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## Duck, Duck, Goose . . . Because You're Christian: An Analysis of Selective Enforcement and Viewpoint Discrimination in a Limited Public Forum in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)

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Note\*

# Duck, Duck, Goose . . . Because You're Christian: An Analysis of Selective Enforcement and Viewpoint Discrimination in a Limited Public Forum in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)

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\* Wesland Wright: Arizona State University, 2008; University of Nebraska College of Law J.D. expected, December 2011. I would like to express my gratitude to my colleagues at the *Nebraska Law Review* for their continued dedication to the production of excellent legal writing. Also, a special thanks to Richard Duncan, Professor of Constitutional Law at the University of Nebraska and Michael W. McConnell, Professor of Constitutional Law and Director of the Stanford University Constitutional Law Center. Most importantly, I would like to thank my beautiful wife, Ashley, and my two princesses, Paisley and Charlotte for their continued support, without which I am sure I would not have been able to finish this Note.

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## I. INTRODUCTION

The proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”<sup>1</sup> 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.<sup>2</sup>

In a line of Supreme Court cases concerning restrictions on speech in a limited public forum the Court holds that “any access barrier” must be both reasonable and viewpoint neutral.<sup>3</sup> In April 2010, the stipulated “all-comers policy” in place at the University of California, Hastings College of Law (Hastings) survived a facial challenge to this test. The Court held Hastings’s open-access condition on Registered Student Organization (RSO) status was both reasonable in light of the purposes of the limited public forum and viewpoint neutral.<sup>4</sup> The student branch of the Christian Legal Society (CLS) at Hastings was thus denied RSO status because it refused to admit members unless they were willing to affirm their belief in certain Christian doctrines and refrain from “participation in or advocacy of a sexually immoral lifestyle.”<sup>5</sup>

While on its face the all-comers policy withstood a constitutional challenge, on remand the lower courts should examine the question of

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1. *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 3000 (2010) (Alito, J., dissenting) (quoting *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting)).

2. *Id.*

3. *See, e.g., id.* at 2984.

4. *Id.* at 2995.

5. *Id.* at 2995–96 (Stevens, J., concurring). For more information on the Christian Legal Society, see CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org> (last visited Nov. 2, 2010).

whether the policy was applied unconstitutionally.<sup>6</sup> Hastings selectively enforced its policy against CLS while allowing other RSOs similarly situated to limit membership and leadership positions to those students who “agree[d] with the organization’s beliefs and purposes.”<sup>7</sup> Because Hastings’s policy was selectively enforced any reason put forth by Hastings to justify its policy should be labeled defunct.<sup>8</sup> The purpose of this Note is to demonstrate that, while the policy in question may have appeared textually both reasonable and viewpoint neutral, it was applied in such a way that amounted to viewpoint discrimination and violated the CLS’s First Amendment right to expressive association.

Part II of this Note will set the judicial foundation governing First Amendment expressive association rights in a limited public forum, such as the one created at Hastings. Part III will present the relevant facts, holding, and reasoning of the Supreme Court in its decision to uphold the all-comers policy. Part IV will analyze the policy as the university applied it. When juxtaposed with Supreme Court precedent governing viewpoint discrimination against religious perspectives, Hastings’s actions should prove unconstitutional. Furthermore, the court on remand, when examining the reasonableness of the policy as applied, will likely be persuaded that the policy does not pass the reasonableness standard. Finally, Part V will present possible conclusions, including forcing Hastings to: (1) grant CLS an exemption from the all-comers policy or (2) to apply the policy to all RSOs equally.

## II. BACKGROUND

### A. Forum Analysis: A Brief Explanation

The Constitution of the United States of America guarantees: “Congress shall make no law . . . abridging the freedom of speech.”<sup>9</sup> The right to associate for the purpose of engaging in the expression of a certain idea is included under this provision of the First Amendment.<sup>10</sup> This guarantee however, is not without limitation. For exam-

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6. *See infra* Part V.

7. *CLS*, at 3004–05 n.1 (Alito, J., dissenting) (citing Brief for Appellant at 14, *Christian Legal Soc’y v. Kane*, 319 F. App’x 645 (9th Cir. 2009) (No. 06-15956), 2006 WL 3420535). For examples of Hastings selective enforcement, see *infra* note 129.

8. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (“Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.”).

9. U.S. CONST. amend. I.

10. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–19 (1984). For an analysis as to why religious student groups constitute expressive association see, Note, *Leaving Religious Students Speechless: Public Universities and Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2884–88 (2005).

ple, in the interest of both public and private safety, a speaker is not permitted to yell, “FIRE!” in a crowded theatre.<sup>11</sup> A group is restricted from sending death threats to the President of the United States.<sup>12</sup> While these restrictions may seem obvious, the Supreme Court has also created standards for evaluating limitations placed on one’s First Amendment rights “depending on the character” of the setting (or forum) where the speech takes place.<sup>13</sup> Put another way, “the extent to which the Government can control access [to a forum] depends on the nature of the relevant forum.”<sup>14</sup> This “forum analysis” has divided government property into three categories: (1) traditional public forums—e.g., sidewalks and parks;<sup>15</sup> (2) government designated public forums—where “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose;”<sup>16</sup> and (3) limited public forums—a forum created by a government entity that is to be used “by certain groups or dedicated solely to the discussion of certain subjects.”<sup>17</sup>

The standard used to determine if “a state has unconstitutionally excluded a private speaker from use of a public forum depend[s] on the nature of the forum.”<sup>18</sup> While the judiciary has granted discretionary power for the government “to preserve [its] property under its control for the use to which it is lawfully dedicated,”<sup>19</sup> this power is reined in under the doctrine of scrutiny. For example, any content-based restrictions placed on speech in the traditional public forum or the government designated public forum are subject to strict scrutiny—“the restriction must be narrowly tailored to serve a compelling govern-

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11. *Schneck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).
  12. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (upholding the constitutionality of a statute limiting free speech rights of those who make “true threats” against the President).
  13. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983).
  14. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).
  15. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1132 (2009) (“This court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, ‘which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” (internal quotation marks omitted) (quoting *Perry*, 460 U.S. at 45)).
  16. *Id.* at 1132 (citing *Cornelius*, 473 U.S. at 802).
  17. *Id.* (citing *Perry*, 460 U.S. at 46 n.7); *see also* Edward J. Neveril, “Objective” Approaches to the Public Forum Doctrine: *The First Amendment at the Mercy of Architectural Chicanery*, 90 Nw. U. L. REV. 1185, 1193 (1996) (providing a more in-depth description and history of the forum doctrine).
  18. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (citing *Perry*, 460 U.S. at 44).
  19. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1996)) (internal quotation marks omitted).

