

**CHRISTIAN LEGAL SOCIETY v. UNIV. OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW**

SUPREME COURT OF THE UNITED STATES

2010 U.S. LEXIS 5367

June 28, 2010, Decided

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. STEVENS, J., and KENNEDY, J., filed concurring opinions. ALITO filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

JUSTICE GINSBURG delivered the opinion of the Court.

In a series of decisions, this Court has emphasized that the *First Amendment* generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). This case concerns a novel question regarding student activities at public universities:

May a public law school condition its official recognition of a student group -- and the attendant use of school funds and facilities -- on the organization's agreement to open eligibility for membership and leadership to all students?

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its *First Amendment* rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of respondent Hastings College of the Law, CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program.

... Compliance with Hastings' all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS -- in common with all other student organizations -- to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The *First Amendment* shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. Finally, Hastings allows officially recognized groups to use its name and logo.

In exchange for these benefits, RSOs must abide by certain conditions. ...

The Law School's Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

"[Hastings] 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."

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." Other law schools have adopted similar all-comers policies.

In 2004, the leaders of a predecessor Christian organization formed CLS by affiliating with the national Christian Legal Society (CLS-National). CLS chapters must adopt bylaws that, *inter alia*, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

CLS submitted to Hastings an application for RSO status, accompanied by all required documents. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation.

"[T]o be one of our student-recognized organizations," Hastings reiterated, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." If CLS instead chose to operate outside the RSO program, Hastings stated, the school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them.

II

[In a stipulation of facts the parties agreed in the District Court that...]

"Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar

[The Court explained it would base its decision on the facts contained in Stipulation, which is controlling under procedural rules, not on contrary facts cited by the Dissent.]

III

A

In support of the argument that Hastings' all-comers policy treads on its *First Amendment* rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800, (1985), the Court has permitted restrictions on access to a *limited public forum*, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain *associational freedom*. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas" -- interests that cannot be advanced "through . . . significantly less restrictive [means]." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). See also, *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." *Roberts*. Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights." *Boy Scouts v. Dale*.

[T]hree observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments, apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked. When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums -- the State may "reserv[e] [them] for certain groups." ("Implicit in the concept" of a limited public forum is the State's "right to make distinctions in access on the basis of . . . speaker identity.") *Cornelius*, ("[A] speaker may be excluded from" a limited public forum "if he is not a member of the class of speakers for whose especial benefit the forum was created.").

An example sharpens the tip of this point: Schools, including Hastings, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students -- even if those groups wish to associate with nonstudents. The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to "confine a [speech] forum to the limited and legitimate purposes for which it was created." ("Associational activities need not be tolerated where they infringe reasonable-campus rules.")

Third, this case fits comfortably within the limited-public-forum category for CLS. in seeking

CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. See, e.g., *Boy Scouts v. Dale* (regulation "forc[ed] [the Boy Scouts] to accept members it [did] not desire).

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. In sum, we are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

B

As earlier pointed out, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits. First, in *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). Characterizing SDS's mission as violent and disruptive, and finding the organization's philosophy repugnant, the college completely banned the SDS chapter from campus. The college, we noted, could require "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law," including "reasonable standards respecting conduct." But a public educational institution exceeds constitutional bounds, we held, when it "restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent."

We later relied on *Healy* in *Widmar*. In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. "A university's mission is education," we observed, "and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." But because the university singled out religious organizations for disadvantageous treatment, we subjected the university's regulation to strict scrutiny. The school's interest "in maintaining strict separation of church and State," we held, was not "sufficiently compelling to justify . . . [viewpoint] discrimination against . . . religious speech."

Most recently and comprehensively, in *Rosenberger*, we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in *Rosenberger* was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held, the university had engaged in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. "Once it has opened a limited [public] forum," we emphasized, "the State must respect the lawful boundaries it has itself set." The constitutional constraints on the boundaries the State may set bear repetition here: "The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint."

C.

We first consider whether Hastings' policy is reasonable taking into account the RSO forum's function and "all the surrounding circumstances."

A college's commission -- and its concomitant license to choose among pedagogical approaches -- is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate."

2

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students." Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students." RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees, the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong." Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.")).

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students." And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings' policy, which incorporates -- in fact, subsumes -- state-law proscriptions on discrimination, conveys the Law School's decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove." Brief for Hastings 35. State law, of course, may not *command* that public universities take action impermissible under the *First Amendment*. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its *First Amendment* rights lessen the burden created by those barriers.

