

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHRISTIAN LEGAL SOCIETY CHAPTER :

4 OF THE UNIVERSITY OF CALIFORNIA, :

5 HASTINGS COLLEGE OF THE LAW, :

6 AKA HASTINGS CHRISTIAN FELLOWSHIP, : No. 08-1371

7 Petitioner :

8 v. :

9 LEO P. MARTINEZ, ET AL. :

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11 Washington, D.C.

12 Monday, April 19, 2010

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 a.m.

17 APPEARANCES:

18 MICHAEL W. McCONNELL, ESQ., Stanford, California; on
19 behalf of Petitioner.

20 GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of
21 Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 08-1371, Christian
5 Legal Society Chapter of the University of California-
6 Hastings v. Martinez.

7 Mr. McConnell.

8 ORAL ARGUMENT OF MICHAEL W. McCONNELL

9 ON BEHALF OF THE PETITIONER

10 MR. McCONNELL: Mr. Chief Justice, and may
11 it please the Court:

12 If Hastings is correct, a student who does
13 not even believe in the Bible is entitled to demand to
14 lead a Christian Bible study, and if CLS does not
15 promise to allow this, the college will bar them from its
16 forum for speech.

17 The First Amendment -- under the First
18 Amendment, rights run the opposite way. Hastings is the
19 government; CLS is private. A public forum for speech
20 must be open and inclusive, but participants in the
21 forum are entitled to their own voice.

22 JUSTICE KENNEDY: Now, these are fundamental
23 arguments, and I don't want to spend too much time on
24 factual matters because that's frustrating to both the
25 Court and the counsel.

1 But we do have the problem of the
2 stipulation. The stipulation makes it clear that
3 Democrats and Republicans can both get into the other
4 one's club. That's the Stipulations 17 and 18 at 220 of the
5 Joint Appendix. You want to get away from the
6 stipulation by what, according to your reply brief,
7 Hastings said in its answer, but the stipulation
8 supersedes the answer.

9 So if both counsel could just address for a
10 moment: What is the case that we have here? You have
11 different views on what case is before us.

12 MR. McCONNELL: Happy to, Justice Kennedy.

13 If you just look with me at Joint
14 Stipulation 17, I think it makes this completely clear.
15 That's on page 221 of the Joint Appendix, and it states:
16 "Both parties agreed that in order to become a
17 registered student organization a student organization's
18 bylaws must provide that its membership is open to all
19 students" -- that's the all-comers policy -- "and the
20 organization must agree to abide by" -- "abide by the
21 Nondiscrimination Policy." That's capital N, capital P,
22 a defined term. The "Nondiscrimination Policy" is
23 defined in Joint Stipulation Number 15. That is what we
24 have been calling the written policy. And the idea that
25 membership must be open to all students is described in

1 Joint Stipulation 18, which is simply a description of
2 what that policy is.

3 JUSTICE SCALIA: But doesn't -- doesn't the
4 one -- isn't the all-comers policy broader than the
5 nondiscrimination policy, so that if you comply with
6 that you automatically comply with everything in the
7 nondiscrimination clause?

8 MR. McCONNELL: It is broader. It's our
9 position that either of these justifications for
10 excluding CLS is unconstitutional.

11 JUSTICE SCALIA: Yes, but -- but the latter,
12 the nondiscrimination policy, you assert is -- is not
13 viewpoint neutral, that it has a particular impact upon
14 a religious organization; whereas, the other policy, the
15 all-comers policy, applies to everybody, and that
16 argument is not available to you.

17 MR. McCONNELL: Justice Scalia, our
18 argument -- there are two policies. They have invoked
19 both. We believe both are unconstitutional, but for
20 slightly different reasons. The written policy is
21 unconstitutional because it's overtly viewpoint
22 discrimination -- discriminatory and thus violating
23 the principles of cases like *Rosenberger* and *Widmar*.

24 The all-comers --

25 JUSTICE GINSBURG: But, Mr. McConnell,

1 Justice Scalia had just made the point that the all-comers
2 policy overwhelms the other, so that I would like you to
3 deal up front with the all-comers policy that the dean
4 in her deposition said, loud and clear: "Our policy is
5 all-comers. Yes, Republicans have to be admitted to the
6 Democratic group and vice versa." So unless you are
7 challenging the veracity of the dean after stipulating,
8 as you did, that all-comers is the policy, I don't see
9 how we can listen to your argument about the so-called
10 written policy.

11 MR. McCONNELL: Well, both policies we contend
12 are unconstitutional. Let's begin with the all-comers
13 policy, and when you conclude that it is
14 unconstitutional, we will also need to deal with the
15 other since they have two arrows in their quiver.

16 JUSTICE KENNEDY: You can do that, but you --
17 it's a much different case if Hastings treats the CLS
18 differently than it treats the Democratic and Republican
19 Clubs. That's a much different -- frankly, it's a much
20 easier case for you. But it's -- it's frustrating for
21 us not to know what kind of case we have in front of us.

22 MR. McCONNELL: Your Honor, it's a case
23 where the -- where Hastings has put forward two quite
24 different justifications for denying our right and both
25 of them are unconstitutional.

1 Let's begin with the all-comers policy.

2 JUSTICE ALITO: Mr. McConnell, when I
3 read -- when I read the papers that Hastings submitted
4 to the district court at the same time that the joint
5 stipulation was submitted, I saw one reference after
6 another to an allegation that Hastings was applying its
7 policy in a discriminatory manner, that it was not in
8 fact insisting that all registered student organizations
9 admit all applicants. And when I read their brief in
10 the Ninth Circuit, I saw that point reiterated again and
11 again.

12 So that led me to believe that what was
13 stipulated was not that in fact they had a policy which
14 they enforced under which anybody who applied to any
15 group would be admitted, but that this was what Dean
16 Kane had announced. That was the stated policy, but not
17 necessarily the actual policy that was employed. And
18 that was the argument it seemed to me that CLS was
19 making; isn't that correct?

20 MR. MCCONNELL: That's entirely correct,
21 Justice -- Justice Alito. That's --

22 JUSTICE SCALIA: Well, you should -- if that
23 was it you should have brought in some -- some evidence
24 of different treatment of other groups. And there --
25 as I --

1 MR. McCONNELL: Justice --

2 JUSTICE SCALIA: There is none of that
3 except your citation of the bylaws of two groups in your
4 brief, as I --

5 MR. McCONNELL: Well, but that is in fact the
6 evidence. When --

7 JUSTICE GINSBURG: But, Mr. McConnell, here
8 is a statement, a stipulation. It's a stipulation for
9 summary judgment. It says: District Judge, you take
10 this to be the fact: Hastings requires that registered
11 student organizations allow any student to participate,
12 become a member, seek leadership positions in the
13 organization. That is not qualified. It says:
14 District Judge, here are the facts that we stipulate.
15 It doesn't say this is what the dean says, but it's not
16 really enforced. It's not qualified at all.

17 MR. McCONNELL: Justice Ginsburg, we -- we
18 stipulated that this was their policy. That stipulation
19 contains nothing about the historical facts as to how
20 Hastings has actually applied it. But let's talk about
21 the policy, because it is unconstitutional --

22 JUSTICE SCALIA: I wish you would. You are
23 going to waste your whole time just discussing this
24 stipulation point. Let's assume -- let's assume that --

25 MR. McCONNELL: Yes.

1 JUSTICE SCALIA: -- the latter is the policy.

2 MR. McCONNELL: Yes, because the policy is I
3 think blatantly unconstitutional. It is manifestly
4 overbroad with respect to any purposes stated. And, of
5 course, in Healy v. James, this Court held that any
6 restriction on a student speech forum may be no more
7 extensive than is required by its purposes. It is also
8 a frontal assault on freedom of association. Freedom of
9 association is the right to form around shared beliefs.
10 To say that groups may not form around shared beliefs --

11 JUSTICE SOTOMAYOR: So is this an exception
12 that you want to talk about as it is applied to
13 religious groups, or are you suggesting that if a group
14 wanted to exclude all black people, all women, all
15 handicapped persons, whatever other form of
16 discrimination a group wants to practice, that a school
17 has to accept that group and recognize it, give it funds,
18 and otherwise lend it space?