mental interest.”<sup>20</sup> The level of scrutiny in the limited public forum however, is more relaxed—a government entity may impose restrictions on speech that are *reasonable* and *viewpoint neutral*.<sup>21</sup> Because the RSO program at Hastings represented a limited public forum it is imperative for the reader to have an understanding of the standard used when evaluating speech in this forum. The Supreme Court noted:

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in “reserving [its forum] for certain groups or for the discussion of certain topics.” The State’s power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be “reasonable in light of the purposes served by the forum.”<sup>22</sup>

What constitutes viewpoint discrimination and unreasonableness in a limited public forum has been examined at great length in recent Supreme Court decisions.<sup>23</sup>

### 1. Healy v. James: *Political Viewpoint Discrimination Against a Student Group*

In 1972, a group of students attending Central Connecticut State College desired to receive official recognition as a student group in order to establish a local chapter of Students for a Democratic Society (SDS).<sup>24</sup> The students filed a request with the student affairs committee and stated three purposes of the group:

[1]provide “a forum of discussion and self education for students developing an analysis of American society”;[2] serve as “an agency for integrating thought with action so as to bring about constructive changes”; and . . . [3] “provide a

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20. *Sumnum*, 129 S. Ct. at 1132; see also *Cornelius*, 473 U.S. at 800 (“Because a principal purpose of the traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Similarly, when the Government has intentionally designated a place . . . as a public forum speakers cannot be excluded without a compelling government interest.” (citing *Perry*, 460 U.S. at 45)).
  21. *Good News Club*, 533 U.S. at 106–07 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius*, 473 U.S. at 806). See generally Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996) (providing definitions, examples, history, and analysis of viewpoint discrimination).
  22. *Good News Club*, 533 U.S. at 106–07 (quoting *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806).
  23. See generally *Good News Club*, 533 U.S. 98; *Rosenberger*, 515 U.S. 819; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.* 508 U.S. 384 (1993); *Healy v. James*, 408 U.S. 169 (1972).
  24. *Healy*, 408 U.S. at 170.

coordinating body for relating the problems of leftists students" with other interested groups on campus and in the community.<sup>25</sup>

The reviewing committee took no issue with the group's proposed purposes but concerned itself with the relationship between the student group and the National SDS organization.<sup>26</sup> The national branches for SDS carried with them a reputation for campus disruption.<sup>27</sup> Once established that the student group was loosely, if at all, connected with the national organization, the committee approved the application.<sup>28</sup> The committee based its approval "on the belief that varying viewpoints should be represented on campus and that since the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status, a group should be available with which 'left wing' students might identify."<sup>29</sup>

Days later the university president rejected the committee's approval and issued a statement indicating the group was not to be afforded official recognition.<sup>30</sup> The president felt the "organization's philosophy was antithetical to the school's policies . . ." <sup>31</sup> The group was denied access to campus communication facilities, including bulletin boards and the school newspaper.<sup>32</sup> It could not hold meetings in classrooms or even congregate at the campus coffee shop, thus jeopardizing the group's growth and even its existence.<sup>33</sup> Running out of options, the students filed a complaint alleging their First Amendment associational rights were violated when the college president refused to grant them official recognition.<sup>34</sup>

On appeal, the Supreme Court examined the possible reasons behind the president's decision to deny official recognition and held: "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition."<sup>35</sup> No matter how much the president of the university disapproved of or disagreed with the

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25. *Id.* at 172 (quoting Appendix to 2d Cir. Opinion at 1135–39, *Healy v. James*, 445 F.2d 1122 (2d. Cir. 1971) (No. 733, 35828)).

26. *Id.* at 172–73.

27. *Id.*; see also Ben Gibberd, *To the Ramparts (Gently)*, N.Y. TIMES (March 23, 2008), <http://www.nytimes.com/2008/03/23/nyregion/thecity/23sds.html> (describing typical campus protests and disruptions performed by the SDS).

28. *Healy*, 408 U.S. at 172–74.

29. *Id.* at 174.

30. *Id.*

31. *Id.* at 175.

32. *Id.* at 176.

33. *Id.*

34. *Id.* at 177.

35. *Id.* at 187; see also Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1936 (2006) ("I have spoken so far of one area in which the government must fund the exercise of constitutional rights: the No Governmental Viewpoint Discrimination Principle, which says that a government program benefiting a broad range of viewpoints may not exclude those viewpoints that the government disfavors.").

group's views, to deny recognition based on this disdain was prohibited.<sup>36</sup> After expressing its reasoning, the Court quoted Justice Black in an effort to reemphasize the importance of viewpoint neutrality: "I do not believe that it can be too often repeated that the freedoms . . . of speech . . . and assembly guaranteed by the First Amendment must be accorded to the ideas [or viewpoints] we hate or sooner or later they will be denied to the ideas we cherish."<sup>37</sup>

## 2. *Lamb's Chapel v. Center Moriches Union Free School District: Speech Otherwise Permitted*

In 1993 the Supreme Court faced, once again, the issue of whether a restriction on speech in a limited public forum violated a party's First Amendment rights. In *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>38</sup> a local church brought suit alleging that a school district's refusal to allow use of the school's facilities to show a film series on family values from a Christian perspective constituted viewpoint discrimination. A New York law authorized school boards to "adopt reasonable regulations for the use of school property . . ." <sup>39</sup> The law set forth a list of permitted uses, including: "social, civic and recreational meetings . . . and other uses pertaining to the welfare of the community . . ." <sup>40</sup> Pursuant to New York law, the school board for Center Moriches Union Free School District issued its own rules and regulations governing the use of school property when not in use for school purposes.<sup>41</sup> Rule seven stated: "[t]he school premises shall not be used by any group for religious purposes."<sup>42</sup> *Lamb's Chapel*, an evangelical church, applied twice to the district for permission to use the school facilities to show a six-part film series on the importance of family values from a Christian perspective.<sup>43</sup> The district denied the application for fear of an Establishment Clause violation, on grounds that the films "appear[ed] to be church related . . ." <sup>44</sup>

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36. *Healy*, 408 U.S. at 187–88.

37. *Id.* at 188 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting)).

38. 508 U.S. 384, 384 (1993).

39. *Id.* at 386 (citing N.Y. EDUC. LAW § 414 (McKinney 1988 and Supp. 1993)).

40. *Id.* (citing N.Y. EDUC. LAW § 414 (1)(c) (internal quotation marks omitted)).

41. *Id.* at 387. For a compilation of cases, laws, and rules governing the use of public school property during non-school hours, see C.T. Foster, Annotation, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R.2d. 1148 (originally published in 1961).