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation. Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. It is beyond dissenter's license, we note again, constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking.

4

CLS nevertheless deems Hastings' all-comers policy "frankly absurd." "There can be no diversity of viewpoints in a forum," it asserts, "if groups are not permitted to form around viewpoints." (ALITO, J., dissenting). This catchphrase confuses CLS's preferred policy with constitutional limitation -- the *advisability* of Hastings' policy does not control its *permissibility*. Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum "need not be the most reasonable or the only reasonable limitation." *Cornelius*.

CLS's concern, shared by the dissent, that an all-comers policy will squelch diversity has not been borne out by Hastings' experience. In the 2004-2005 academic year, approximately 60 student organizations, representing a variety of interests, registered with Hastings, from the Clara Foltz Feminist Association, to the Environmental Law Society, to the Hastings Chinese Law and Culture Society. Three of these 60 registered groups had a religious orientation: Hastings Association of Muslim Law Students, Hastings Jewish Law Students Association, and Hastings Koinonia.

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO-hijackings at Hastings. Students tend to self-sort and presumably will not endeavor en masse to join -- let alone seek leadership positions in -- groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. Several RSOs at Hastings limit their membership rolls and officer slates in just this way. As Hastings notes, other "checks [are also] in place" to prevent RSO-sabotage. Brief for Hastings 43. "The [Law] School's student code of conduct applies to RSO activities and, *inter alia*, prohibits obstruction or disruption, disorderly conduct, and threats."

Finally, CLS asserts that the Law School lacks any legitimate interest -- let alone one reasonably related to the RSO forum's purposes -- in urging "religious groups not to favor co-religionists for purposes of their religious activities." CLS's analytical error lies in focusing on the benefits it must

Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.

D

We next consider whether Hastings' all-comers policy is viewpoint neutral.

1

It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

2

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." (ALITO, J., dissenting). Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R. A. V. v. St. Paul*, 505 U.S. 377, 390, (1992).

Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases." *Wisconsin v. Mitchell*, 508 U.S. 476, 488, (1993). CLS's conduct -- not its Christian perspective -- is, from Hastings' vantage point, what stands between the group and RSO status. "In the end," as Hastings observes, "CLS is simply confusing its *own* viewpoint-based objections to . . . nondiscrimination laws (which it is entitled to have and [to voice] with viewpoint *discrimination*." Brief for Hastings 31.

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims.

IV

For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

To be effective, a limited forum often will exclude some speakers based on their affiliation (*e.g.*, student versus nonstudent) or based on the content of their speech, interests, and expertise (*e.g.*, art professor not chosen as speaker for conference on public transit). When the government does exclude from a limited forum, however, other content-based judgments may be impermissible. For

In *Rosenberger*, the essential purpose of the limited forum was to facilitate the expression of differing views in the context of student publications. The forum was limited because it was confined: first, to student-run groups; and second, to publications. The forum was created in the long tradition of using newspapers and other publications to express differing views and also in the honored tradition of a university setting that stimulates the free exchange of ideas. These considerations supported the Court's conclusion that, under the *First Amendment*, a limited forum for student-run publications did not permit the exclusion of a paper for the reason that it was devoted to expressing religious views.

Rosenberger is distinguishable from the instant case in various respects. Not least is that here the school policy in question is not content based either in its formulation or evident purpose; and were it shown to be otherwise, the case likely should have a different outcome. Here, the policy applies equally to all groups and views. And, given the stipulation of the parties, there is no basis for an allegation that the design or purpose of the rule was, by subterfuge, to discriminate based on viewpoint.

An objection might be that the all-comers policy, even if not so designed or intended, in fact makes it difficult for certain groups to express their views in a manner essential to their message. A group that can limit membership to those who agree in full with its aims and purposes may be more effective in delivering its message or furthering its expressive objectives; and the Court has recognized that this interest can be protected against governmental interference or regulation. See *Boy Scouts of America v. Dale*). By allowing like-minded students to form groups around shared identities, a school creates room for self-expression and personal development. See *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000).

In the instant case, however, if the membership qualification were enforced, it would contradict a legitimate purpose for having created the limited forum in the first place. Many educational institutions, including respondent Hastings College of Law, have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it. Students may be shaped as profoundly by their peers as by their teachers. Extracurricular activities, such as those in the Hastings "Registered Student Organization" program, facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self. The Hastings program is designed to allow all students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities. Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.

