No. 11-744

In The Supreme Court of the United States

ALPHA DELTA CHI-DELTA CHAPTER, et al.,

Petitioners,

v.

CHARLES B. REED, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION, CAMPUS CRUSADE FOR CHRIST INTERNATIONAL, REJOYCE IN JESUS MINISTRIES, BETA UPSILON CHI, CAMPUS BIBLE FELLOWSHIP INTERNATIONAL, RATIO CHRISTI, AND NATIONAL ASSOCIATION OF EVANGELICALS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech. For that reason, CLS was instrumental in passage of the Equal Access Act of 1984 that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. § 4071 *et seq*. (2011). *See* 128 *Cong. Rec.* 11784-85 (1982) (Senator Hatfield statement). Nearly every case decided under the Act has been brought by either a religious or homosexual student group seeking to meet for disfavored speech. CLS is proud of its 35 years of work to protect freedoms of speech and expressive association for all students.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study,

[1] Pursuant to Rule 37.2(a), counsel for *amici* gave to parties' counsel timely notice of the intent to file this brief in support of petitioners. The parties' letters consenting to the filing of this brief *amici curiae* are on file with the Clerk. Neither a party nor its counsel authored this brief in whole or in part nor made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made such a monetary contribution.

and worship at a time and place convenient to the students. CLS meetings are open to all students. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian beliefs, which has defined CLS for over fifty years.

Beginning in 1993, CLS chapters began to encounter university administrators' use of nondiscrimination policies – intended to *protect* religious students – to *exclude* religious student groups from campus simply because they required their leaders to agree with their religious beliefs. CLS student chapters have experienced recognition problems because of their religious viewpoints at numerous law schools. *See, e.g.*, *Christian Legal Soc'y Chapter at So. Ill. Univ. v. Walker,* 453 F.3d 853 (7th Cir. 2006).

CLS and its co-*amici* have student chapters not only in the Ninth Circuit but across the country that likely will be adversely affected by the Ninth Circuit's decision below. Both before and after *Christian Legal Society v. Martinez,* 130 S. Ct. 2971 (2010), a number of universities have threatened *amici*'s student chapters with derecognition unless they abandon their religious criteria for leaders. *See, e.g., Beta Upsilon Chi v. Machen,* 586 F.3d 908 (11th Cir. 2009) (University of Florida denied *amicus* Beta Upsilon Chi recognition because of its faith requirement but eventually mooted the case by modifying its nondiscrimination policy to allow religious student groups to limit membership and leadership to persons who share the groups' religious beliefs.); Ga. Op. Att'y Gen. No.

97-32 (Dec. 12, 1997) (Georgia Tech violated ReJOYce in Jesus student group's expressive association right by denying it recognition because of its religious criteria for voting members and leaders.).

Christian Medical and Dental Association ("CMDA"), founded in 1931, provides a public voice for Christian healthcare professionals and students. With a current membership of more than 16,000, CMDA addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing education resources, and sponsors student ministries in medical and dental schools.

Campus Crusade for Christ, International, ("CCCI"), is a nondenominational Christian ministry with 1622 student groups on college and high school campuses nationwide.

CCCI believes it is of vital importance, in order to preserve and advance its distinctive message and mission as an organization, that the leadership of its chartered student groups share its faith and agree with the message and mission it seeks to communicate. Its model constitution for student groups states CCCI's qualifications for student leaders:

> Officers serve as representatives of the Chapter and organization of Campus Crusade for Christ and, as members of the leadership team, must subscribe to the Statement of Belief. They must agree that an important part of such belief is taking action and making

> decisions that are consistent with and based upon those beliefs. They must acknowledge that being a leader requires one to set an example for others on how to live a holy and Biblically-based life. They must also be committed to advancing the purpose and mission of Campus Crusade for Christ International.

ReJOYce in Jesus Ministries, with student chapters on campuses nationwide, promotes the teachings of Jesus Christ according to the Bible through Bible study, campus activities, and service to the campus community. Its mission is to assist disadvantaged youth to become responsible adults and to inspire students to pursue academic excellence and spiritual maturity. Leaders and voting members must agree with its statement of faith.

