SUPREME COURT OF THE UNITED STATES

No. 08–1371

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, AKA HASTINGS CHRISTIAN FELLOWSHIP, PETITIONER *v.* LEO P. MARTINEZ ET AL.

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

[June 28, 2010]

JUSTICE STEVENS, concurring.

The Court correctly confines its discussion to the narrow issue presented by the record, see *ante*, at 8–12, and correctly upholds the all-comers policy. I join its opinion without reservation. Because the dissent has volunteered an argument that the school's general Nondiscrimination Policy would be "plainly" unconstitutional if applied to this case, *post*, at 18 (opinion of ALITO, J.), a brief response is appropriate. In my view, both policies are plainly legitimate.

The Hastings College of Law's (Hastings) Nondiscrimination Policy contains boilerplate language used by institutions and workplaces across the country: It prohibits "unlawfu[l]" discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." App. 220. Petitioner, the Hastings chapter of the Christian Legal Society (CLS), refused to comply. As the Court explains, *ante*, at 5–6, CLS was unwilling to admit members unless they affirmed their belief in certain Christian doctrines and refrained from "participation in or advocacy of a sexually immoral lifestyle," App. 146. CLS, in short, wanted to receive the school's formal recognition—and the benefits that attend

formal recognition—while continuing to exclude gay and non-Christian students (as well as, it seems, students who advocate for gay rights).

In the dissent's view, by refusing to grant CLS an exemption from the Nondiscrimination Policy, Hastings violated CLS's rights, for by proscribing unlawful discrimination on the basis of religion, the policy discriminates unlawfully on the basis of religion. There are numerous reasons why this counterintuitive theory is unsound. Although the First Amendment may protect CLS's discriminatory practices off campus, it does not require a public university to validate or support them.

As written, the Nondiscrimination Policy is content and viewpoint neutral. It does not reflect a judgment by school officials about the substance of any student group's speech. Nor does it exclude any would-be groups on the basis of their convictions. Indeed, it does not regulate expression or belief at all. The policy is "directed at the organization's activities rather than its philosophy," *Healy* v. *James*, 408 U. S. 169, 188 (1972). Those who hold religious beliefs are not "singled out," *post*, at 19 (ALITO, J., dissenting); those who engage in discriminatory *conduct* based on someone else's religious status and belief are singled out.[1] Regardless of whether they are the product

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[1] The dissent appears to accept that Hastings may prohibit discrimination on the basis of religious *status*, though it rejects the notion that Hastings may do the same for religious *belief*. See, *e.g., post*, at 22, n. 5, 28. If CLS sought to exclude a Muslim student in virtue of the fact that he "is" Muslim, the dissent suggests, there would be no problem in Hastings forbidding that. But if CLS sought to exclude the same student in virtue of the fact that he subscribes to the Muslim faith, Hastings must stand idly by. This proposition is not only unworkable in practice but also flawed in conception. A person's religion often simultaneously constitutes or informs a status, an identity, a set of beliefs and practices, and much else besides. (So does sexual orientation for that matter, see *ante*, at 22–23, notwithstanding the dissent's view that a rule excluding those who engage in "unrepentant homosex-

of secular or spiritual feeling, hateful or benign motives, all acts of religious discrimination are equally covered. The discriminator's beliefs are simply irrelevant. There is, moreover, no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views. The policy's religion clause was plainly meant to promote, not to undermine, religious freedom.

To be sure, the policy may end up having greater consequence for religious groups—whether and to what extent it will is far from clear *ex ante*—inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths. But there is likewise no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations. And it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination.[2] The dissent

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ual conduct," App. 226, does not discriminate on the basis of status or identity, *post*, at 22–23.) Our First Amendment doctrine has never required university administrators to undertake the impossible task of separating out belief-based from status-based religious discrimination.

[2] See, *e.g., Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 763 (1994); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 385 (1992); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623, 628 (1984); cf. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–879 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). Courts and commentators have applied this insight to the exact situation posed by the Nondiscrimination Policy. See, *e.g., Christian Legal Society* v. *Walker*, 453 F. 3d 853, 866 (CA7 2006) (stating that "[t]here can be little doubt that" comparable nondiscrimination policy "is viewpoint neutral on its face"); *Truth* v. *Kent School Dist.*, 542 F. 3d 634, 649–650 (CA9 2008) (similar); Volokh, Freedom of Expressive Association and Government Subsidies, 58 Stan. L. Rev. 1919, 1930–1938 (2006).

has thus given no reason to be skeptical of the basic design, function, or rationale of the Nondiscrimination Policy.

What the policy does reflect is a judgment that discrimination by school officials or organizations on the basis of certain factors, such as race and religion, is less tolerable than discrimination on the basis of other factors. This approach may or may not be the wisest choice in the context of a Registered Student Organization (RSO) program. But it is at least a reasonable choice. Academic administrators routinely employ antidiscrimination rules to promote tolerance, understanding, and respect, and to safeguard students from invidious forms of discrimination, including sexual orientation discrimination.[3] Applied to the RSO context, these values can, in turn, advance numerous pedagogical objectives. See *post*, at 3–4 (KENNEDY, J., concurring).

It is critical, in evaluating CLS's challenge to the Nondiscrimination Policy, to keep in mind that an RSO program is a *limited* forum—the boundaries of which may be *delimited* by the proprietor. When a religious association, or a secular association, operates in a wholly public setting, it must be allowed broad freedom to control its membership and its message, even if its decisions cause offense to outsiders. Profound constitutional problems would arise if the State of California tried to "demand that all Christian groups admit members who believe that Jesus

[3] In a case about an antidiscrimination policy that, even if ill-advised, is explicitly directed at *preventing* religious discrimination, it is rather hard to swallow the dissent's ominous closing remarks. See *post*, at 37 (suggesting that today's decision "point[s] a judicial dagger at the heart of" religious groups in the United States (internal quotation marks omitted)). Although the dissent is willing to see pernicious antireligious motives and implications where there are none, it does not seem troubled by the fact that religious sects, unfortunately, are not the only social groups who have been persecuted throughout history simply for being who they are.

was merely human." *Post*, at 27 (ALITO, J., dissenting). But the CLS chapter that brought this lawsuit does not want to be just a Christian group; it aspires to be a recognized student organization. The Hastings College of Law is not a legislature. And no state actor has demanded that anyone do anything outside the confines of a discrete, voluntary academic program. Although it may be the case that to some "university students, the campus is their world," *post*, at 13 (internal quotation marks omitted), it does not follow that the campus ought to be equated with the public square.

The campus is, in fact, a world apart from the public square in numerous respects, and religious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role. Some of those decisions will be controversial; many will have differential effects across populations; virtually all will entail value judgments of some kind. As a general matter, courts should respect universities' judgments and let them manage their own affairs.

The RSO forum is no different. It is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals. These are not legal questions but policy questions; they are not for the Court but for the university to make. When any given group refuses to comply with

the rules, the RSO sponsor need not admit that group at the cost of undermining the program and the values reflected therein. On many levels, a university administrator has a "greater interest in the content of student activities than the police chief has in the content of a soapbox oration." *Widmar* v. *Vincent*, 454 U. S. 263, 280 (1981) (STEVENS, J., concurring in judgment).

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct," App. 226. The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.