The school's objectives thus might not be well served if, as a condition to membership or participation in a group, students were required to avow particular personal beliefs or to disclose private, off-campus behavior. Students whose views are in the minority at the school would likely fare worse in that regime. Indeed, were those sorts of requirements to become prevalent, it might undermine the principle that in a university community -- and in a law school community specifically -- speech is deemed persuasive based on its substance, not the identity of the speaker. The era of loyalty oaths is behind us. A school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view's validity should be tested through free and open

discussion. The school's policy therefore represents a permissible effort to preserve the value of its forum.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644 (1929) (Holmes, J., dissenting). Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

The Hastings College of the Law currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS).

[T]he Court finds that it has been Hastings' policy for 20 years that all registered organizations must admit *any* student who wishes to join. Deferring broadly to the law school's judgment about the permissible limits of student debate, the Court concludes that this "accept-all-comers" policy, is both viewpoint-neutral and consistent with Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups.

I

The Court provides a misleading portrayal of this case. As related by the Court, (1) Hastings, for the past 20 years, has required any student group seeking registration to admit any student who wishes to join, (2) the effects of Hastings' refusal to register CLS have been of questionable importance; and (3) this case is about CLS's desire to obtain "a state subsidy". I begin by correcting the picture.

A

During the 2004-2005 school year, Hastings had more than 60 registered groups, including political groups (*e.g.*, the Hastings Democratic Caucus and the Hastings Republicans), religious groups (*e.g.*, the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students), groups that promote social causes (*e.g.*, both pro-choice and pro-life groups), groups organized around racial or ethnic identity (*e.g.*, the Black Law Students Association, the Korean American Law Society, La Raza Law Students Association, and the Middle Eastern Law Students Association), and groups that focus on gender or sexuality (*e.g.*, the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings).

Not surprisingly many of these registered groups were and are dedicated to expressing a message. Most of the funds available to RSOs come from an annual student activity fee that every student must pay. When CLS applied for registration, the Director of Hastings' Office of Student Services, sent an e-mail to an officer of the chapter informing him that "CLS's bylaws did not appear to be compliant" with the Hastings Nondiscrimination Policy, a written policy that provides in pertinent part that "[t]he 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". A few days later, three officers of the chapter met with [the Director], and she reiterated that the CLS bylaws did not comply with "the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization." On both of these occasions, it appears that not a word was said about an accept-all-comers policy.

Hastings claims that [its] accept-all-comers policy has existed since 1990 but points to no evidence that the policy was ever put in writing or brought to the attention of members of the law

tion of the Nondiscrimination Policy runs into obvious difficulties. First, the two policies are simply not the same: The Nondiscrimination Policy proscribes discrimination on a limited number of specified grounds, while the accept-all-comers policy outlaws all selectivity. Second, the Nondiscrimination Policy applies to everything that Hastings does, and the law school does not follow an accept-all-comers policy in activities such as admitting students and hiring faculty.

Third, the record is replete with evidence that, at least until July 2005 [during the litigation], Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints. For example, the bylaws of the Hastings Democratic Caucus provided that "any full-time student at Hastings may become a member of HDC *so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization ...*" The constitution of the Association of Trial Lawyers of America at Hastings provided that every member must "adhere to the objectives of the Student Chapter as well as the mission of ATLA." A student could become a member of the Vietnamese American Law Society so long as the student did not "exhibit a consistent disregard and lack of respect for the objective of the organization," which centers on a "celebrat[ion] [of] Vietnamese culture." Silenced Right limited voting membership to students who "are committed" to the group's "mission" of "spread[ing] the pro-life message." La Raza limited voting membership to "students of Raza background."

Finally, when Hastings filed its brief in this Court, its policy, which had already evolved from a policy prohibiting certain specified forms of discrimination into an accept-all-comers policy, underwent yet another transformation. Now, Hastings claims that it does not really have an accept-all-comers policy; it has an accept-*some*-comers policy. Hastings' current policy, we are told, "does not foreclose neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Brief for Hastings. Hastings' brief goes on to note with seeming approval that some registered groups have imposed "even conduct requirements." Hastings, however, has not told us which "conduct requirements" are allowed and which are not -- although presumably requirements regarding sexual conduct fall into the latter category.

B

At the beginning of the 2005 school year, the Hastings CLS group had seven members, so there can be no suggestion that the group flourished. And since one of CLS's principal claims is that it was subjected to discrimination based on its viewpoint, the majority's emphasis on CLS's ability to endure that discrimination -- by using private facilities and means of communication -- is quite amazing.

This Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable. Nor have we taken this approach in other discrimination cases.

C

Finally, according to the majority, CLS is "seeking what is effectively a state subsidy," and the question presented in this case centers on the "use of school funds". In fact, funding plays a very small role in this case. Most of what CLS sought and was denied -- such as permission to set up a table on the law school patio -- would have been virtually cost free. If every such activity is regarded as a matter of funding, the *First Amendment* rights of students at public universities will be at the mercy of the administration. As CLS notes, "[t]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication

II

To appreciate how far the Court has strayed, it is instructive to compare this case with *Healy*, our only *First Amendment* precedent involving a public college's refusal to recognize a student group. The group in *Healy* was a local chapter of the Students for a Democratic Society (SDS). When the students who applied for recognition of the chapter were asked by a college committee whether they would "respond to issues of violence as other S.D.S. chapters have," their answer was that their "action would have to be dependent upon each issue." The president of the college refused to allow the group to be recognized, concluding that the philosophy of the SDS was "antithetical to the school's policies" and that it was doubtful that the local chapter was independent of the national organization, the "published aims and philosophy" of which included "disruption and violence."

The effects of nonrecognition in *Healy* were largely the same as those present here. The SDS was denied the use of campus facilities, as well as access to the customary means used for communication among the members of the college community.

This leaves just one way of distinguishing *Healy*: the identity of the student group. In *Healy*, the Court warned that the college president's views regarding the philosophy of the SDS could not "justify the denial of *First Amendment* rights." Here, too, disapproval of CLS cannot justify Hastings' actions.

III

The Court pays little attention to *Healy* and instead focuses solely on the question whether Hastings' registration policy represents a permissible regulation in a limited public forum. In this case, the forum consists of the RSO program. Once a public university opens a limited public forum, it "must respect the lawful boundaries it has itself set." *Rosenberger*. The university "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Ibid*. And the university must maintain strict viewpoint neutrality. *Board of Regents of Univ. of Wis. System v. Southworth*.

This requirement of viewpoint neutrality extends to the expression of religious viewpoints. We have applied this analysis in cases in which student speech was restricted because of the speaker's religious viewpoint, and we have consistently concluded that such restrictions constitute viewpoint discrimination. We have also stressed that the rules applicable in a limited public forum are particularly important in the university setting, where "the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."

IV

It bears emphasis that permitting religious groups to limit membership to those who share the groups' beliefs would not have the effect of allowing other groups to discriminate on the basis of religion. It would not mean, for example, that fraternities or sororities could exclude students on that basis. As our cases have recognized, the right of expressive association permits a group to exclude an applicant for membership only if the admission of that person would "affect in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts v. Dale*. Groups that do not engage in expressive association have no such right. Similarly, groups that are dedicated to expressing a viewpoint on a secular topic (for example, a political or ideological viewpoint) would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no effect on the group's ability to express its views. But for religious groups, the situation is very different. This point was put well by a coalition of Muslim, Christian, Jewish, and Sikh groups: "Of course there is a strong interest in prohibiting religious

discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association." Brief for American Islamic Congress.

Sexual orientation. The Hastings Nondiscrimination Policy, as interpreted by the law school, also discriminated on the basis of viewpoint regarding sexual morality. CLS has a particular viewpoint on this subject, namely, that sexual conduct outside marriage between a man and a woman is wrongful. Hastings would not allow CLS to express this viewpoint by limiting membership to persons willing to express a sincere agreement with CLS's views. By contrast, nothing in the Nondiscrimination Policy prohibited a group from expressing a contrary viewpoint by limiting membership to persons willing to endorse that group's beliefs. A Free Love Club could require members to affirm that they reject the traditional view of sexual morality to which CLS adheres. It is hard to see how this can be viewed as anything other than viewpoint discrimination.

V

Hastings' current policy, as announced for the first time in the brief filed in this Court, fares no better than the policy that the law school invoked when CLS's application was denied. It seems doubtful that Hastings' new policy permits registered groups to condition membership eligibility on whatever "conduct requirements" they may wish to impose. If that is the school's current policy, it is hard to see why CLS may not be registered, for what CLS demands is that members forswear "unrepentant participation in or advocacy of a sexually immoral lifestyle." That should qualify as a conduct requirement.