19 MR. McCONNELL: Not at all, Justice
20 Sotomayor. Our position is that --

21 JUSTICE SOTOMAYOR: So then, what is --
22 what is wrong with the purpose of a school to say we don't
23 wish any group that doesn't -- that discriminates?

24 MR. McCONNELL: The stipulation is that they
25 may not exclude based on status or beliefs. We have

1 only challenged the beliefs, not status. Race, any
2 other status basis Hastings is able to enforce. But
3 they may not tell a group --

4 JUSTICE STEVENS: So, what if the belief --

5 MR. McCONNELL: -- that you just have to let
6 you in that don't agree with you.

7 JUSTICE STEVENS: What if the belief is that
8 African Americans are inferior?

9 MR. McCONNELL: Again, I think they can
10 discriminate on the basis of the belief, but not on
11 the basis of the status. So that if the --

12 JUSTICE SCALIA: You could have --

13 MR. McCONNELL: -- if there were racist
14 organizations --

15 JUSTICE SCALIA: -- a student
16 organization, I suppose, of that type. It wouldn't
17 include many people. But if there were such an
18 organization, I assume that they would have that -- that
19 belief required, right?

20 MR. McCONNELL: That's right, but they could
21 not go the next step and exclude someone on the basis of
22 status, under our --

23 JUSTICE BREYER: Doesn't this say the
24 opposite? It says we are -- you have to let anybody in --
25 anybody -- regardless of their status or beliefs. So you can't

1 discriminate on the basis of status or belief. That's
2 what the policy says I just read. It doesn't say you
3 can; it says you can't.

4 MR. McCONNELL: It's that the group may not
5 confine its leadership based upon its beliefs. That means
6 that --

7 JUSTICE BREYER: That's what you say, but
8 that's not what the policy says. The policy says that
9 you have to let everybody in, regardless of their status
10 or belief.

11 MR. McCONNELL: Right. And -- and our view is
12 that the status --

13 JUSTICE BREYER: So you cannot discriminate on
14 the basis of status or belief.

15 MR. McCONNELL: The status half of that is
16 perfectly constitutional and --

17 JUSTICE SCALIA: You say you --

18 MR. McCONNELL: -- the belief half of that is not.

19 JUSTICE BREYER: -- you have to -- you
20 have to let these organizations discriminate on the
21 basis of belief. And they say: No, we don't want to;
22 that's too complicated for us to figure out which ones
23 we should, which ones we shouldn't. We'd rather let them
24 work off-campus. We just don't want to get into this
25 business. It's not just against religion. It might be

1 against a Turkish-speaking society that thinks Turkish
2 is extremely important to speak or a chess club that
3 thinks the same. It could be a lot of people.

4 Now, why do you -- what's wrong with us, a First
5 Amendment -- an organization itself affected with First
6 Amendment interests, saying we just don't want to have
7 those on campus organizations, too much trouble.

8 MR. McCONNELL: What is -- what is wrong with
9 that is that restrictions on a designated public forum must
10 be reasonable in light of the purposes of the forum. The
11 purpose of the forum is set forth in Joint Stipulation
12 Number 8. It is to promote a diversity of viewpoints
13 among registered student organizations. If the student
14 organizations are not allowed to have a coherent set of
15 beliefs, there can be no diversity among them.

16 JUSTICE SOTOMAYOR: But this sounds like a
17 debate over whether the policy as the school believes it
18 should be implemented is not a good one. But isn't that
19 their choice? Don't we give deference to an educational
20 institution in terms of the choices it makes about
21 effecting its own -- its purposes? And the purpose here
22 is we don't want our students to discriminate.

23 MR. McCONNELL: There is a stipulation as to
24 what the purpose is, and the purpose is to promote a
25 diversity of viewpoints among registered student

1 organizations.

2 JUSTICE GINSBURG: And is --

3 JUSTICE BREYER: That's their way of doing
4 that.

5 MR. McCONNELL: It is a stipulated fact.

6 JUSTICE GINSBURG: And Hastings takes the
7 position that it's all in favor of diversity, not only
8 among the groups but within the groups. So --

9 MR. McCONNELL: Which is not the joint
10 stipulation. The stipulation is that the purpose of the
11 forum is diversity among groups. Their policy is not --
12 it's not only just unreasonable in light of it; it is
13 contrary to it.

14 JUSTICE GINSBURG: It is that they --

15 MR. McCONNELL: It defeats the purpose of the forum.

16 JUSTICE GINSBURG: They say, yes, we believe in
17 diversity among groups, but we also believe in diversity
18 within the group; that's a good thing. They are not backing
19 off from: We think diversity among groups is fine.

20 MR. McCONNELL: They say that in their
21 brief, but that is not the stipulated fact in the
22 case.

23 JUSTICE BREYER: Let me make an imaginary
24 example, and that's --

25 JUSTICE SCALIA: Where -- where is the

1 stipulation?

2 MR. McCONNELL: It's page 216 in the Joint
3 Appendix, Joint Stipulation Number 8. It is the only
4 stipulation in the case having to do with what the
5 purpose is of the RSO forum.

6 JUSTICE SCALIA: Wait a minute now. A
7 diversity --

8 MR. McCONNELL: "Hastings seeks to promote a
9 diversity of viewpoints among registered student
10 organizations."

11 And note how destructive an all-comers
12 policy directed on belief is toward -- toward that.
13 That means that if, for example, there's an NAACP
14 chapter, it would have to allow a -- a racist skinhead
15 to sit on -- in on its planning meetings. That means
16 that if there's an environmentalist club that has a
17 demonstration in Sacramento in favor of cap-and-trade
18 legislation, they would have to allow --

19 JUSTICE GINSBURG: It may be --

20 MR. McCONNELL: -- a global warming skeptic
21 to --

22 JUSTICE GINSBURG: It may be an ill-advised
23 policy, but the school says: It's our policy. It's
24 working fine, and all the -- the hypotheticals about
25 sabotage, takeover, they haven't happened.

1 MR. McCONNELL: They haven't happened
2 because this policy came into being -- was announced for
3 the first time in 2005. So there couldn't possibly be
4 any -- any record of that.

5 JUSTICE SCALIA: This -- this was not the
6 policy on the basis of which CLS was excluded; is that
7 correct?

8 MR. McCONNELL: That's correct, it was not.

9 JUSTICE SCALIA: It -- when they were
10 refused participation in the -- in the student
11 organization program, they were not told about the
12 all-comers policy.

13 MR. McCONNELL: That's correct. Joint
14 Stipulation Number 40 states clearly that the -- that the
15 -- that they were informed, and I quote: "They were
16 informed that CLS bylaws were not compliant with the
17 religion and sexual orientation provisions of the
18 Nondiscrimination Policy."

19 JUSTICE ALITO: And was there any written
20 document memorializing this policy prior to the time
21 when the former dean gave her deposition?

22 MR. McCONNELL: Never. And --

23 JUSTICE ALITO: And is the -- is the policy
24 as articulated by the dean in her deposition the same as
25 the policy that Hastings now claims it has in its brief?

1 MR. McCONNELL: I don't think so. Every
2 time the policy is mentioned, it seems to morph into
3 something else. When the dean announced it at the
4 deposition, she said all students may participate on
5 the -- in all activities, period, full stop. Now we
6 find out in their brief, well, their -- groups can have
7 conduct limitations, they can require dues, they can
8 have attendance requirements, they can have competitive
9 contests to see whether they get in.

10 This -- this policy is -- it changes with
11 every wind.

12 And -- but the fundamental problem with
13 this -- with this is what -- what this Court stated in
14 *Velazquez v. Legal Services Corporation*, that you cannot
15 allow -- you cannot allow the terms of the policy just
16 to say that whatever their policy is, that that
17 determines the contours of the program, because that
18 would render the First Amendment a -- a nullity.