42. *Lamb's Chapel*, 508 U.S. at 387 (alteration in original) (quoting Appendix to Appellate Petition for Writ of Certiorari at 57a, *Lamb's Chapel*, 508 U.S. 384 (1993) (No. 91-2024), 1992 WL 12012085 (internal quotation marks omitted)).

43. *Id.*

44. *Id.* at 388–89 ("The District denied the first application, saying that '[t]his film does appear to be church related and therefore your request must be refused.' The second application for permission to use school premises for showing the film se-



The Supreme Court recognized the school as a limited public forum and quickly reminded the parties that control over such a forum requires viewpoint neutrality and must be reasonable in light of the purposes of the forum.<sup>45</sup> The Court found the film series that Lamb's Chapel wished to show dealt with a subject otherwise permissible under New York law, and "its exhibition was denied *solely because the series dealt with the subject from a religious standpoint.*"<sup>46</sup> The Court then stated a foundational principle in the recognition of viewpoint discrimination: "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."<sup>47</sup> To permit school property to be used for the presentation of all views concerning family issues and child-rearing except those dealing with the subject matter from a religious standpoint amounted to discrimination on the basis of viewpoint.<sup>48</sup> Lamb's Chapel was excluded from the forum strictly because its message, otherwise includible in that setting, was delivered from a religious perspective.<sup>49</sup> The school district violated the First Amendment when it denied Lamb's Chapel access to the limited public forum solely to "suppress the point of view . . . [it] espouse[d] on an otherwise includible subject."<sup>50</sup>

3. *Rosenberger v. Rector and Visitors of the University of Virginia: Religious Viewpoint Discrimination at a Public University*

In *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>51</sup> the Supreme Court found that the University of Virginia violated the First Amendment rights of a Christian student group when it refused to pay the printing fees for the group's student magazine based on the magazine's Christian perspective. The university created a program that authorized the payment of outside contractors for

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ries, which described it as a 'Family oriented movie—from a Christian perspective,' was denied using identical language.").

45. *Id.* at 392–94. The Court specifically stated:

[A]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

*Id.* (citations omitted) (internal quotation marks omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)).

46. *Id.* at 394 (emphasis added).

47. *Id.* (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)) (internal quotation marks omitted).

48. *Id.*

49. *Id.*

50. *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* 460 U.S. 37, 49 (1983)).

51. 515 U.S. 819 (1995).

printing and other publication costs associated with the creation of a variety of student magazines.<sup>52</sup> Due to an unfounded fear of violating the Establishment Clause, the college created an exception to the program—it would withhold authorization and refuse to accord funds to any publication that “primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.”<sup>53</sup> Wide Awake Productions (WAP), a contracted independent organization officially recognized as a student group on campus, published *Wide Awake: A Christian Perspective at the University of Virginia*.<sup>54</sup> The magazine discussed issues relevant to college students including professor interviews, music reviews, and missionary work from a Christian viewpoint.<sup>55</sup> The University of Virginia refused to provide financial benefits to WAP, because, in its view, the publication triggered the university’s exception to the program.<sup>56</sup>

The issue addressed to the Supreme Court was whether the exclusion constituted viewpoint discrimination against WAP and therefore violated the group’s First Amendment rights.<sup>57</sup> The Court labeled the university’s funding program as a limited public forum and reminded the college that once it established a limited public forum it “must respect the lawful boundaries it has itself set.”<sup>58</sup> The university would be permitted to discriminate on the basis of *content* so long as the purposes of the forum were preserved.<sup>59</sup> For example, the college was not constitutionally required to authorize or pay the publication fees for a non-student organization magazine.<sup>60</sup> Such an action would fall outside the scope of the purposes of the forum. However, if the university refused to authorize payment for the printing fees of a student publication that otherwise fell within the forum’s limitations solely

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52. *Id.* at 822.

53. *Id.* at 822–23.

54. *Id.* at 825–26.

55. *Id.* at 827.

56. *Id.*

57. *Id.* at 828.

58. *Id.* at 829.

59. *Id.* at 829–30.

60. *Id.* The Court specifically stated:

Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.

*Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n* 460 U.S. 37, 46 (1983)). See generally Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGEORGE L. REV. 595 (2003) (explaining the distinctions between content and viewpoint based restrictions).

based on the group's viewpoint, the university had presumably violated the First Amendment.<sup>61</sup> Relying on its decision in *Lamb's Chapel*, the Court pointed out the blatant viewpoint discrimination exhibited by the university when it denied WAP financial reimbursement for its publication because the group's magazine was written from a Christian perspective.<sup>62</sup>

In her concurring opinion, Justice O'Connor called on Supreme Court precedent to remind the University of its error: "We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship."<sup>63</sup> The University of Virginia created a limited public forum through its funding program and when it denied WAP the benefits of that program based on the group's Christian standpoint it not only treated WAP differently based on the God it worshipped, it violated the First Amendment to the Constitution through viewpoint discrimination.

#### 4. *Good News Club v. Milford Central School: Viewpoint Discrimination and Reasonableness*

More recently, in *Good News Club v. Milford Central School District*,<sup>64</sup> the Supreme Court reaffirmed its decisions in both *Lamb's Chapel* and *Rosenberger*, striking down a community use policy that forbade the afterschool use of public school facilities for religious purposes. With facts strikingly similar to those in *Lamb's Chapel*, the Milford Central School District denied access to the cafeteria for afterschool use by the Good News Club—a private Christian organization for children ages six to twelve.<sup>65</sup> The club's purpose was to educate children on the Bible and to discuss its application in their lives.<sup>66</sup> The school considered the club's activities to be "the equivalent of religious worship" and, because of a tenuous fear of the Establishment Clause, denied the Good News Club access to school facilities.<sup>67</sup>

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61. *Rosenberger*, 515 U.S. at 829–30.

62. *Id.* at 831 ("We conclude, . . . that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake.").

63. *Id.* at 846 (O'Connor, J., concurring) (internal quotation marks omitted) (quoting Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in judgment)).

64. 533 U.S. 98 (2001).

65. *Id.* at 103.

66. *Id.*; see also *What is a Good News Club?*, CHILD EVANGELISM FELLOWSHIP, [http://www.cefonline.com/index.php?option=com\\_content&view=category&id=13&Itemid=100049/](http://www.cefonline.com/index.php?option=com_content&view=category&id=13&Itemid=100049/) (last visited Nov. 2, 2010) (providing the history and purpose of The Good News Club).

67. *Good News Club*, 533 U.S. at 104 (internal quotation marks omitted) (quoting Brief of Appellee at 4, *Good News Club*, 202 F.3d 502 (No. 98-9494), 1999 WL 33629937).