If it does not, then what Hastings' new policy must mean is that registered groups may impose some, but not all, conduct requirements. And if that is the case, it is incumbent on Hastings to explain which conduct requirements are acceptable, which are not, and why CLS's requirement is not allowed. Hastings has made no effort to provide such an explanation.

VI

It is clear that the accept-all-comers policy is not reasonable in light of the purpose of the RSO forum, and it is impossible to say on the present record that it is viewpoint neutral.

A

Taken as a whole, the RSO regulations plainly contemplate the creation of a forum within which Hastings students are free to form and obtain registration of essentially the same broad range of private groups that nonstudents may form off campus. That is precisely what the parties in this case stipulated: The RSO forum "seeks to promote a diversity of viewpoints *among* registered student organizations, including viewpoints on religion and human sexuality."

As noted, Hastings had more than 60 RSOs in 2004-2005, each with its own independently devised purpose. Some addressed serious social issues; others -- for example, the wine appreciation and ultimate Frisbee clubs -- were simply recreational. Some organizations focused on a subject but did not claim to promote a particular viewpoint on that subject (for example, the Association of Communications, Sports & Entertainment Law); others were defined, not by subject, but by viewpoint. The forum did not have a single Party Politics Club; rather, it featured both the Hastings Democratic Caucus and the Hastings Republicans. There was no Reproductive Issues Club; the forum included separate pro-choice and pro-life organizations. Students did not see fit to create a Monotheistic Religions Club, but they have formed the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students. In short, the RSO forum, true to its design, has allowed Hastings students to replicate on campus a broad array of private, independent, noncommercial organizations that is very similar to those that nonstudents have formed in the outside

The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the *First Amendment* rights of private groups if applied off campus. As explained above, a group's *First Amendment* right of expressive association is burdened by the "forced inclusion" of members whose presence would "affect in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts v. Dale*. The Court has therefore held that the government may not compel a group that engages in "expressive association" to admit such a member unless the government has a compelling interest, "unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid*.

There can be no dispute that this standard would not permit a generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs. Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views. The State of California surely could not demand that all Christian groups admit members who believe that Jesus was merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam.

While there can be no question that the State of California could not impose such restrictions on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints.

... the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. Such practices are not manifestations of "contempt" for members of other faiths. Nor do they thwart the objectives that Hastings endorses. Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through "[a] confident pluralism that conduces to civil peace and advances democratic consensus-building," not by abridging *First Amendment* rights.

In sum, Hastings' accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints "among" -- not within -- "registered student organizations."

B

The Court is also wrong in holding that the accept-all-comers policy is viewpoint neutral. The Court proclaims that it would be "hard to imagine a more viewpoint-neutral policy," but I would not be so quick to jump to this conclusion. Even if it is assumed that the policy is viewpoint neutral on its face, there is strong evidence in the record that the policy was announced as a pretext.

The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination. A simple example illustrates this obvious point. Suppose that a hated student group at a state university has never been able to attract more than 10 members. Suppose that the university administration, for the purpose of preventing that group from using the school grounds for meetings, adopts a new rule under which the use of its facilities is restricted to groups with more than 25 members. Although this rule would be neutral on its face, its

Here, CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy.

C

One final aspect of the Court's decision warrants comment. In response to the argument that the accept-all-comers-policy would permit a small and unpopular group to be taken over by students who wish to silence its message, the Court states that the policy would permit a registered group to impose membership requirements "designed to ensure that students join because of their commitment to a group's vitality, not its demise." With this concession, the Court tacitly recognizes that Hastings does not really have an accept-all-comers policy -- it has an accept-some-dissident-comers policy -- and the line between members who merely seek to change a group's message (who apparently must be admitted) and those who seek a group's "demise" (who may be kept out) is hopelessly vague.

Here is an example. Not all Christian denominations agree with CLS's views on sexual morality and other matters. During a recent year, CLS had seven members. Suppose that 10 students who are members of denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message. The new leadership would likely proclaim that the group was "vital" but rectified, while CLS, I assume, would take the view that the old group had suffered its "demise." Whether a change represents reform or transformation may depend very much on the eye of the beholder.

In the end, the Court refuses to acknowledge the consequences of its holding. A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses. Rules requiring that members attend meetings, pay dues, and behave politely, would not eliminate this threat.

The possibility of such takeovers, however, is by no means the most important effect of the Court's holding. There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. This is where the Court's decision leads.

* * *

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. Even those who find CLS's views objectionable should be concerned about the way the group has been treated -- by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.