Beta Upsilon Chi ("BYX"), also known as Brothers Under Christ, is a national Christian fraternity founded in 1985. It is the largest Christian fraternity in the United States, existing at twenty-five universities across twelve states.

Campus Bible Fellowship International has chapters at twenty public and private universities and colleges across the nation. Its purpose is to provide sound Bible study and fellowship for college students. Officers must agree to "The Baptist Mid-Missions Articles of Faith."

Ratio Christi student chapters are Christian apologetics clubs dedicated to bringing together faith

and reason on college campuses. These chapters on over fifty campuses defend the veracity of the Bible and Christ's Resurrection. Leaders must agree with its statement of faith. Ratio Christi is directly affected by the decision below because it intends to start a chapter at San Diego State University.

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves fifty member denominations and associations, representing 45,000 local churches and over thirty million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. Religious speech as the first target of the censor goes at least as far back as John Milton's *Areopagitica* (1644). Its protection is imperative.

SUMMARY OF ARGUMENT

It is common sense, not discrimination, for religious groups to require their leaders to agree with their religious beliefs. A religious group's ability to choose its leaders is an indispensable component of religious liberty. Nondiscrimination policies serve good and essential purposes, but those purposes are contravened when nondiscrimination policies are misused to exclude religious groups. "[T]he application of the nondiscrimination policy against faith-based groups undermines the very purpose of the

nondiscrimination policy: protecting religious freedom." Joan Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 914 (2009).

Not surprisingly, *amici* believe *Christian Legal Society v. Martinez*, 130 S. Ct. 795 (2010), seriously impairs First Amendment liberty. That said, *amici* also believe that this case does not present the same issue decided in *Martinez*. Furthermore, *amici* believe that in extending *Martinez*'s reach beyond its established borders, the Ninth Circuit failed to grasp the inherent importance of religious groups' ability to choose their leaders without government interference, recently reaffirmed in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* No. 10-553, 2012 WL 75047 (U.S. Jan. 11, 2012).

The panel majority below wrongly concluded that this case presents the same issue as in *Martinez* and that *Martinez* permitted it to reach a truly aberrant First Amendment result: the Free Speech Clause permits government to engage in content-based, viewpoint-based discrimination specifically against *religious* speech and association. That holding is flatly contrary to nearly a half dozen of this Court's precedents.[2] And naturally enough, given these

[2] *Good News Club v. Milford Central School,* 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Capitol Square Rev. & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches*

(Continued on following page)

precedents, the decision below conflicts with the decisions of two other circuits.[3] These are sufficient reasons for granting review.

The facts, and the holding below, frame the issue starkly: San Diego State University, an instrumentality of state government, permits campus student groups to restrict their membership and leadership to students who "agree with the particular ideology, belief, or philosophy the group seeks to promote." Pet. App. 101a (Stipulation No. 35). This express stipulation removes this case entirely from the ambit of the rule stated in *Martinez*, where it was stipulated – exactly the opposite of the case here – that *no* student groups could so limit their membership or leadership. Rather, in *Martinez,* all student groups were required to accept "all comers" as members or leaders. 130 S. Ct. at 2982, 2984. At San Diego State the opposite is the policy and the practice: *student groups can and do limit their membership to students who adhere to the stated views of the group as determined by its other members.* Thus, the Lebanese Club limits

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Union Free Sch. Dist., 508 U.S. 384 (1993); *Board of Educ. v. Mergens,* 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). *See also, Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Niemotko v. Maryland,* 340 U.S. 268 (1951). *Cf. Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (government may not "impose special disabilities on the basis of religious views or religious status").

[3] *Christian Legal Soc'y Chapter at So. Ill. Univ. v. Walker,* 453 F.3d 853 (7th Cir. 2006); *Hsu v. Roslyn Union Free Sch. Dist.,* 85 F.3d 839 (2d Cir. 1996).

membership to students "willing to . . . walk the road toward success and toward an independent Lebanon." The Immigration Rights Coalition requires members to "hold the same values regarding immigrant rights as the organization." The "VOX Voices for Planned Parenthood" student group limits membership to students "dedicated to protecting reproductive freedom," to note just a few examples – stipulated to by the parties. Pet. App. 101a-105a (Stipulation Nos. 35(a), 35(i), and 35(m)).