19 JUSTICE KENNEDY: Of course, that was not a
20 religion case. Your argument at its most fundamental
21 level is that religious organizations are different
22 because religion is all about belief. But at that point
23 don't we also have a tradition of separation? That's
24 the whole reason why church and state for many purposes
25 are kept separate, so that States are not implicated

1 with religious beliefs.

2 And it -- it -- it seems to me we have to
3 consider that when we are considering your argument.
4 Now, you can cite Rosenberger, but -- but I think this is
5 different from that.

6 MR. McCONNELL: The separation is between
7 church and state, but this Court has held over and over
8 again that speech forums -- that people participating in
9 a speech forum are not the state. The state is
10 Hastings. We are perfectly private. There is nothing
11 wrong with a religious organization, even on public --

12 JUSTICE SOTOMAYOR: You're not --

13 JUSTICE SCALIA: Anyway, as I understand
14 your argument on the all-comers policy, it is not an
15 argument that -- that is based upon the religious nature
16 of CLS. You would make the same argument of
17 unconstitutionality with respect to the student
18 Republican Club, wouldn't you?

19 MR. McCONNELL: We would.

20 JUSTICE SCALIA: Or --

21 MR. McCONNELL: Now, we do --
22 there is in addition a free exercise argument, but I
23 don't -- but in this case what the Free Exercise Clause
24 protects is exactly what the associational freedom test
25 would protect for everyone.

1 JUSTICE KENNEDY: I had thought that an
2 important part of the case, of your case, is that belief
3 is inherent to the idea of religious expression and must
4 be protected. But if the protection causes problems
5 within the school for other policies, then doesn't the
6 separation policy come into play? That's -- that's what
7 I'm asking.

8 MR. McCONNELL: Again, separation does not
9 apply to private parties when they are operating, even
10 on government property.

11 JUSTICE GINSBURG: Mr. McConnell, let's say
12 it is the belief of this group, based on their reading
13 of the Bible, that only white men can lead the Bible
14 studies, can become officers of the group, and that's
15 based on their fundamental belief that that's what the
16 Bible instructs. On your view, must Hastings give this
17 organization status as a recognized student
18 organization?

19 MR. McCONNELL: No, Justice Ginsburg. Our
20 position is it is unconstitutional to -- to prohibit
21 groups to form around beliefs but not around status.

22 JUSTICE GINSBURG: But the belief is -- this
23 is the belief.

24 MR. McCONNELL: They can insist that -- that
25 everyone who participates in the group have that belief,

1 and that, as Justice Scalia said, may mean it's going to
2 be a very small group. But they cannot discriminate on
3 the basis of status. But belief -- as this Court said
4 in *Cantwell v. Connecticut*, belief, the freedom to
5 believe, is absolute.

6 JUSTICE GINSBURG: So, they -- they would have
7 to negate their belief in their practice. They could
8 believe this, but they couldn't implement it?

9 MR. McCONNELL: Well, it's not unusual to
10 say people -- people can believe in all kinds of things
11 that are illegal. That doesn't mean that they can do
12 them. It's not a -- it's not an unfamiliar distinction
13 in our law. But let's look at --

14 JUSTICE SCALIA: This was the basis -- your
15 distinction between status and belief was the basis for
16 your saying that the original policy, whatever --
17 whatever we call it -- what is the name of it?

18 MR. McCONNELL: The written policy?

19 JUSTICE SCALIA: The written policy -- when
20 it forbids discrimination on the basis of sexual
21 orientation was complied with by CLS because it would
22 not discriminate on the basis of orientation, only on
23 the basis of belief.

24 MR. McCONNELL: That's correct.

25 JUSTICE BREYER: If -- if a homosexual

1 person said, I want to belong to this club, and I
2 believe in its principles, I don't believe in sexual
3 relationships before marriage, and that's why I want to
4 work for homosexual marriage, which I do, so my
5 consistency there, is that person -- I am consistent in
6 what I work for, what I believe, and on -- as far as
7 premarital sex is concerned, it's totally 100 percent
8 with your organization that you are representing; would
9 they admit that person or not?

10 MR. McCONNELL: Yes. There's a joint
11 stipulation to that effect, Number 34.

12 JUSTICE SCALIA: CLS doesn't have any -- any
13 belief that marriage is between a man and a woman?

14 MR. McCONNELL: It -- it does. I thought
15 that Justice Breyer posited the case of a person of
16 homosexual orientation who shares that belief.

17 JUSTICE SCALIA: No, no, no, no.

18 JUSTICE BREYER: He shares the belief that
19 there should be no premarital sex --

20 JUSTICE SCALIA: But he wants to marry --

21 JUSTICE BREYER: -- and he says that's why I
22 am working for Proposition 8 or whatever the
23 proposition, or against it --

24 MR. McCONNELL: Oh, oh, I'm sorry,
25 Justice Breyer --

1 JUSTICE BREYER: I'm working to legalize
2 homosexual marriage in which --

3 MR. McCONNELL: I'm sorry. I misunderstood
4 your question. This is a religious group. Their
5 understanding of marriage is based upon their --

6 JUSTICE BREYER: So they would not -- the
7 answer is no, that person --

8 MR. McCONNELL: Not if that person was
9 engaging in sexual conduct that is contrary to the --

10 JUSTICE BREYER: No, he's not --

11 MR. McCONNELL: Well, in that --

12 JUSTICE BREYER: -- because his
13 sexual conduct --

14 MR. McCONNELL: -- or -- I'm sorry. Or --

15 JUSTICE BREYER: -- he will refrain until
16 marriage is made lawful --

17 MR. McCONNELL: Right.

18 JUSTICE BREYER: -- at which point he intends
19 to engage in sexual conduct.

20 MR. McCONNELL: That's right. If the
21 person --

22 JUSTICE BREYER: That person.

23 MR. McCONNELL: Regardless of what he
24 intends to do, if he does not agree with the -- the
25 organization on the point of -- of marriage, then he can

1 be -- he can be excluded from leadership in the group.

2 Again, he's able to attend all the
3 activities. CLS has all of its activities entirely open
4 to everyone. And what it objects to is having -- is
5 being run by non-Christians, because after all, this is
6 a group whose very purpose is --

7 JUSTICE SOTOMAYOR: You keep talking about
8 being forced to let people in. And this is where I'm a
9 little bit confused by your yellow brief.

10 The school has taken the position that any
11 group can apply to use its facilities; priority and
12 funding, et cetera, will only go to recognized student
13 groups. But your group is not being excluded or
14 ostracized completely from the school. Presumably, you
15 can meet in the cafeteria. You can meet in open spaces
16 in the school. You can apply like everyone else, any
17 other nonstudent group, recognized student group. But
18 you have been saying repeatedly in your presentation
19 that you're barred from the campus. And so I'm a little
20 confused as to exactly --

21 MR. McCONNELL: What I -- Justice Sotomayor,
22 I believe what we consistently say is that we have been
23 denied the right to meet on campus. And that is
24 completely true. Look -- if you would look at Joint
25 Stipulation Number 10, at the top of page 219, it provides

1 that CLS, although not currently registered, is eligible
2 to apply for permission for rooms. But there is no
3 stipulation that that will ever be granted, and the
4 record shows that every time CLS has requested
5 permission to meet they have gotten a complete
6 run-around. They have been told: Well, you have to
7 apply through your lawyer, and then their -- they don't
8 get an answer on time and when they get an answer it's,
9 well, because you're not a registered student group --

10 JUSTICE SOTOMAYOR: But let's -- could we --

11 MR. McCONNELL: -- there is not room for
12 you.

13 JUSTICE SOTOMAYOR: Let's -- let's assume,
14 because I'm not quite sure what the record is on these
15 issues -- I'm somewhat confused on the factual assumptions
16 underlying this case. But let's assume two things: One,
17 that in fact you have the option of applying for use of
18 the space and that, assuming there are no conflicts and
19 other things that -- that are in the normal course would
20 preclude your use, that you would be granted use. Is your
21 argument different in that situation?