The Good News Club filed suit alleging a violation of its First Amendment rights.<sup>68</sup> On appeal the Supreme Court granted certiorari and faced the question of whether denying access to The Good News Club constituted viewpoint discrimination.<sup>69</sup> Guided by its analysis in previous cases, the Court noted the teaching of morals and character development to children was a permissible purpose under the school district's policy.<sup>70</sup> The court also found that when Milford Central School denied The Good News Club access to its limited public forum, it did so because the otherwise permissible subject matter being presented was taught from a Christian perspective.<sup>71</sup> As discussed in both *Lamb's Chapel* and *Rosenberger*, a restriction on speech otherwise permissible in a limited public forum inflicted on a group because of its religious perspective amounts to viewpoint discrimination and is a violation of the group's First Amendment rights.<sup>72</sup>

The *Good News* decision is particularly poignant because it expounds the reasonableness prong of the limited public forum standard. Recall that in a limited public forum any restriction on speech must be viewpoint neutral *and reasonable* in light of the purposes served by the forum.<sup>73</sup> In *Good News*, the Court twice addressed whether a viewpoint discriminatory policy is ever justifiable.<sup>74</sup> The Court noted that while content-based discrimination may be justified under strict scrutiny to avoid an Establishment Clause violation, it "is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."<sup>75</sup> The Court seems to answer this inquiry by concentrating on whether it is even necessary to evaluate the reasonableness of the restriction once viewpoint discrimination has been established: "[b]ecause the restriction is viewpoint discriminatory, we need not decide whether it is unreasona-

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68. *Id.* at 98.

69. *Id.* at 106.

70. *See id.*

71. *Id.* at 109–10.

72. *Id.* at 106–10. The Court expounded on its prior precedents, noting:

In *Lamb's Chapel*, we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination.

*Id.* at 107.

73. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)).

74. *Good News Club*, 533 U.S. at 111–13.

75. *Id.* at 113.

ble in light of the purposes served by the forum.”<sup>76</sup> This begs the question: In a limited public forum is it ever justifiable to limit speech, which would otherwise be permitted, because that speech is delivered from a certain perspective? After analyzing Supreme Court precedent, the answer to that question appears to be in the negative.<sup>77</sup> Once viewpoint discrimination has been established someone’s First Amendment rights have been violated, and there is no need to discuss the offending party’s justifications.

Whether the speech comes from a controversial political perspective as in *Healy* or a sectarian religious perspective as in *Lamb’s Chapel*, *Rosenberger*, and *Good News*, the creator of the limited public forum must “respect the lawful boundaries it has itself set.”<sup>78</sup> Once established that the speech in question is otherwise permissible within the limitations of the forum, excluding that speech based on its perspective or viewpoint violates the First Amendment to the Constitution.<sup>79</sup> Furthermore, the decision in *Good News* is dispositive—it is not necessary to evaluate the reasonableness of a restriction on speech once viewpoint discrimination is established.<sup>80</sup> In Part III of this Note, the background and relevant facts of the *Christian Legal Society* decision are established for the purpose of analyzing the decision under the afore-described First Amendment jurisprudence.

### III. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: FACTS, HOLDING, AND REASONING

#### A. The Registered Student Organization Program

Founded in 1878, Hastings College of Law, like many other institutions, encourages students to organize “extracurricular associations that ‘contribute to [the colleges] community and experience.’”<sup>81</sup> These groups foster an environment where students can intermingle academic and social interests in a place outside the classroom.<sup>82</sup> In addition, these organizations further education and create a forum in which students may “develop leadership skills.”<sup>83</sup> Through its Registered Student Organization (RSO) program, Hastings offers official recognition to student groups and supplies them with benefits such as: financial assistance to subsidize events, access to law school communication channels, and permission to apply to use law school facilities

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76. *Id.* at 107.

77. *See supra* Part II.

78. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

79. *Id.* at 829–30.

80. *See Good News Club*, 533 U.S. at 113.

81. *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2978 (2010).

82. *Id.*

83. *Id.* at 2979.

such as classrooms for group meetings or events.<sup>84</sup> In exchange for these benefits Hastings requires all student groups adhere to a non-discrimination policy, which it interprets as an “all-comers policy,” requiring all RSOs to “allow any student to participate, become a member, or seek leadership positions in the organization regardless of [her] status or belief.”<sup>85</sup> This does not preclude an RSO from creating neutral and generally applicable membership requirements, such as a writing competition in the case of law journal, or mandating attendance, and prohibiting gross misconduct.<sup>86</sup> As long as a group’s bylaws do not exclude a student based on his belief or status it will be permitted.<sup>87</sup>

## B. Procedural History

In September of 2004 the student branch of the Christian Legal Society (CLS) submitted all necessary documentation to Hastings in an effort to receive RSO status.<sup>88</sup> Included in its proposed bylaws, CLS set forth the group’s “Statement of Faith,” which included the belief that “sexual activity should not occur outside of marriage between a man and a woman” thus, CLS excluded from affiliation anyone who engaged in “unrepentant homosexual conduct.”<sup>89</sup> Further, through application of its bylaws, CLS also excluded students whose religious convictions differed from those set forth in the Statement of Faith.<sup>90</sup> Several days after submitting its application for RSO status CLS was denied recognition on the basis that its bylaws violated the all-comers policy by excluding students based on religious beliefs and sexual orientation.<sup>91</sup> CLS then formally requested an exemption from the policy and was denied.<sup>92</sup>

In October of 2004 CLS filed suit alleging a violation of its First and Fourteenth Amendment rights to free speech and expressive association.<sup>93</sup> Applying the doctrine of forum analysis, both the District Court and the Ninth Circuit Court of Appeals found that, on its face, Hastings’s all-comers policy was reasonable in light of the purposes of

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84. *Id.*

85. *Id.*

86. *Id.* at 2979 n.2.

87. *Id.*

88. *Id.* at 2980.

89. *Id.*

90. *Id.*

91. *Id.* at 2980–81 (“[T]o be one of our student recognized organizations . . . CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation.”).