This case is therefore quite clear: As a matter of policy and practice, student groups at San Diego State as a *general* rule may limit their membership and leadership to students who agree with the motivating ideology or stated purposes of the group as a whole. But there is an equally clear *exception* to this rule: *when the motivating ideology or purpose of the group is religious in nature*, a group may *not* limit its membership and leadership to students who agree with the group's religious beliefs and purposes. San Diego State denied recognition to two campus religious associations *specifically because* they "require[ ] members and/or officers to profess a specific religious belief." Pet. App. 133a (Stipulation No. 215). The university refused recognition to the student religious groups in question because their members are expected to "agree with [a] statement of faith." Pet. App. 142a-143a (Stipulation Nos. 358 & 360).

This is as plain a case of viewpoint-discriminatory treatment, specifically on the basis of *religious* viewpoint, as they come. The court below

nonetheless held it permissible for a state university to permit *certain* campus groups to restrict their membership to students who subscribe to the beliefs of the group – to allow some groups to exercise the freedom of association in this regard – but to forbid *other* groups (specifically, religious groups) to exercise the same freedom to restrict membership to those who subscribe to the group's *religious* beliefs. This was allowable, the court below reasoned, because university officials did not *mean* to suppress religious viewpoints or discriminate against religious groups. Pet. App. 18a ("Plaintiffs have put forth no evidence that San Diego State implemented its nondiscrimination policy for the *purpose* of suppressing Plaintiffs' viewpoint.") Because the university's stated purpose was "to prevent discrimination," its policy therefore did not violate the First Amendment. *Id.* at 19a.

This viewpoint discrimination is, of course, flatly inconsistent with this Court's precedents in *Good News Club, Lamb's Chapel, Rosenberger,* and *Widmar*. Still, the court below *thought* that this conclusion was permitted by the Court's decision in *Martinez*. *See id.* at 11a (finding "no material distinction between San Diego State's student organization program and the student organization program discussed in *Christian Legal Society*"). This is greatly disturbing, and an important reason to grant review: the Ninth Circuit – and some university administrators – have read this Court's decision in *Martinez* as a general license to bar campus religious groups from having religious faith statements and leadership requirements, even

when other student groups are permitted to have analogous requirements.

The decision below is plainly not a correct application of *Martinez*. But it demonstrates how easily *Martinez* can be misconstrued to authorize overt discrimination against *religious* group association. This Court should grant certiorari in this case to reverse the grievous error of the decision below and, further, to clarify that the *Martinez* case is limited to its unusual facts as stated in the majority opinion.

Amici offer two primary substantive points:

1. *Martinez* is clearly distinguishable from this case. In *Martinez,* the Court explicitly did not decide whether enumerated nondiscrimination policies may be used to penalize the religious students they are intended to protect. The Court narrowly confined its decision to an unusual policy that required *all* student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with – or actively opposed – the values, beliefs, or speech of the group. 130 S. Ct. at 2982, 2984; *id.* at 2999 (Kennedy, J., concurring). Moreover, the Court held it was not enough for a university to adopt an all-comers policy: the policy must actually be uniformly applied to all student groups. 130 S. Ct. at 2995.

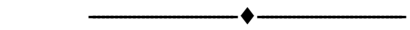
The decision in *Martinez* rested on the mistaken premise that a state university might uniformly provide that *all* campus groups be denied rights of "expressive association" traditionally enjoyed by

private expressive groups, as an aspect of the university's restrictions on its limited public forum. That premise is inconsistent with longstanding First Amendment jurisprudence, for reasons explained below, and in an appropriate case, we hope the Court will revisit that premise.

But that premise is not applicable here, where the express stipulations are directly the opposite: San Diego State does not have an "all-comers" policy but instead permits student groups to limit membership to those who embrace the views and purposes of the group, unless the group is a religious group with religious views and purposes.