22 MR. McCONNELL: Justice Sotomayor, even the
23 access to campus communications is absolutely essential,
24 as this Court said in the -- in Healy v. James. We are
25 barred from access to the -- to Hastings' e-mail system;

1 we can't post notices on the usual bulletin board; we
2 are left out of the weekly --

3 JUSTICE SOTOMAYOR: There are bulletin
4 boards. There are other ones.

5 MR. McCONNELL: There -- there's -- there
6 are ones for the -- for campus and student groups, and
7 there's another one for community groups. We're
8 allowed to post on the community group, but we're not
9 allowed to post on the boards that -- that students look
10 to for where student activities occur.

11 We are left out of the -- a very important
12 point -- the student organization fair at the beginning
13 of the year where groups introduce themselves to the
14 One L's as they -- as they come in.

15 JUSTICE SOTOMAYOR: Are you disputing that
16 this is --

17 MR. McCONNELL: We're -- we're barred from
18 that.

19 JUSTICE SOTOMAYOR: Are you disputing this
20 is a limited forum, public forum?

21 MR. McCONNELL: No, it's definitely a
22 limited designated public forum.

23 JUSTICE KENNEDY: But that's different from
24 Cantwell. Cantwell is where the Jehovah's Witness
25 plays the record on the -- on the street. And -- and --

1 MR. McCONNELL: I only cite Cantwell for the
2 proposition that belief is absolute.

3 JUSTICE KENNEDY: No. No. And Cantwell
4 said that belief is central to -- to religions and that
5 people would disagree. But that's precisely why
6 Hastings might argue to us that -- that this is
7 inconsistent with their idea of what this forum is. And
8 if -- will you just address that, please?

9 MR. McCONNELL: I would address it. The
10 forum -- the purposes of the forum are undisputed. They
11 are to provide a diversity of expression among student
12 groups. Their policy disserves the purpose of the forum
13 and therefore cannot be regarded as reasonable in light
14 of that. And what is more, what they have done is --
15 it's also not reasonable because it's independently
16 unconstitutional. What they have done is they've said
17 you may not have fundamental freedom of association or,
18 if you do, we will withdraw an otherwise available
19 benefit from you.

20 As recently as the unanimous decision of
21 this Court in FAIR v. Rumsfeld, the Court reiterated the
22 -- the now I think 100-year old principle that
23 constitutional rights may not be penalized by the
24 withdrawal of benefits any more than they can by -- by
25 direct prohibition.

1 I see that my white light is up, and I'd
2 like to reserve the remainder of my time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 McConnell.

5 Mr. Garre.

6 ORAL ARGUMENT OF GREGORY G. GARRE

7 ON BEHALF OF THE RESPONDENTS

8 MR. GARRE: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This case was decided by both courts below
11 on the premise, which is not disputed at any point in the
12 petition for certiorari, that Hastings reserves the
13 funding and benefits that go to student groups that
14 obtain school recognition to groups that choose to admit
15 all students

16 CHIEF JUSTICE ROBERTS: Well, then why do
17 you have --

18 MR. GARRE: -- regardless of their status or
19 their beliefs.

20 CHIEF JUSTICE ROBERTS: Why do you have a policy,
21 a written policy -- you don't have a written policy that says
22 anything about all-comers. You've got a written
23 policy that says you can -- you can't discriminate on
24 the basis of only one type of belief, religious belief.

25 MR. GARRE: Mr. Chief Justice, first of all,

1 this is a case about injunctive relief. As a matter of
2 law, the only policy that's relevant is the current
3 policy, and that's the one --

4 CHIEF JUSTICE ROBERTS: Well, then why is --

5 MR. GARRE: -- that both sides agree is
6 in place.

7 CHIEF JUSTICE ROBERTS: Is this
8 nondiscrimination policy no longer on the books?

9 MR. GARRE: No. It's -- it's the way in which
10 Hastings implements the nondiscrimination policy in this
11 particular forum. And, again, look at the Ninth Circuit
12 decision in this case. It's --

13 JUSTICE SCALIA: That is not an
14 implementation of the nondiscrimination policy. I mean,
15 the two policies are quite different. Now, are you
16 telling us that the written policy is no longer
17 operative?

18 MR. GARRE: No, it -- Justice Scalia, this
19 is --

20 JUSTICE SCALIA: No, what? No, it's not
21 operative or no, you're not telling me that?

22 (Laughter.)

23 MR. GARRE: It is operative. This -- the
24 all-comers policy is how it's implemented in this
25 context. And the written policy applies not only to the

1 enumerated characteristics; it applies to any arbitrary
2 unreasonable discrimination, and the law school --

3 CHIEF JUSTICE ROBERTS: Well, it doesn't --
4 it doesn't say that.

5 MR. GARRE: It does, Your Honor. It says in
6 the first paragraph on -- this is on page 220 --

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. GARRE: -- of the Joint Appendix: The
9 college is committed to a policy against legally
10 impermissible, arbitrary, or unreasonable discriminatory
11 practices. And then it also goes on and enumerates
12 specific factors. And this is spelled out, I believe in
13 page --

14 CHIEF JUSTICE ROBERTS: So they -- so you're
15 saying the second paragraph is totally
16 unnecessary. You say the first paragraph says you can't
17 discriminate on any basis, and the second paragraph
18 spells out the bases. So why do you do have the second
19 paragraph?

20 MR. GARRE: I think it provides additional
21 guidance. But -- but, again, there shouldn't be any
22 debate about what policy is at issue here. The Ninth
23 Circuit's decision in this case is two-sentence long.
24 The first sentence describes the policy at issue in this
25 case. And it says: "The parties stipulate" --

1 JUSTICE ALITO: Do you think this case
2 deserved a two-sentence decision in the Ninth Circuit?

3 MR. GARRE: Justice Alito, it was decided in
4 the wake of the Ninth Circuit's decision in Truth, which
5 had not only garnered a substantial panel decision but
6 had garnered serious consideration on -- on rehearing.
7 So this case, the Ninth Circuit properly concluded, was
8 controlled by the Truth decision. So in that respect --

9 JUSTICE ALITO: So the answer is yes, this case
10 which is -- before us has produced hundreds and hundreds of
11 pages of amicus briefs, deserved two sentences in the
12 court of appeals?

13 MR. GARRE: In the -- in the sense that it
14 was backed up by the Truth decision, yes. But look at
15 the petition for certiorari in this case. Nowhere did
16 -- did Petitioners challenge the Ninth Circuit's
17 characterization of the policy at issue. The petition
18 says on page 2 that "There are no disputed issues of
19 material fact."

20 JUSTICE ALITO: But hasn't it been -- hasn't
21 it been CLS's position from the very beginning of this
22 case that Hastings has not in fact required every group
23 to admit any student who applies? Don't they say that
24 over and over again in their district court papers, in
25 the court of appeals briefs, and in the cert petition?

1 MR. GARRE: If -- if they believe that that
2 caused the school to adopt a different policy, they
3 shouldn't have stipulated to the policy that they did.
4 And they should have challenged at a minimum --

5 JUSTICE SCALIA: Well, they stipulated that
6 the policy exists. They didn't stipulate that it is --
7 is being faithfully applied by Hastings. What do you do
8 about the -- the -- the two organizations' bylaws
9 referred to in the -- in the Petitioner's brief, which
10 clearly do -- conflict with the so-called all-comers
11 policy?

12 MR. GARRE: All of the bylaws that they've
13 pointed to, Justice Scalia --

14 JUSTICE SCALIA: All of the bylaws --

15 MR. GARRE: -- that they have pointed to in
16 their brief --

17 JUSTICE SCALIA: Yes.

18 MR. GARRE: -- Justice Scalia, either,
19 number one, explicitly say that the organization will
20 comply with the rules and regulations of the school or
21 say that they will admit all students. That includes
22 all the bylaws.