92. *Id.*

93. *Id.* at 2981.

the forum and was viewpoint neutral.<sup>94</sup> CLS appealed the Ninth Circuit decision and the Supreme Court granted certiorari.<sup>95</sup>

### C. Majority Opinion: An Invitation to Examine Selective Enforcement

In its expansive opinion, the Supreme Court went to great lengths to explain why it found Hastings's all-comers policy to be reasonable. The policy, the Court stated: (1) "ensures . . . leadership, educational, and social opportunities . . . are available to all students";<sup>96</sup> (2) "helps Hastings police the written terms of its nondiscrimination policy without inquiring into an RSO's motivation for membership restrictions";<sup>97</sup> (3) "brings together individuals with diverse backgrounds and beliefs";<sup>98</sup> and (4) "conveys the Law School's decision 'to decline to subsidize with public monies . . . conduct of which the people of California disapprove.'"<sup>99</sup> The Court continued to justify the policy by pointing to the "alternative channels that remain open for [CLS-student] communication to take place,"<sup>100</sup> and denouncing CLS's allegation that the policy will invite "hostile takeovers" of student groups by pointing to the absence of evidence that any such takeover is likely to, or has ever, occurred.<sup>101</sup> The Court finalized its reasonableness argu-

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94. *Id.*

95. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 795 (2009).

96. *CLS*, 130 S. Ct. at 2989.

97. *Id.* at 2990.

98. *Id.*

99. *Id.* at 2990. The Court further emphasized, "State law . . . 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." *Id.* at 2990–91.

100. *Id.* at 2991 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983)). Just after announcing Hastings's policy more creditworthy due to the alternative channels of communication available to CLS, the Court posited warning: "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." *Id.*

101. *Id.* at 2992 ("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."). Ironically, this assumption by the majority has been interpreted by some as an invitation to demonstrate against groups with which they disagree by gaining membership. See Meghan Grizzle, *In Martinez Justice Ginsburg Disregards Serious Threat of Hostile Takeovers*, FIRE: FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (June 29, 2010), <http://www.thefire.org/article/12007.html>. One such hostile takeover situation is quoted below:

[A]t Central Michigan University (CMU), for example, Young Americans for Freedom (YAF), a conservative political student group, was told by the administration that because of the university's nondiscrimination policy, it could not exclude from membership students who were explicitly seeking to dissolve the group. In February 2007, CMU students started a group on the social networking site Facebook.com entitled

ment by stating that Hastings had “reasonably draw[n] a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.”<sup>102</sup>

Next, the Court briefly considered whether the all-comers policy was viewpoint neutral, and concisely stated: “[i]t is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”<sup>103</sup> The Supreme Court affirmed the decision of the Ninth Circuit Court of Appeals and found the open-access policy on RSO status to be both reasonable in light of the purposes of the forum and viewpoint-neutral, thus rejecting CLS’s free speech and expressive association claims.<sup>104</sup>

Just before closing its 5-4 opinion, the Court recognized CLS’s argument that the all-comers policy had been selectively enforced. Justice Ginsburg, in writing for the majority stated: “Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all comers policy . . . .”<sup>105</sup> CLS urged the Supreme Court to resolve the issue by establishing whether Hastings had exercised unconstitutional viewpoint discrimination through selective enforcement of its all-comers policy.<sup>106</sup> Justice Ginsburg reminded CLS that the Supreme Court is “a court of review, not of first view,”<sup>107</sup> and invited the Ninth Circuit to consider the issue on remand.<sup>108</sup>

#### IV. ANALYSIS

##### A. The Standard

In order to establish whether Hastings discriminated against CLS based on its viewpoint it is necessary to recall the rules governing analysis in a limited public forum. Both parties stipulated that Hastings’s RSO program constituted a limited public forum,<sup>109</sup> thus, any restrictions placed on speech must have been reasonable in light of the

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“People Who Believe the Young Americans for Freedom is a Hate Group,” where students posted messages suggesting ways to destroy YAF. One post suggested that members of the Facebook group “go to their meetings and . . . vote eachother [sic] onto the board and dissolve the group.

*Id.*

102. *CLS*, 130 S. Ct. at 2993.

103. *Id.*

104. *Id.* at 2995.

105. *Id.*

106. *Id.* at n.28.

107. *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 (2005)).

108. *Id.* at 2995 (“On remand, the Ninth Circuit may consider CLS’s pretext argument.”).

109. *Id.* at 2984 n.12.



purposes of the forum and viewpoint neutral.<sup>110</sup> Hastings violated CLS's constitutional rights if it can be established that (1) the speech participated in by CLS would otherwise be permitted in the forum, and (2) Hastings selectively enforced its all-comers policy against CLS solely because it disagreed with the group's viewpoint.<sup>111</sup> Further, even if Hastings can convince the court on remand to examine its enforcement of the all-comers policy under strict scrutiny—which under *Good News* is not likely<sup>112</sup>—Hastings will not be able to prove it was achieving a compelling interest.

1. *CLS's Language Permitted in the Limited Public Forum*

It must first be established that CLS participated in such speech that would otherwise be permitted in the forum created by Hastings through its RSO program.<sup>113</sup> Once Hastings has created its forum it must respect the boundaries it has itself set.<sup>114</sup> The purposes and requirements for the RSO program are clearly set forth in the majority opinion. The RSO program was created to: (1) “contribute to the Hastings community and experience,” (2) provide students with opportunities to “pursue academic and social interests outside of the classroom” (3) to “further education,” and (4) to provide leadership opportunities.<sup>115</sup> In essence, “the RSO forum . . . allow[s] Hastings students to replicate on campus a broad array of private, independent, noncommercial organizations that is very similar to those that non-students have formed in the outside world.”<sup>116</sup> Hastings made no contention that CLS, as a religious RSO, would frustrate any of these purposes.<sup>117</sup> In fact, Hastings has approved many religious groups for RSO status including: The Jewish Law Student Association, The J. Reuben Clark Law Society (a student group centered on beliefs of the Church of Jesus Christ of Latter Day Saints), and The Association of

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110. *Id.* (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001)).

111. *Id.* at 2988, 2994.

112. Recall that under *Good News*, once viewpoint discrimination has been established it is no longer necessary to examine the reasonableness prong of the limited public forum standard governing restrictions on speech.

113. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389–90 (1993) (explaining that once a limited public forum is opened to a particular type of speech, selectively denying access or speech based on viewpoint of a group whose speech would otherwise be allowed in the forum constitutes viewpoint discrimination; thus, it is necessary to establish whether CLS was participating in speech that was permissible in the forum created by the RSO program).

114. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

115. *CLS*, 130 S. Ct. at 2978–79.

116. *Id.* at 3014 (Alito, J., dissenting).

117. *See generally id.*

Muslim Law Students.<sup>118</sup> When Hastings denied CLS official recognition as an RSO it provided only one reason: “CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation.”<sup>119</sup> Hastings made no contention that the speech CLS engaged in was not the type permitted in the forum. In other words, if CLS, for example, had written into its bylaws that all students were welcome to join the group leaving out any membership limitations, but then required that its “Statement of Faith” be recited at the invocation of every meeting—denouncing sexual activity outside the bonds of marriage between a man and a woman—Hastings likely would have granted CLS RSO status. Hastings would have permitted this practice because, as the majority points out, CLS is entitled to its beliefs.<sup>120</sup> Hastings only took issue with CLS’s membership limitations, not with the group’s speech.<sup>121</sup> Based on Hastings’s willingness in the past to grant RSO status to religious groups, and the fact that Hastings cited CLS’s membership limitations as the only reason for denying the group RSO status, it is apparent that the type of speech in which CLS engaged served the purposes of the RSO program and would otherwise be permitted in the limited public forum.