2. This Court should reaffirm that the Free Speech Clause and Free Exercise Clause do not permit instrumentalities of state government to discriminate against, or impose unique disabilities on, religious speech and association specifically because of its religious nature. A wealth of earlier decisions all stand for this fundamental principle. Rather, as this Court has freshly reaffirmed, "[t]he right to freedom of association is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor*, 2012 WL 75047, at *11. Indeed, "the First Amendment itself . . . gives special solicitude to the rights of religious organizations." *Id.* The Court should make clear that *Martinez* does not undermine this bedrock principle. Consequently, the holding of the court

below – which made exactly this mistake – should be reversed.



REASONS FOR GRANTING THE WRIT

I. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ* IS DISTINGUISHABLE ON PRINCIPLED GROUNDS FROM THIS CASE.

A. *Martinez* Is Contrary to Forty Years of Free Speech and Expressive Association Jurisprudence.

In *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), the Court held that campus student groups using state university premises or facilities – whether religious or non-religious – do not possess the traditional "freedom of expressive association" enjoyed by private, noncommercial groups, if a state university so decides as an across-the-board condition of its limited public forum policy, imposed on all student groups. *Id*. at 2993 ("Hastings . . . may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership."). Thus, the Court in *Martinez* held a state law school could uniformly require all student groups to accept "all comers" to membership and leadership in such groups. *Id.* at 2978, 2995.

We think that decision discordant with basic First Amendment law. The right of expressive association is recognized in a great many of this Court's

cases. *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995); *Roberts v. Jaycees*, 468 U.S. 609 (1984); *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981); *Healy v. James*, 408 U.S. 169 (1972).

At its core, the right allows a group of speakers to define its identity and its message by defining its membership. As the Court put it in *Democratic Party v. Wisconsin,* "the freedom to associate for the common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 122 (quotation marks and citations omitted). As Justice O'Connor put the point:

> [A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. . . . Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.

Roberts, 468 U.S. at 633 (O'Connor, J., concurring).

Simply put, to require a group, engaged in expressive activity, to include members and speakers who do not share the views and purposes of the

group, *is to violate the First Amendment expressive freedom of the members of the group*. As Justice Souter stated for a unanimous Court in *Hurley*, interference with a group's collective message by requiring the inclusion of speakers the group does not wish to include "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. For a state to require a private organization engaged in expressive activity to accept any and all persons who wish to join in that expression would violate the First Amendment. "Since every participating unit affects the message conveyed," a state requirement of inclusion requires a private organization "to alter the expressive content" of its message. *Id.* at 572-73. "[T]he communication produced by the private organizers would be shaped by all those . . . who wished to join in with some expressive demonstration of their own." *Id.* Even where the purpose is the elimination of discrimination, "[o]ur tradition of free speech commands" that speakers, including groups, have the right to express their views "free from interference by the State based on the content of what [they] say[ ]." *Id.* at 579. "The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Id.*

In *Hosanna-Tabor*, the Court instructed that the freedom of association for religious groups has enhanced protection under the Religion Clauses. Unanimously, the Court noted that the First Amendment forbids government interference with a religious body's choice of its religious leaders: "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." 2012 WL 75047, at *11. The First Amendment "protects a religious group's right to shape its own faith and mission through its appointments." *Id.*

So too here: to require campus student groups at state universities, engaged in expressive activity, to include persons who do not share the views and purposes of the group, is to violate the First Amendment expressive freedom of the group's members. For nearly forty years before the *Martinez* decision – since *Healy v. James*, *supra* – it had been universally recognized that group rights of freedom of speech and association extended to student groups operating on state university campuses. With respect, *Martinez* gravely impaired these First Amendment principles.

Martinez deeply conflicts with the Court's decisions in *Healy* and in *Widmar v. Vincent*, *supra*. Both of those cases held that campus student groups possess an affirmative freedom of speech and expressive association to meet on state university campuses, without restriction based on officials' disapproval of

the nature of their associations or identity. *Healy* involved a *political* group's associational freedom. *Widmar* involved a *religious* group's religious speech and identity. In each situation, campus officials had argued that they possessed the authority to exclude such groups from recognition because of the nature and content of the groups' expressive identity. And in each case, the Court rejected the officials' arguments.[4]