23 Now, they have pointed to various things
24 from the bylaws, and this evolved as they've tried to
25 create material factual issues in this Court. One of

1 the things they've pointed to is the bylaws saying, like
2 the Outlaw bylaw, that says that students who are
3 members of a group can be expelled if they -- expelled
4 if they engage in disruptive or gross misconduct. There
5 is nothing inconsistent about that with the school's
6 policy. The school's interest is not in allowing
7 students to disrupt the activities of students'
8 groups --

9 CHIEF JUSTICE ROBERTS: Well, they -- they
10 quite -- quote the bylaws of the National Lawyers Guild,
11 which says any member must "agree with the objectives
12 of the organization as set forth herein." That's not
13 all-comers. That's a bylaw that restricts an
14 organization according to its -- members can't join
15 unless they sign on the dotted line that they believe in
16 objectives of the organization.

17 MR. GARRE: There's a fundamental
18 difference between a group that says people of a
19 particular sexual orientation are not allowed to become
20 members --

21 JUSTICE SCALIA: Well, they don't say that.

22 CHIEF JUSTICE ROBERTS: It has nothing to
23 do with --

24 JUSTICE SCALIA: They don't say that.

25 CHIEF JUSTICE ROBERTS: It's got nothing to

1 do with sexual -- well, I don't know the National
2 Lawyers Guild, but they say you have got to agree with
3 the objectives of the organization.

4 MR. GARRE: Justice Scalia, the district
5 court made a -- may I?

6 CHIEF JUSTICE ROBERTS: No, start with mine.

7 MR. GARRE: Okay. My apologies.

8 (Laughter.)

9 MR. GARRE: Mr. Chief Justice, as -- as
10 Dean -- as director of student services testified, the
11 fact that the bylaws may say we want students who are
12 interested in our activities doesn't mean that the
13 bylaws are excluding students who want to join. And
14 there's a fundamental difference, again, between saying
15 students that have these particular beliefs or status
16 cannot become members of our group --

17 CHIEF JUSTICE ROBERTS: It seems to me that
18 your position is continually evolving wherever the First
19 Amendment pressure comes. You've got a written
20 nondiscrimination policy. And then you say, well, yes,
21 but we use an all-comers policy. You've got an
22 all-comers policy, and then groups don't actually follow
23 the all-comers policy, and you have another answer to
24 that. It seems to me that we should go with -- why
25 shouldn't we go with the written policy and the written

1 bylaws?

2 MR. GARRE: Well, with respect, Your Honor,
3 I think it's my friend's position that is evolving. You
4 have joint stipulations before you as to what the policy
5 is. You have the decisions of both courts below
6 describing that policy consistently with the joint
7 stipulations, and you have a petition for certiorari
8 that never challenges that the all-comers policy is at
9 issue.

10 JUSTICE SOTOMAYOR: What do we do with the
11 selective application argument, which is what
12 Justice Alito referred to and Justice Scalia, which is
13 it is troubling that some of these bylaws do limit their
14 groups? La Raza limited it to people of Hispanic
15 descent, and the Lawyers Guild to people who adopt its
16 -- its beliefs. What are we going to do with this
17 selective application argument?

18 MR. GARRE: This case wasn't --

19 JUSTICE SOTOMAYOR: It's in the case, isn't
20 it? And if it is, what does it do to your policy?

21 MR. GARRE: Justice Sotomayor, this case
22 wasn't litigated as a pretext case. If you look at the
23 briefs in this case, the first time that the word
24 "pretext" is used is in the reply brief in this Court.
25 It was litigated as a challenge, which is a serious

1 challenge, to the constitutionality of an all-comers
2 policy in this particular forum.

3 JUSTICE SCALIA: The -- the two are connected,
4 though, Mr. Garre. Frankly, one reason why I am
5 inclined to think this is pretextual is that it is so
6 weird to require the -- the campus Republican Club to
7 admit Democrats, not just to membership, but to
8 officership. To require this Christian society to allow
9 atheists not just to join, but to conduct Bible classes,
10 right? That's crazy.

11 (Laughter.)

12 MR. GARRE: But --

13 JUSTICE SCALIA: And is there any other
14 university in the country that has this kind of a
15 policy?

16 MR. GARRE: There absolutely is, Justice
17 Scalia, and it's explained --

18 JUSTICE SCALIA: Where is that?

19 MR. GARRE: It's explained
20 in the amicus brief for the American Council of
21 Education, explained in the State Universities amicus
22 brief.

23 JUSTICE KENNEDY: Well, there are very few
24 universities. But why doesn't this just all work out?
25 If the Christian Legal Society has these beliefs, I am

1 not so sure why people that don't agree with them want
2 to belong to them. What -- doesn't this all just work
3 out?

4 MR. GARRE: Justice Kennedy --

5 JUSTICE KENNEDY: And doesn't it work out that
6 the Democrats -- they don't want to go in the Republican
7 club and run for officership anyway.

8 MR. GARRE: Hastings --

9 JUSTICE KENNEDY: So why -- what's --
10 what interest does this -- does the school have in this
11 policing mechanism that it's imposing?

12 MR. GARRE: A few -- a number of things,
13 Justice Kennedy. The first is the line-drawing issue
14 that has been made clear during the first part of the
15 argument this morning. If you're going -- they appear
16 to take off the table race and what they say are other
17 status considerations. I'm not sure why that excludes
18 sexual orientation.

19 But if you're going to allow religious
20 groups, or any group, to draw exceptions for some
21 people, then you have to determine where to draw the
22 line. And I think a school can reasonably say: We
23 don't want to get into this business at all; we want to
24 allow all comers

25 JUSTICE ALITO: But you now say --

1 MR. GARRE: -- for all school-subsidized groups.

2 JUSTICE ALITO: You now say in your brief that
3 it is okay for a group to impose membership requirements
4 that are neutral and not based on beliefs. Isn't that right?

5 MR. GARRE: That doesn't go to status or
6 belief. If you're talking about attendance
7 requirements or competition --

8 CHIEF JUSTICE ROBERTS: No, you're talking
9 about --

10 MR. GARRE: -- those are merits-based
11 requirements.

12 CHIEF JUSTICE ROBERTS: -- La Raza background.
13 As I understand it, the La Raza organization says you have
14 to be of La Raza background to be a policy member of the
15 organization.

16 MR. GARRE: The La Raza bylaws -- first of
17 all, they did explicitly say that groups could not
18 exclude members on the basis of sexual orientation.

19 Now, they -- there was some confusion about
20 how La Raza had interpreted their bylaws. The school
21 went back to La Raza and said: Are you excluding
22 members? La Raza said: No, we're not; we're open to
23 all. And to eliminate any doubt, they amended their
24 bylaws. That's the one example they've come up in the
25 20-year history of this policy. And what does it show?

1 If you want to look at --

2 JUSTICE SCALIA: Wait, wait, wait. Twenty
3 years? Do you have any evidence that this policy, the
4 one we're arguing about now, that is to say, the
5 all-comers policy, existed before CLS brought this
6 litigation? As I recall, the only evidence in the
7 record is a letter from the dean describing this policy
8 after the litigation began.

9 MR. GARRE: Justice Scalia, it's based on
10 the sworn deposition testimony on the former dean, who
11 had been at the school since 1993, the director of
12 student services, who had been there at least since
13 1999, as this is how they had implemented the
14 nondiscrimination policy. I don't think there's any
15 basis for this Court to overturn that sworn testimony.

16 JUSTICE BREYER: What we have is a rule, a
17 stipulation. And as I read it, to try to make sense out
18 of it, it does seem to discriminate against
19 organizations in respect to which intellectual purity
20 would be important. They're going to have a harder
21 time. The ones that don't care that much will have an
22 easier time.