## 2. *Hastings’s Selective Enforcement and Viewpoint Discrimination*

Once established that CLS’s speech would otherwise be permitted in the forum, it becomes necessary to determine if the limitation placed on CLS’s First Amendment right to expressive association was a result of viewpoint discrimination. In his concurring opinion, Justice Kennedy explained that CLS would have “a substantial case on the merits” if it could demonstrate that Hastings “enforced its policy with the intent or purpose of discriminating or disadvantaging [the] group on account of its views.”<sup>122</sup> When CLS refused to change its membership requirements, Hastings denied RSO status, thus making CLS the only group whose application had ever been rejected.<sup>123</sup> Such

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118. See *Student Organizations*, UNIV. OF CAL. HASTINGS COLL. OF LAW, <http://www.uchastings.edu/student-services/student-orgs/index.html> (last visited Nov. 5, 2010).

119. *CLS*, 130 S. Ct. at 2980–81.

120. *Id.* at 2994 n.26 (“Although registered student groups must conform their conduct to the Law School’s regulation by dropping access barriers, *they may express any viewpoint they wish—including a discriminatory one.*” (citing *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 60 (2006) (emphasis added))).

121. If CLS wanted to become a recognized RSO it would be required to drop its limitations on membership and accept all potential members regardless of their belief or sexual orientation. *Id.* at 2980–81.

122. *Id.* at 3000 (Kennedy, J., concurring).

123. *Id.* at 3002 (Alito, J., dissenting).

selective enforcement of the all-comers policy amounted to viewpoint discrimination.

The standard for determining if a statute, or policy in this case, has been selectively enforced, and is thus in violation of the law is similar in both the criminal and civil justice systems.<sup>124</sup> A concise explanation of the standard involved in criminal cases is laid out in *Gardenhire v. Schubert*. In *Gardenhire*, the court stated three factors for determining when selective enforcement has occurred:

First, [an official] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons belonging to that group in similar situation. Second, [the official] must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the group which the defendant belongs to.<sup>125</sup>

When selective enforcement is at issue “it is an absolute requirement that the plaintiff make at least a *prima facie* showing” that the law or policy was not enforced against others similarly situated.<sup>126</sup>

In his dissent, Justice Alito pointed to numerous examples in the record where registered student groups included in their bylaws—the very bylaws to be reviewed and approved by the same committee who purportedly required an all-comers policy—limitations on membership and leadership positions to “*those who agreed with the groups’ viewpoints.*”<sup>127</sup> These student organizations “require[d] that their leaders and/or members agree[d] with the organization’s beliefs and purposes.”<sup>128</sup> Justice Alito continued:

[T]he 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 as long as the student did not “exhibit a consistent disregard and lack of respect for the objective of the

124. *Gardenhire v. Schubert*, 205 F.3d 303, 318–19 (6th Cir. 2000) (citing *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991)).

125. *Id.* at 319 (citing *Anderson*, 923 F.2d at 453); see also 16B AM. JUR. 2D *Constitutional Law* § 941 (1998) (providing examples of what constitutes selective enforcement for the purposes of the equal protection clause).

126. *Id.* (citing *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997)).

127. *CLS*, 130 S. Ct. at 3004 (Alito, J., dissenting) (emphasis added).

128. *Id.* at 3005 n.1 (Alito, J., dissenting) (quoting Brief for Appellant at 14–15, *CLS*, 130 S. Ct. 2971 (No. 06-15956 (CA9))). It is worth noting that there is a discrepancy in the case as to the policy Hastings supposedly adhered to at certain times. *Id.* at 3005–06. At one point Hastings admitted to allowing student groups to exclude members based on viewpoint. *Id.* This admission referred to the same policy it is now claiming is an “accept all-comers” policy. *Id.* In essence, Hastings judicially admitted to allowing students to discriminate based on belief until *CLS* asked to do the same thing. *Id.*

organization,” which centers on a “celebrat[ion] [of] Vietnamese culture.” Silenced Right limited voting membership to students who “are committed” to the groups “mission” of “spread[ing] the pro-life message.” La Raza limited voting membership to “students of Raza background.”<sup>129</sup>

In addition to the clear evidence that Hastings allowed officially recognized student groups to limit membership and leadership based on belief, Hastings admitted to this practice in its answer to CLS’s complaint. The nondiscrimination policy—which Hastings interprets and now refers to as the all-comers policy<sup>130</sup>—“permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.”<sup>131</sup> The result of such application of the all-comers policy meant, for example, that the pro-life student group did not have to grant membership to someone who supported a woman’s right to an abortion. The Student Democratic Caucus did not have to offer a leadership position to a student affiliated with a conservative Tea Party movement. But if CLS wanted to be officially recognized as an RSO it would be forced to grant membership to “avowed atheists.”<sup>132</sup> When Hastings singled out CLS to selectively enforce its policy, and continued to allow similarly situated student groups to limit their membership based on belief, Hastings participated in “patent viewpoint discrimination.”<sup>133</sup>

Hastings offered no justification as to its selective enforcement, however, as the old cliché goes, “actions speak louder than words.” The effect of this enforcement was clearly discriminatory. Hastings created a limited public forum and then violated the boundaries it set for itself<sup>134</sup> by denying CLS its First Amendment rights based on the

129. *Id.* at 3004 (internal citations omitted).

130. *Id.* at 3005–06.

131. *Id.* at 3010 (quoting Answer to First Amended Complaint, Christian Legal Soc’y v. Kane at 7, No. C04-04 484JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006), 2008 WL 4050121).

132. *Id.*

133. *Id.* Eugene Volokh also notes:

Under what I call the No Governmental Viewpoint Discrimination Principle, the government may not discriminate among speakers based on viewpoint, at least when it subsidizes a broad range of private speakers that are expressing their own views. Under the No Governmental Religious Discrimination Principle, the government may not exclude religious conduct from subsidy programs when it subsidizes equivalent secular conduct. Both principles mean that sometimes the government indeed must subsidize behavior with which it disagrees, at least if it subsidizes other behavior that differs only in its viewpoint or religiosity. But, as I’ll explain, these exceptions do not stop the government from imposing antidiscrimination conditions on its subsidies. Such conditions are religion-neutral, viewpoint-neutral, and generally even content-neutral, *at least if they’re applied evenhandedly to all participating groups.*

Volokh, *supra* note 35, at 1922–23 (emphasis added).

134. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

group's Christian viewpoint. In addition, the Court in *Healy* was unequivocal; no matter how much the university disagreed with group's viewpoint and philosophy "[t]he mere disagreement . . . affords no reason to deny [the group] recognition."<sup>135</sup>

As *Good News* explains, once viewpoint discrimination has been established, the reasons provided for the restriction on speech are irrelevant.<sup>136</sup> The exhaustive list of justifications for the all-comers policy becomes obsolete once it is established that the policy, while neutral on its face, was enforced in a viewpoint discriminatory manner. Hastings placed CLS at a disadvantage to its competitors because of CLS's standpoint in a forum in which CLS's language would otherwise be permitted. Under the circumstances, and considering the precedent, it would be nearly impossible for Hastings to legally justify its actions.

## B. Counter Arguments

On remand Hastings may try to contort its policy into a content-based barrier—one that limits the time, place, or manner of the speech—rather than a restriction based on viewpoint, triggering analysis under strict scrutiny.<sup>137</sup> If successful, Hastings would have to prove that the restriction on CLS's expressive association rights served a compelling government interest and was narrowly tailored to achieve that end.<sup>138</sup> The university will likely set out as a compelling interest the need to protect students against discrimination based on sexual orientation, and the necessity to provide students with opportunities to "pursue academic and social interests outside the classroom . . ." <sup>139</sup> CLS's answer to these interests should be two-fold: (1)

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135. *Healy v. James*, 408 U.S. 169, 187 (1972).

136. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001).

137. See *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a registered religious student group was denied access to university facilities because of the university's fear of violating the Establishment Clause. *Id.* at 280. The Court of Appeals for the Eight Circuit viewed the university's regulation as content-based discrimination on speech and subjected the university's actions to strict scrutiny. The university was unable to find a compelling justification for its regulation and lost the case. *Id.* at 263. The Supreme Court affirmed. *Id.* at 277. This case is distinguished from *Christian Legal Society* in that it focuses more on equal access rights than on forum analysis and First Amendment jurisprudence. Further, Justice Stevens in his concurring opinion to *Widmar* states the very principle that should govern *Christian Legal Society on remand*: "the university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted." *Id.* at 280 (Stevens, J., concurring).

138. *Id.* at 270 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)); see also Jacobs, *supra* note 60, at 596 (explaining that when a government restriction on speech is categorized as a content-based restriction, it is subjected to the most rigorous scrutiny, "which is almost always fatal").

139. *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2971, 2997 (2010).

CLS did not discriminate on the basis of sexual orientation and (2) if this interest is so compelling why did Hastings allow other groups to limit membership based on viewpoint?

1. *Discrimination on the Basis of Sexual Orientation*

CLS's proposed bylaws did not exclude members based on sexual orientation. Instead, they limited membership "on the basis of a conjunction of conduct and the belief that that conduct is not wrong."<sup>140</sup> Recall that CLS required members to sign a "Statement of Faith" and to "conduct their lives in accord with prescribed principles."<sup>141</sup> Among those principle beliefs was that "sexual activity should not occur outside of marriage between a man and a woman."<sup>142</sup> Under this provision, membership would be excluded not just from students who participated in homosexual activity, but from students who engaged in premarital, heterosexual activity, or bi-sexual activity.

Hastings would have the court believe CLS's bylaw is an assault on sexual orientation; when in reality, it is an avenue for CLS to demonstrate its entitled belief that sexual activity should be reserved for marriage between man and wife.<sup>143</sup> CLS was not standing outside its meetings holding signs that read: "No Homosexuals Allowed," instead it was asking potential members to agree with its purposes and beliefs the same way many other RSOs had already done. Under its own bylaws, CLS would grant membership to a repentant homosexual<sup>144</sup> the same way it would admit a repentant heterosexual; what mattered to CLS was that the student cease participating in activity contrary to the group's mission, and adopt the beliefs and purposes of the CLS. CLS's "Statement of Faith" was not an attack on homosexuals, it was a way for CLS to limit membership based on a combination of conduct and the belief that the conduct was not wrong.<sup>145</sup> The majority dismissed this distinction without examining the practices of other RSOs.<sup>146</sup>

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140. *Id.* at 2990.

141. *Id.* at 2980.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 2990 (citing Brief for Petitioner at 35–36, *CLS* 130 S. Ct. 2971 (No. 08-1371 (CA9))).

146. The Court seemed to base its dismissal, in part, on language from *Lawrence v. Texas*, stating: "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." *Id.* (quoting *Lawrence v. Texas* 539 U.S. 558, 575 (2003)). This comparison is flawed in that CLS's bylaw was not targeted solely at homosexual conduct. While it may be argued that CLS's bylaws had a disproportionate effect against homosexuals, such effect is generally not enough to establish unconstitutional discrimination. See *Washington v. Davis*, 426 U.S. 229 (1976) (explaining that a disproportionate impact on African Americans of a writ-

Had the Court taken the time to examine how other RSOs were permitted to limit membership, it likely would not have discharged CLS's explanation so quickly. When compared to other groups, it is apparent that CLS was only asking to limit membership in the same manner as other RSOs. For example, recall that the student group Silenced Right was permitted to limit membership to students who were committed to the group's mission of "spread[ing] the pro-life message."<sup>147</sup> This student group clearly did not agree with certain conduct—the practice of receiving and/or administering an abortion—and excluded members whose *conduct and beliefs* were contrary to its mission. Thus, a student who received an abortion, and believed her actions were appropriate, could possibly be denied membership in Silenced Right because her actions, and the belief that those actions were not wrong, did not further the group's mission of "spreading the pro-life message." When CLS asked for an exemption from the all-comers policy it was, in essence, asking to limit membership in the exact same way as Silenced Right. In actuality, CLS was not asking for an exemption; it was asking to be treated on equal terms as other RSOs. If CLS is entitled to its beliefs,<sup>148</sup> it should be entitled to practice those beliefs by limiting membership in the same way other officially recognized student groups have been permitted.

In addition, it could also be argued that because CLS is entitled to its beliefs, it should be permitted to demonstrate those beliefs through action. CLS included in its Statement of Faith a commitment to the Holy Bible as "the inspired Word of God."<sup>149</sup> Many Christian sects believe their faith, or in this instance their belief, "is dead" if not accompanied by a demonstration of that belief.<sup>150</sup> In other words, CLS's belief ceases to exist if not accompanied by some action. Thus, to deny CLS the right to limit membership based on this combination of belief and conduct—the same right as was afforded to other RSOs—could amount to a denial of CLS's entitled right to belief.