Healy specifically rejected a state university's claimed authority to deny a student political group, Students for a Democratic Society ("SDS"), recognition because of its associational identity: "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." 408 U.S. at 181. Accordingly, "denial of official recognition, without justification, to college organizations burdens or abridges that associational right." *Id.* The Court held that a state university "*may not restrict speech or association*" of campus student groups simply because it considered a particular group's views, identity, or affiliations to be

[4] *Healy* and *Widmar* of course stand in the midst of a long line of this Court's cases recognizing a broad right of expressive association. *See* Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1923-39 (2001) (collecting and discussing cases); *see generally,* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996) (discussing the issue of freedom-of-expressive-association restrictions on religious groups imposed as a condition on access to a public forum or to public benefits).

undesirable as a policy matter – indeed, even if it thought a group's positions "abhorrent." 408 U.S. at 187-88 (emphasis added).

Widmar expressly extended *Healy*'s recognition of campus groups' freedom of speech and association to religious groups: "*With respect to persons entitled to be there*, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." 454 U.S. at 268-69 (emphasis added). Because "students enjoy First Amendment rights of speech and association on the campus," denial of recognition and use of facilities to student groups, on the basis of their religious mission and identity, "must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Id*. at 267 n.5 (citing *Healy*).

If *Martinez* is correct, however, all that the campus officials in *Healy* needed to do to keep the SDS off campus was to adopt a uniform policy restricting all campus student groups' freedom of expressive association. Under *Martinez* – quite contrary to *Healy* – a state university apparently *may* restrict speech and association and *does* have power to "burden[ ] or abridge[ ]" the "associational right" of student groups "to associate to further their personal beliefs." *Contra Healy,* 408 U.S. at 181. All that is required is that a university impose "neutral," across-the-board restrictions on all groups' expressive association.

Likewise, if *Martinez* is correct, all that the campus officials in *Widmar* need have done in order to have kept students from using university facilities for religious meetings would have been to adopt a uniform policy forbidding all student groups, including religious ones, from having any ideologically distinctive, defining group identity. Under *Martinez* – quite contrary to *Widmar* – students "enjoy First Amendment rights of speech and association on the campus" only to the extent state university officials choose to define their limited forum in such a way as to allow such rights. *Contra Widmar,* 454 U.S. at 267-68 & n.5.

This cannot be right. *Martinez* attempted to distinguish *Healy* and *Widmar.* 130 S. Ct. at 2987-88. *Healy* and *Widmar* were treated as cases where the student groups "had been unconstitutionally *singled out*" for different treatment. *Id.* There was no *general* right of campus student groups to freedom of expressive association. This distinction is utterly alien to the opinions in *Healy* and *Widmar* themselves which spoke clearly of students possessing group rights of "*speech and association*," "*on campus,*" simply because they were "*entitled to be there.*" *Widmar*, 454 U.S. at 268-69 (emphasis added). *Accord Healy*, 408 U.S. at 181-82, 184.

Equally fundamental, the central premise of *Martinez* is irreconcilable with the bedrock premise of *Healy* and *Widmar,* and *Lamb's Chapel*, *Rosenberger*, *Mergens,* and *Good News Club*. *Martinez*'s premise is that permitting a student group access to a limited

forum is "subvention" or "state subsidy" of the group's expression. 130 S. Ct. at 2978, 2986.

But this premise simply cannot be squared with four decades of caselaw protecting student groups' free speech and expressive association. If access to a speech forum is a "state subsidy" of the group's purposes or identity, then *Healy, Widmar*, *Lamb's Chapel*, *Rosenberger*, *Mergens,* and *Good News Club* were all wrongly decided. That is, if a student group's access to meeting space is a state subsidy, then Central Connecticut State College had every right to refuse to subsidize the SDS's advocacy of violence in *Healy*. And the school officials in *Widmar, Lamb's Chapel, Rosenberger, Mergens,* and *Good News Club* were absolutely correct that access for religious groups was the equivalent of government subsidy of religious speech in violation of the Establishment Clause.