23 Now, in trying to judge the
24 constitutionality of that, I first have no idea which
25 these organizations are. We've got one of them, but

1 there may be a lot of others. I don't know if the
2 Democratic Club is or is not. I don't know how big the
3 tent they want. I don't know whether the Turkish
4 Society even exists. I don't know how the chess club
5 feels about players of tiddlywinks.

6 (Laughter.)

7 JUSTICE BREYER: So I have an absolute void
8 in this record, which in turn I think would be important
9 to fill that void, because their justification --

10 MR. GARRE: Well --

11 JUSTICE BREYER: -- is they don't want to get
12 into this, it's too complicated, and we're not
13 doing that much harm to them because they can meet
14 off-campus, and it's a big, disruptive influence, all of
15 these things.

16 And then sneaking in here is this anti-gay
17 bias issue, and -- and they want to say: That isn't
18 much, because that isn't really the point here, and
19 that's what we think, anyway. It's just an example of
20 something.

21 So with that great unclarity, asked to
22 decide a constitutional issue where I feel I'd need more
23 facts and I don't have them --

24 MR. GARRE: Well, you --

25 JUSTICE BREYER: -- the more justification to

1 know what it really is, which I don't have, what should
2 I do?

3 MR. GARRE: If the Court believes that,
4 respectfully, we think it should dismiss the writ as
5 improvidently granted. This case was litigated based on
6 stipulations to avoid precisely these factual issues
7 that we're now talking about for the first time before
8 this Court.

9 Now, I think it is common ground that --

10 JUSTICE GINSBURG: But you -- Mr. Garre, you
11 did say that the evidence is the dean's deposition.
12 There's no prior evidence. But there are schools,
13 including law schools, that have this policy. Is that
14 not so?

15 MR. GARRE: That's true. Georgetown Law
16 School does. Columbia Law School. Look, there's an
17 amicus brief filed by 13 educational organizations
18 representing thousands of colleges and universities
19 across the country, including the Association of Jesuit
20 Colleges and Universities, saying that this is a
21 not-uncommon and a reasonable policy. We're not saying
22 it's the only approach that colleges can take in
23 balancing the competing interests here.

24 JUSTICE ALITO: Well, let's explore --

25 MR. GARRE: We're saying it's a

1 constitutional --

2 JUSTICE ALITO: Let's explore the
3 implications of this policy. Suppose at a particular
4 campus there is a great deal of anti-Muslim animus.
5 And there's a small Muslim group; it has 10 students.
6 If the group is required to accept anybody who applies
7 for membership, and 50 students who hate Muslims show up
8 and they want to take over that group, you say the First
9 Amendment allows that?

10 MR. GARRE: Justice Alito, that's the
11 claim, obviously, that the other side is making. And,
12 with respect, this example has never happened at
13 Hastings in 20 years. It has really never happened in
14 the history of American education. If you look at cases
15 like the voter I.D. case, the partial-birth abortion
16 case --

17 CHIEF JUSTICE ROBERTS: So if you have a law
18 that says every newspaper that's published in the
19 United States must be reviewed every day by the
20 government's censor board, and the fact that the
21 government's censor board decides not to do it, then
22 that law is okay?

23 MR. GARRE: I think this Court would
24 ordinarily take into account the likelihood that
25 something would happen, and if you're dealing where the

1 only experience --

2 CHIEF JUSTICE ROBERTS: A newspaper sues
3 saying that law is constitutional, and we'll say it's
4 all right; it has never been applied?

5 MR. GARRE: Of course this Court is going to
6 examine the chill, but so -- just like in the voter I.D. case,
7 where you had had people saying this was going to and,
8 on secondhand accounts, did exclude people from getting
9 to the -- ballot access. This Court said, look, that might
10 happen, but it's not a basis to invalidate this law
11 across the board. Come back with an as-applied challenge.

12 CHIEF JUSTICE ROBERTS: That was because
13 they might adopt a different policy. We're not dealing
14 with a future different policy in this case.

15 MR. GARRE: And there's -- as to the
16 takeover hypothetical, there is no evidence that it has
17 happened. Groups can take measures to prevent it. They
18 can require attendance requirements before people become
19 members. They can instruct into their bylaws --

20 CHIEF JUSTICE ROBERTS: That's not going to
21 help if you have the 50 anti-Muslim students who want to
22 take over the group.

23 MR. GARRE: People have to be -- attend a
24 certain number of meetings before they can join. They can
25 have --

1 CHIEF JUSTICE ROBERTS: Okay. They take
2 over the group and the first thing they do is say we're
3 abolishing the attendance policy.

4 (Laughter.)

5 MR. GARRE: They can have in their -- they
6 can -- sure. I mean, we can entertain the
7 hypotheticals. But they can have in their bylaws a
8 provision just like the Constitution of the United
9 States, that amendments can only be made by a
10 super-majority --

11 JUSTICE ALITO: Well, CLS obviously thinks
12 this is a real threat. Now, what do you propose that
13 they do? Suppose that you win this case, and then when
14 the case -- and then when this all-applicants policy is
15 administered, then precisely what they fear begins to
16 take place. Do they have any recourse?

17 MR. GARRE: I think if that started to take
18 place, the college would reconsider its policy. It
19 could bring a First Amendment challenge saying that --

20 JUSTICE ALITO: No, do they have any --

21 MR. GARRE: -- that would --

22 JUSTICE ALITO: Do they have any recourse?

23 MR. GARRE: I think at that point --

24 JUSTICE ALITO: If they have 10 members,
25 and 8 who are completely hostile to the organization

1 sign up?

2 MR. GARRE: I think obviously the members
3 would rejoin and form another group, Your Honor. I
4 mean, we're not dealing with this in a factual vacuum.
5 CLS's predecessor existed at the schools for 10 years
6 and in --

7 JUSTICE ALITO: I understand the answer to
8 that question. So, if -- if hostile members take over
9 CLS, the former members of CLS can form CLS II?

10 (Laughter.)

11 MR. GARRE: If that happened Your Honor. I
12 mean, this has never happened ever in -- in the history
13 of --

14 JUSTICE GINSBURG: It's also the --

15 MR. GARRE: -- education.

16 JUSTICE GINSBURG: -- the university's
17 across-the-board rules for all student conduct against
18 disruption, against incivility. The list would certainly
19 carry over.

20 MR. GARRE: Absolutely. And CLS, like any
21 group, can have a rule that disruptive members should be
22 expelled.

23 CHIEF JUSTICE ROBERTS: I'm sorry. I don't
24 understand your --

25 JUSTICE KENNEDY: It's also never happened

1 from, what I can tell, that someone who disagrees with
2 this group has applied for membership.

3 MR. GARRE: Well, Your Honor, the record
4 does show that --

5 JUSTICE KENNEDY: I mean, that's -- that's
6 what so puzzling about the -- the case.

7 MR. GARRE: The record does show, Your
8 Honor, that there was a gay student who was a member of
9 the group. And that's -- let me give you that --

10 JUSTICE GINSBURG: That was the predecessor
11 group.

12 JUSTICE KENNEDY: The predecessor group --

13 MR. GARRE: That was the predecessor group.

14 JUSTICE KENNEDY: -- and obviously uncomfortable
15 with their position, so he or she left.

16 MR. GARRE: Well, actually --

17 JUSTICE KENNEDY: That's the way it works.

18 MR. GARRE: -- what the record shows is that
19 she participated in discussions that the officer of the
20 group said it was a joy to have her and that both sides
21 learned.

22 I think CLS's position depends on the dark
23 notion that students would not have any interest in
24 joining a group with different viewpoints on certain
25 issues except to disrupt that group. And I think that

1 greatly undersells the intellectual curiosity of
2 students. It greatly undersells the fact that groups
3 have many different interests and perspectives.

