the funds create a “marketplace of ideas” that are valuable to higher education, and that if the funds were distributed using viewpoint-neutral guidelines, the fees were constitutional.

<sup>144</sup> *Id.* at 230. The Court stated, “The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling. We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students.”

<sup>145</sup> Eugene Volokh, *Freedom of Expressive Associations and Government Subsidies*, 58 STAN. L. REV. 1919, 1924 (2006).

<sup>146</sup> *Id.*

reasonable to reach its goals for the forum, Hastings is therefore not presumptively required to fund the expressive association.

Once the Supreme Court establishes there is a limited public forum, and the school is using a viewpoint-neutral policy, the court must finally apply a balancing test to ensure that the policy is both reasonable and non-coercive in its application. That is, a group's presumption of freedom of expressive association can be limited by a reasonable and non-coercive government interest, especially when the speech forum has been limited with a particular interest in mind.<sup>147</sup> As has been established, Hastings' interest in recognizing various organizations is to provide auxiliary learning experiences to *all* of its students, regardless of beliefs or status. The government's interest in this matter goes beyond Hastings' decision; the state of California has prohibited public school funds from being distributed to "any program or activity" that discriminates on a variety of bases, including sexual orientation and religion.<sup>148</sup> It is undoubtedly reasonable that the government has an interest in ensuring public funds are not used at the expense of any group or class of persons.

On the issue of coercion, the Christian Legal Society relies heavily on the Court's decision in *Boy Scouts v. Dale*.<sup>149</sup> However, this case is readily distinguishable from the one at bar. In *Dale*, the New Jersey courts sought to compel the Boy Scouts to include Dale, an openly gay man, as a leader in the organization due to its public accommodations laws.<sup>150</sup> Contrary to the situation here, the Boy Scouts' freedom of

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<sup>147</sup> Jack Battaglia, *Religion, Sexual Orientation and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 395 (1999).

<sup>148</sup> Hastings, *supra* note 5, at 11.

<sup>149</sup> Christian Legal Society, *supra* note 8, at 18, 26-27, 30, 32, 34-35, 43-45, 49.

<sup>150</sup> 530 U.S. 640, 646 (2000).

expressive association would have, indeed, been infringed upon because of the lack of choice in the matter. Here, the Christian Legal Society's freedom of expressive association is not hindered in any way. If the group has a religious objection to persons that engage in "homosexual activity," they absolutely have the First Amendment right to exclude such people from representing the group in a leadership capacity. However, they cannot believe, and the Court should not compel, Hastings from endorsing that belief via a "special exception" to a universally applied policy.

The Christian Legal Society's First Amendment rights do not guarantee them the right to access a limited public forum when the enforcement of its beliefs violate a viewpoint-neutral prerequisite for access to the forum.<sup>151</sup> The Boy Scouts were initially given no option to define their organization's leadership. Here, the Christian Legal Society is free to do so—and has done so since its petition was denied.

The Boy Scouts of America, in fact, filed an *amicus curiae* brief on behalf of the Christian Legal Society because of its history with this topic.<sup>152</sup> The Boy Scouts break down the *Dale* decision and state, "[t]he membership decisions of an association are constitutionally protected if: (1) the association is expressive, and (2) the state's forced inclusion of an unwanted person in the association affects in a significant way the

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<sup>151</sup> Battaglia, *supra* note 147, at 395.

<sup>152</sup> Brief of *Amicus Curiae* Boy Scouts of America in Support of Petitioner at 2, *Christian Legal Society v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010). [hereinafter *Boy Scouts Brief*]. In its brief, the Boy Scouts of America state that they have two interests in participating as an *amicus* in this case: "First, the principle stated in *Dale* that the state may not involve nondiscrimination rules to force unwanted members on an expressive association is crucial to Boy Scouts. Second, the principle stated in *Rosenberger* [] that the state cannot exclude an expressive association from a forum for speech on the basis of the association's speech is crucial to Boy Scouts. The same violation of associational rights occurs if the state forces an unwanted member on the association by direct regulation or by threatened exclusion from a forum for speech."

association's ability to express itself."<sup>153</sup> The brief continues on to qualify those elements with an exception, but Hastings does not even need it. The state is not *forcing* the Christian Legal Society to include anyone.

Further, even if the Court finds that the withholding of funds is overly coercive, this chapter of the Christian Legal Society, much like many other chapters around the country, cannot show that a gay or lesbian student's full involvement in the organization would hinder its message in a significant way. Nothing on the record indicates that that the Christian Legal Society's mission or activity would be hindered by abiding by Hastings' nondiscrimination policy. On the contrary, Hastings' chapter of the Christian Legal Society had an openly lesbian student member, as recently as the 2003-2004 academic school year.<sup>154</sup> During the fact-finding portion of the trial, the attorney for the Christian Legal Society even stated that,

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 [the Christian Legal Society] at Hastings was not changed in any way nor could it have been.<sup>155</sup>

The Christian Legal Society conceded that its ability to express itself was not and *could not* have been altered by the presence of a gay or lesbian student. The standard in *Dale* is simply not met in this case.

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<sup>153</sup> *Id.* at 4-5.

<sup>154</sup> Brief in Opposition for Hastings College of the Law Respondents at 6, *Christian Legal Soc'y v. Martinez*, No. 08-1371 (U.S. argued Apr. 19, 2010).

<sup>155</sup> *Id.* at 6.

## **B. Conclusion**

The First Amendment rights to freedom of speech, religion and expressive association are two of the most fundamental rights this country holds dear. However, as a country, we simultaneously recognize certain situations where the government has valid concerns and interests that make these rights in absolute. A public university's interest in guaranteeing that all students have equal opportunities to engage in meaningful extracurricular activities is, indeed, one of them.

Where the government limits a public speech forum, it must do so neutrally and across-the-board.<sup>156</sup> However, such truly viewpoint-neutral limitations on free speech are constitutional if they further the goals of limiting the forum and are reasonably and non-coercively applied. Here, the Hastings Law School requires student organizations to comply with a standard non-discrimination policy to gain full recognition and utilize some specific benefits of such recognition. Because the language of the policy must necessarily be included in the bylaws of every organization, because it reasonably enables the school to make certain that all students have full access to organizations and educational opportunities, and because it is the least coercive and least-limiting method possible, the Supreme Court of the United States must affirm the Ninth Circuit's decision in finding the policy constitutional.

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<sup>156</sup> Rosenberger, 515 U.S. at 834.