In *Rosenberger,* the Court explained that access to meeting space, channels of communication, and student activity fee funds was not a government subsidy of the religious student group's private speech. 515 U.S. at 834 ("[W]e did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."). Accordingly, the Court in *Rosenberger* emphasized that the Establishment Clause was not violated by a religious group's access to meeting space, channels of communication, or

student activity fee funding. *Id.* at 842-43. Instead, "[i]f the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar, Mergens,* and *Lamb's Chapel* would have to be overruled." *Id.* at 843. *Martinez*'s basic construct – that student groups' access to classroom space and campus communication channels is a government subsidy – is a radical departure from *Healy, Rosenberger, Widmar, Lamb's Chapel, Mergens,* and *Good News Club.*

Martinez's treatment of students' associational rights conflicts with prior, long-established precedent establishing the First Amendment principle that students at state universities possess group rights of expression and association, simply by virtue of being "entitled to be there" as students at state university campuses.

B. *Martinez* Did Not Address Use of an Enumerated Nondiscrimination Policy to Exclude Religious Students from Campus.

At all events, *Martinez* is readily distinguishable from this case. As noted above, in *Martinez* it was stipulated that no campus group was permitted to limit membership to persons who agreed with the purposes and goals of the group, and the case was decided on that basis. *See supra*, pp. 7-11. Here, exactly the reverse is stipulated. Campus groups *are*

permitted to restrict membership and leadership to students who "agree with the particular ideology, belief, or philosophy the group seeks to promote." Pet. App. 101a (Stipulation No. 35). It is further stipulated that this is San Diego State's practice. Pet. App. 101a-105a (Stipulation Nos. 35(a), 35(i), 35(m)). Finally, it is stipulated that campus *religious* groups may *not* require that their members and leaders agree with the group's *religious* beliefs or faith philosophy. Pet. App. 142a-143a (Stipulation Nos. 358 & 360).

This is viewpoint discrimination, plain and simple. It presents an entirely different situation from that stipulated to be the case in *Martinez*. There is no way to reconcile San Diego State's practice with the core First Amendment rule that government may not regulate or discriminate on the basis of speech content or viewpoint. As Justice Kennedy put it for the Court in *Rosenberger*:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . In the realm of private speech or expression, government regulation may not favor one speaker over another. . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

515 U.S. at 828-29 (citations omitted). *Accord Lamb's Chapel*, 508 U.S. at 394 ("[T]he First Amendment forbids the government to regulate speech in ways

that favor some viewpoints or ideas at the expense of others."), *quoting City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984); *Simon & Schuster v. New York State Crime Victims Bd.,* 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

Nothing in *Martinez* supports the proposition that a state university may *permit some* types of student organizations, reflecting certain views or positions, to limit their membership to persons who support the purposes or ideas of the group, but *deny other* types of student groups, reflecting *religious* views or positions, the same right. The distinction is absolutely critical, and the panel below completely missed the point, thinking – quite simply wrongly – that a state university could engage in viewpoint discrimination as long as that was not its consciously intended purpose. Pet. App. 18a. *Contra Simon & Schuster*, 502 U.S. at 117 (intent to suppress specific ideas not required for a state practice to violate First Amendment) (unanimous).

This case is an appropriate opportunity to clarify *Martinez* and to make clear that it does not authorize content-based or viewpoint-based discrimination against religious speech or association. The plain

error of the court below highlights the need for that decision to be tightly constrained.[5]

II. *HOSANNA-TABOR*'S REAFFIRMATION OF RELIGIOUS GROUPS' ABILITY TO CHOOSE THEIR LEADERS CASTS DOUBT ON *MARTINEZ*'S REJECTION OF RELIGIOUS GROUPS' FREE EXERCISE CLAIM.

The recent *Hosanna-Tabor* decision casts serious doubt on the correctness of *Martinez*'s holding that *Employment Division v. Smith*, 494 U.S. 872 (1990), "forecloses" a religious student group's claim, under the Free Exercise Clause, that a state university may not penalize a religious group for requiring its leaders to agree with its religious beliefs. *Martinez,* 130 S. Ct.