4 The church has a stance in homosexuality,
5 but it has stances on many other issues, too. And if a
6 student -- even if he or she disagrees with the stance on
7 homosexuality, they may agree with many other aspects of
8 the groups, and they may want to join in the fellowship of
9 that group, they want to take advantage of intangible
10 benefits like not --

11 JUSTICE SCALIA: Teach Bible classes?
12 Right?

13 MR. GARRE: Your Honor --

14 JUSTICE SCALIA: You have to let them teach
15 Bible classes, too, right?

16 MR. GARRE: In fact, the record in the --
17 case shows that only officers teach Bible classes,
18 and groups are perfectly free to structure their
19 organization like that. They can have requirements
20 that people attend certain meetings before they do that.
21 CLS isn't forced to have anyone lead Bible classes.

22 JUSTICE ALITO: If an orthodox --

23 MR. GARRE: CLS --

24 JUSTICE ALITO: If an orthodox Jewish group
25 or a Muslim group applied for recognition and the group

1 said part of our beliefs is -- one of our beliefs is that
2 men and women should sit separately at religious services,
3 would Hastings deny registration to that group?

4 MR. GARRE: If it was excluding students
5 from that group on the basis of their beliefs or their
6 status, then, yes, it would.

7 Hastings isn't in the business of
8 second-guessing the -- the beliefs of -- of individual
9 groups, and the whole point of the policy really is to
10 stay out of this, to just have a blanket rule that's
11 equally neutral.

12 JUSTICE ALITO: We have -- we have two amicus
13 briefs from orthodox Jewish groups and a brief from a
14 Muslim group. So, your answer is that they could not be
15 recognized under Hastings' policy because of their
16 religious beliefs regarding the way religious services
17 should be conducted?

18 MR. GARRE: Your Honor, I think even my
19 friend recognizes that a group could not exclude an
20 individual on the basis of their gender or their
21 beliefs -- on the basis of their gender or race.
22 And remember the Bob Jones case, this Court --

23 CHIEF JUSTICE ROBERTS: Well, but that's because
24 gender or race is fundamentally different from religious
25 belief. Gender and race is a status. Religious belief --

1 it has to be based on the fundamental notion that we are
2 not open to everybody. We have beliefs, you have to
3 subscribe to them. And we've always regarded that as
4 a good thing. That type of exclusion is supported in --
5 in the Constitution. The other types of exclusion are
6 not.

7 MR. GARRE: But not at all costs,
8 Mr. Chief Justice. In the Bob Jones case, the claim was
9 from a -- a small private religious school that has a
10 sincere religious belief that people who believed in
11 interracial dating should not become members of their
12 school. And this Court, nevertheless, held that that
13 belief, sincere as it was, did not trump a statute that
14 denied education -- denied Federal financial assistance
15 on a viewpoint-neutral basis to schools that
16 discriminated on the basis of religion.

17 Here we have a -- a group that wants to
18 exclude members on the basis of sexual orientation. We
19 can -- CLS has tried to change that part --

20 CHIEF JUSTICE ROBERTS: You phrase it that
21 way. It's a group that wants to exclude -- a religious
22 group, a religious-oriented group, that wants to exclude
23 people who do not subscribe to their religious beliefs.

24 MR. GARRE: They -- there is a binding
25 judicial admission. And, again, this gets back to the

1 Bob Jones example. I think --

2 JUSTICE SCALIA: Where -- yes, let's get back
3 to this homosexual orientation. You say that that's
4 established in the case.

5 MR. GARRE: Look at page -- J.A. page 460,
6 which is where the district court said that CLS made
7 a binding judicial admission that they wanted to
8 discriminate on the basis of sexual orientation. Keep
9 in mind that this case began because CLS came back to
10 the law school and said we're happy to say we won't
11 discriminate on some grounds, but we're not going to
12 say we won't exclude students on the basis of sexual
13 orientation.

14 JUSTICE BREYER: What's supposed to happen?
15 I don't know the answer to this. Hastings, let's say,
16 or Berkeley has four or five or six different religious
17 chapels for services on Sunday or Saturday, and they say
18 we're open to all branches of religion, orthodox Jews,
19 conservative, and reformed. And then the orthodox say
20 we want men and women to sit separately.

21 Now, can Hastings say or Berkeley, no, we'll
22 let the reform come, we'll let the conservatives come,
23 but not the -- not the orthodox Jews. They can't
24 have their service. Would -- would that be
25 constitutional?

1 MR. GARRE: Your Honor, I think it would be
2 a much different case. It --

3 JUSTICE BREYER: Yes, but what is your opinion?

4 MR. GARRE: I -- I think if the school is
5 regulating outside of the purposes of a limited forum,
6 public forum for recognized groups, then I doubt it
7 could go in --

8 JUSTICE BREYER: So if, in fact, the --
9 the --

10 MR. GARRE: -- and tell the groups --

11 JUSTICE BREYER: -- they have clubs and they're
12 not services, and what they do is they discuss -- they
13 discuss the -- the nature of the service, and there can
14 they have separate discussions --

15 MR. GARRE: Where -- where --

16 JUSTICE BREYER: -- men from -- men and
17 women?

18 MR. GARRE: Where the rule operates on a
19 viewpoint-neutral basis. Here what the -- the school is
20 doing is it is publicly subsidizing --

21 JUSTICE BREYER: I guess your answer to that
22 is the orthodox Jews cannot. They cannot have
23 separate women's groups in their organization, which is
24 an after religious school organization.

25 MR. GARRE: They can exist separately. At

1 the school we have are numerous --

2 JUSTICE BREYER: Outside of the university,
3 et cetera.

4 MR. GARRE: In fact, Your Honor, it's not --
5 it's not --

6 JUSTICE BREYER: Well, that's their problem here.

7 MR. GARRE: -- unusual for schools to have
8 all male or all women clubs. They are not recognized
9 parts of the community. These -- these are activities
10 that are subsidized by the students themselves through the
11 mandatory student activities fees.

12 JUSTICE BREYER: And their reason to put in
13 a sentence as to why they don't want these orthodox Jews
14 to meet separately on the campus -- men in one group,
15 women in another -- and discuss the religious service
16 -- they want none like that, and their reason for wanting
17 none like that is?

18 MR. GARRE: Well, I think that's a much
19 different example than this case --

20 JUSTICE BREYER: Well, I'm trying to make it
21 as close as possible.

22 MR. GARRE: Well, I -- I may have
23 misunderstood the hypothetical. I mean, I think it's
24 a much different --

25 JUSTICE BREYER: They have a small orthodox

1 club.

2 MR. GARRE: The reason why the school has a
3 policy that all groups that it subsidizes must admit
4 all-comers is that, number one, it ensures that all
5 students enjoy equal access to all school-subsidized and
6 school-recognized activities.

7 Number two, it avoids the line-drawing
8 problems that we've discussed early this morning and I
9 think are necessarily going to arise and also create
10 strife in small educational communities.

11 Number three, it allows --

12 JUSTICE SCALIA: Can I ask about number 2,
13 the -- the so-called line-drawing problem? Aren't you
14 just letting yourself into even more line-drawing
15 problems?

16 MR. GARRE: Not with the all-comers rule.

17 JUSTICE SCALIA: I mean, the other -- it's
18 whether you were discriminating on the basis of one of
19 the forbidden bases. But now you're saying you can't
20 discriminate on any basis, which means there're going
21 to be even more lines to have to draw. Why does it
22 solve your problem?

23 MR. GARRE: I don't think it -- that
24 happens at all, Justice Scalia. I think when you've
25 the policy that all students have to become members,

1 regardless of their status or belief, that gets the
2 school out of the business of determining whether,
3 number one, people are discriminating on the basis of an
4 essential belief, which is, is the way that Petitioner
5 describes his -- their rule.

6 JUSTICE ALITO: As I understood the
7 position, your latest position in your brief, you
8 really don't say you have an all-comers policy. There
9 are certain criteria that can be applied, like interest,
10 knowledge; is that correct?

11 MR. GARRE: Competitive-based, merit-based
12 requirements are not excluded. It -- they're
13 not --

14 JUSTICE ALITO: Could a -- well, could a
15 group, consistent with your revised all-comers policy,
16 require that members who want -- anyone who wants to
17 become a member show a particular level of knowledge
18 about the subject of the group?