## 2. *The Not-So-Compelling Government Interest*

Finally, the fact that RSO status was granted to groups who clearly exclude membership and leadership positions based on viewpoint runs contrary to any purported compelling interest by Hastings that it is invested in providing students with opportunities to "pursue

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ten test of verbal skill administered to applicants for employment as police officers did not warrant the conclusion that the test, which was neutral on its face, was a purposely discriminatory device.).

147. *CLS*, 130 S. Ct. at 3004.

148. *Id.* at 2994 n.26 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) ("[registered student groups] may express any viewpoint they wish—including a discriminatory one.")).

149. *Id.* at 2980.

150. *James* 2:17 (King James) ("[F]aith, if it hath not works, is dead . . .").

academic and social interests outside of the classroom . . . .”<sup>151</sup> How can Hastings purport to have such an interest in affording membership opportunities to “all-comers” in one sentence, and permit groups to pass bylaws that clearly exclude membership based on viewpoint in the next without defeating its own purposes? It can’t.

## V. CONCLUSION

Hastings College of Law created a limited public forum through its RSO program. Under Supreme Court precedent, Hastings “must respect the lawful boundaries it has itself set.”<sup>152</sup> By selectively enforcing the all-comers policy against CLS, Hastings participated in viewpoint discrimination and violated CLS’s constitutional rights. Upon remand the lower courts should have three options; (1) grant CLS the exemption to the all-comers policy, (2) enforce the policy equally throughout its RSO program, or (3) refuse to review the case entirely.

As stated earlier, granting the exemption to the policy would result in CLS being treated on equal terms as other RSOs who have already been permitted to exclude members based on viewpoint.<sup>153</sup> Since the Supreme Court upheld the constitutionality of the policy on its face, the lower court may enjoin Hastings to apply the policy uniformly throughout the RSO program. Such a response from the lower court would result in a lose-lose situation for both Hastings and CLS. The university would be forced to disband multiple RSOs who were previously granted permission to exclude members and allow them to reapply for RSO status with modified bylaws. Hastings would then be required to examine all proposed bylaws to ensure no group was attempting to limit membership based on viewpoint. This would put an immense burden on both the existing RSOs and Hastings. CLS would either have to continue existing separate from the RSO program, or change its bylaws to allow all students membership opportunities—neither of which would be ideal for CLS. The best case scenario for CLS would be for the lower court to enjoin Hastings to treat CLS on equal terms as other RSOs and allow them to limit their membership to those who “agree with the organization’s beliefs and purposes.”<sup>154</sup>

Finally, the court on remand may refuse to review the case entirely. This could prove disastrous for minority student groups across the country. Universities would be permitted to create facially neutral policies and selectively enforce them against minority groups sim-

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151. *CLS*, 130 S. Ct. at 2978.

152. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

153. *See supra* subsection III.B.1 (discussing the example of the RSO “Silenced Right”).

154. *CLS*, 130 S. Ct. at 3005 n.1 (Alito, J., dissenting) (citing Brief for Appellant at 14–15, *CLS*, 130 S. Ct. 2971 (No. 06-15956 (CA9))).



ply because they do not agree with the group's ideas or philosophies. Fear of such unconstitutional backlash was evident by the plethora of amici curiae briefs filed with the Court once the decision in the subject case was announced.<sup>155</sup> Hastings unjustifiably discriminated against CLS because it did not agree with the group's viewpoint. CLS should be granted permission to limit membership and be treated on equal terms as every other RSO at the college, not subjected to discriminatory selective enforcement of a disputed all-comers policy.

## VI. UPDATE

In November 2010, the Ninth Circuit Court of Appeals refused to review the issue of whether Hastings selectively applied its nondiscrimination policy.<sup>156</sup> The court claimed CLS had failed to preserve for appeal its argument that Hastings selectively applied its nondiscrimination policy.<sup>157</sup> The appellate court bifurcated the issue into two related discrimination arguments—an “uneven effect” argument, and a “pretext” argument—claiming the importance of the distinction due to the fact that the Supreme Court “remanded only the pretext claim.”<sup>158</sup> In the end, the Ninth Circuit refused to review the issue, and in doing so, passed up a historical opportunity to create—or

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155. After the Court's ruling, multiple briefs of amici curiae in support of the Christian Legal Society were filed with the court. The following list is just a sample of the institutions: The Boy Scouts of America, Advocates International, The Foundation for Individual Rights in Education, The Center for Constitutional Jurisprudence, The Pacific Justice Institute, Agudath Israel, Cornerstone at Boise State University, Officers of Various Christian Legal Society student Chapters, Union of Orthodox Jewish Congregations of America, and one brief written from the Attorney Generals of thirteen different states. See *Christian Legal Society v. Martinez*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/christian-legal-society-v-martinez/> (listing all Amicus Briefs). These institutions posited many different arguments as to why they disagreed with the Supreme Court's ruling, however, they are united in believing that “the [Court of Appeals] ruling . . . threatens the fundamental right of students to associate for a common cause and purpose, and in particular student groups who adhere to common religious beliefs.” Brief of Amicus Curiae the Rutherford Institute in Support of Petitioner at 1, *CLS*, 130 S. Ct. 2971 (No. 08-1371).

156. See *Christian Legal Soc'y v. Wu*, 626 F.3d 483 (9th Cir. 2010).

157. *Id.* at 485 (“We review only issues [that] are argued specifically and distinctly in a party's opening brief.” (citing *Brownfield v. City of Yakima*, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010))).

158. *Id.* The Ninth Circuit Court of Appeals noted:

First, CLS has argued that the school's Nondiscrimination Policy is unconstitutional because it prohibits discrimination on certain bases, including religion, but not others. Thus, even neutrally applied, the policy leaves groups like Hastings Democratic Caucus free to limit membership to those who agree with its core beliefs (which involve political issues), while CLS (whose core beliefs are religious) cannot. We call this the “uneven effect” argument. Second, CLS has argued that in practice Hastings selectively applies its policy against CLS because of its particular beliefs. We call this the “selective application” or “pretext” argument.

break, for that matter—judicial boundaries in which the First Amendment rights of association, speech, and religion interact. The Ninth Circuit did, however, leave the door open for possible litigation in the future; if Hastings continues to selectively enforce its nondiscrimination policy, CLS is not restricted from bringing another claim.<sup>159</sup> Though silent for now, given the impact of the issue on First Amendment law, the issue is far from settled.

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The distinction between these arguments is critical, because the Supreme Court remanded only the pretext claim.

*Id.* (internal citations omitted).

159. *Id.* at 488.