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[5] It is in the best traditions of this Court to limit promptly questionable decisions that spawn serious impairments of First Amendment rights – or that simply require clarification so as not to be read in an overbroad manner. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (First Amendment does not permit compelled flag salute in public school classroom exercise), *overruling in part Minersville School District v. Gobitis,* 310 U.S. 586 (1940) (upholding schools' compulsory flag salute against students' challenge on First Amendment grounds); c*ompare R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (unanimous as to result) (First Amendment does not permit municipality to define a criminal offense in terms of the viewpoint communicated by expressive activity) *with Wisconsin v. Mitchell,* 508 U.S. 476 (1993) (unanimous) (clarifying that First Amendment, as interpreted in *R.A.V.*, does not forbid state to impose enhanced penalty for independently wrongful, non-speech criminal activity, based on discriminatory mental state of perpetrator).

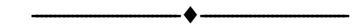
at 2995 n.27, 2993 n.24. In *Hosanna-Tabor*, this Court unanimously distinguished "a church's selection of its ministers" from *Smith* which "involved government regulation of only outward physical acts." 2012 WL 75047, at *12. A state university's use of its nondiscrimination policy to penalize a religious student group for insisting its leaders agree with its religious beliefs seems much closer to the "government interference with an internal church decision that affects the faith and mission of the church itself," found unconstitutional in *Hosanna-Tabor,* than to "government regulation" of "an individual's ingestion of peyote," permitted in *Smith*. *Id.* This is particularly true given that the Free Exercise Clause provides "special solicitude to the rights of religious organizations." *Id.* at *11.

But even when *Smith* governs, the government may not regulate, or discriminate against, the exercise of First Amendment rights of expression and association, on the basis of the *religious* nature of such expression or association. It is universally agreed that the minimum content of the Free Exercise Clause is that government must not *discriminate against religion specifically* and regulate conduct *specifically because* of its religious nature or the religious identity of the person or persons engaged in it. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Smith*, 494 U.S. at 877; *McDaniel v. Paty*, 435 U.S. 618 (1978).

One would have hoped that these principles, so often repeated and so unwaveringly applied, would be

beyond doubt and impossible to disregard. As set forth above, this case plainly involves precisely such a situation – a situation where groups' expressive association and conduct is restricted if religious in nature and not restricted if not religious in nature. "The right to freedom of association is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor,* 2012 WL 75047, at *11.

San Diego State's policy and practice is flagrantly unconstitutional, under more than a half-dozen uncontested precedents of this Court. Yet, the court below, seemingly confused by *Martinez*, missed the First Amendment point entirely.



CONCLUSION

A parable drawn from a remarkable case decided by this Court more than a century ago, *Berea College v. Kentucky*, 211 U.S. 45 (1908), illustrates both the importance of freedom of association for religious organizations – and the danger to that freedom posed by contemporary assumptions about "correct" social arrangements, and the perceived need to force such arrangements on faith communities.

Berea College, as a matter of its faith principles, insisted, contrary to the prevailing social consensus of the day, that segregated education was inconsistent with Christianity. The college thus sought to educate blacks and whites together – in violation of Kentucky law, which forbade integrated education, even by

private religious colleges. Kentucky's rule reflected the generally accepted, "best" thinking of the time as to correct social policy. The Christian college's views were very much out of step with the times.

This Court upheld Kentucky's law against constitutional challenge, rejecting Berea College's argument that the law violated its liberty under the Fourteenth Amendment. (Reflecting the spirit of the age, the college's argument was cast more in terms of impairment of its general and economic liberty than specifically in First Amendment terms.) The Court held that regulation of the college's associational practices was properly within the power of the State to attach reasonable conditions to the "privilege" of operating as a corporation chartered under laws of the State. 211 U.S. at 54. Berea College "was organized under the authority of an act for the incorporation of voluntary associations," *id*. at 56, and was, therefore, subject to the State's conditions. Kentucky's law did not target religious colleges or associations in particular. It was a general, across-the-board prohibition of teaching black and white students at the same school.

Berea College stands today as an eerie reminder of the danger to liberty – and to justice – of state intrusion into the associational freedom of religious communities, imposed in the assumption of it being necessary to achieve correct social policy, and justified legally as merely a reasonable condition on a "privilege" the State has discretion to grant or withhold.

The petition should be granted to reverse the judgment below.

Respectfully submitted.

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