19 MR. GARRE: Yes. And I think --

20 JUSTICE ALITO: So if the CLS required
21 anybody who wanted to become a member to pass a test on
22 the Bible, that would be okay?

23 MR. GARRE: If it were truly an objective
24 knowledge test, it would be okay. It would be no
25 different than the law review. These are merits-based

1 determinations. There's a fundamental difference
2 between excluding people on the basis of merit and
3 excluding people on the basis of status or belief that
4 has no connection to merit. That -- that, I think, is a
5 long-standing understanding of discrimination.

6 CHIEF JUSTICE ROBERTS: Well, that --
7 that -- that's pretty tough. That has no connection to
8 merit. I assume there are groups that think subscribing
9 to their beliefs is evidence of merit, particularly
10 religious groups. So, how can you have a -- a test that
11 allows distinctions based on merit but not -- not
12 beliefs?

13 MR. GARRE: I think it goes to the nature of
14 whether it's discrimination under the school's policy,
15 and I think status or belief. People understand -- that's
16 why we are talking about things like race or gender or
17 sexual orientation, disability, military status, any
18 number of these things. And I think the school's policy
19 avoids having to draw lines as to whether or not a group
20 has a sufficient enough belief that military members
21 should become a member of the Amnesty International club
22 because they disagree with the war, that disabled
23 members should be -- disabled students should be a
24 member of a particular group. And the school's policy
25 avoids these line-drawing --

1 JUSTICE ALITO: If the school adopt an
2 all-comers policy --

3 JUSTICE STEVENS: May I ask this question,
4 Mr. Garre?

5 JUSTICE ALITO: -- for the purpose --

6 JUSTICE STEVENS: May I ask one question?
7 I'd like you to answer, and I'd like your opponent, too:
8 Do you think that, in order to decide this case, we have
9 to pass on the constitutionality of an all-comers policy?

10 MR. GARRE: Yes, that's the policy before
11 this Court.

12 JUSTICE STEVENS: That we must do that to decide
13 the case? And I want to ask your opponent the same
14 question.

15 MR. GARRE: I believe you have to do that,
16 because that is the policy --

17 JUSTICE STEVENS: So they're all --

18 MR. GARRE: -- before this Court.

19 JUSTICE STEVENS: There may be a lot of
20 other things we can decide, but in all events, we must
21 decide that much?

22 MR. GARRE: Absolutely. Absolutely. If I
23 could just discuss briefly the --

24 JUSTICE ALITO: Well, could I just ask one
25 quick question relating to that?

1 If -- if an all-comers policy is adopted for
2 the purpose of discriminating on the basis of viewpoint,
3 does it violate the First Amendment?

4 MR. GARRE: If it's pretextual in the Church
5 of Lukumi Babalu Aye sense, yes. No -- no school can
6 purposely discriminate at a group, no matter what policy
7 it adopts.

8 JUSTICE KENNEDY: And what if we think that
9 the policy has not been evenhandedly applied? Can't we
10 decide the case on that basis, and then we could just
11 assume *arguendo* Justice -- the answer to Justice
12 Stevens' question.

13 MR. GARRE: I don't think so, Justice --
14 Justice Kennedy, because that --

15 JUSTICE GINSBURG: Is -- was there any proof
16 in this record? I mean, there's a stipulation for summary
17 judgment. Was there any proof showing that it wasn't
18 evenly applied?

19 MR. GARRE: No. And I get back to the
20 petition for certiorari. On page 2 of the petition, the
21 petition --

22 JUSTICE KENNEDY: Let me just say, suppose
23 it were shown that it were not applied evenhandedly, you'd
24 have no problem with our saying that it's then
25 unconstitutional.

1 MR. GARRE: It -- yes. We don't think that
2 that's the case here. But if a policy is applied
3 evenhandedly -- unevenhandedly, in a viewpoint-neutral
4 way and it burdens religious groups, then there's
5 common ground that that policy violates the
6 Constitution. Of course, we think the policy here is --

7 JUSTICE ALITO: If this were an employment
8 case, and when an employee is denied promotion the
9 employee said it's for reason A, and then after
10 litigation begins the employer says, well, no, it really
11 wasn't for reason A, it was for reason B because of a
12 policy that we've long had, but there's never --
13 there's no written documentation of this new policy;
14 and then at a later point in the litigation the employer
15 says, well, it wasn't really either for reason A or
16 reason B; it was for reason C -- do you think that summary
17 judgment could be granted in favor of the employer on
18 the issue of pretext?

19 MR. GARRE: I think that that would create a
20 factual issue and that that issue might well be tried,
21 Justice Alito.

22 And the one thing that is important to keep in
23 mind is that this is a request for injunctive relief and not
24 damages. So the only policy that matters -- and *Wilkinson v.*
25 *Austin* makes this clear -- is the current policy; all

1 parties agree that the current policy is the all-comers
2 policy. That's the policy supported by the record in
3 this case.

4 CHIEF JUSTICE ROBERTS: Well, I'm sorry. All
5 parties do not agree that the policy is the all-comers
6 policy. Your friend argued repeatedly that the policy
7 was the written nondiscrimination policy.

8 MR. GARRE: I understood my friend's opening
9 brief to acknowledge at the least that that's the policy
10 the school has said it has today. It is the school's
11 policy. It's supported by substantial history and
12 sworn deposition testimony.

13 JUSTICE GINSBURG: Mr. Garre, the -- the
14 so-called written policy, that has a -- that list has a
15 correspondence to the State's law, doesn't it?

16 MR. GARRE: It does.

17 JUSTICE GINSBURG: The categories that are
18 listed there are the categories that under California
19 law are proscribed bases for discrimination?

20 MR. GARRE: It does. And that is an
21 additional basis for the school's policy. Look at
22 California Education Code 66270. It explicitly
23 prohibits discrimination in -- in programs and
24 educational activities by public schools like Hastings.
25 Hastings has an obligation under State law to prohibit

1 discrimination on the basis of sexual orientation. The
2 reason why we're here today is because CLS insisted
3 on the right to discriminate, to exclude students on the
4 basis of their sexual orientation.

5 JUSTICE ALITO: Well, section 66270 applies
6 to programs conducted by a post-secondary educational
7 institution, and your position is that if -- if a
8 religious group complies with your policies and then it
9 conducts religious services, those religious services
10 are conducted by Hastings?

11 MR. GARRE: Our position is that the
12 registered student organization program is a program
13 of the university; it's subsidized by the university;
14 it's recognized by the university; and that all students
15 should be able to enjoy access to that program.

16 CHIEF JUSTICE ROBERTS: In your response to
17 Justice Ginsburg concerning California law, is it your
18 position that California law requires religious groups
19 to admit people who do not believe in their religious
20 beliefs and in fact to conduct services of that group?

21 MR. GARRE: Your Honor, our position is that
22 the provision that we've cited to, 66270, does not carve
23 out an exemption in this program for a religious student
24 organization. On its face --

25 CHIEF JUSTICE ROBERTS: So the answer to my

1 question is "yes"?

2 MR. GARRE: Yes. On its face, it excludes --
3 it has an exemption for religious schools; it does not
4 include an exemption for religious organizations within
5 the context of this program. And we think that the
6 program is reasonable.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Garre.

9 MR. GARRE: Thank you very much.

10 CHIEF JUSTICE ROBERTS: Mr. McConnell, you
11 have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

13 ON BEHALF OF THE PETITIONER

14 MR. McCONNELL: Well, thank you,
15 Mr. Chief Justice.

16 First, in answer to Justice Stevens'
17 question, we do believe that the Court needs to
18 reach the constitutionality of the all-comers policy as
19 applied to CLS in this case. We brought only an
20 as-applied challenge.

21 JUSTICE STEVENS: Put -- put to a side a
22 moment -- forget the as-applied. Just take a -- a pure
23 all-comers policy. Must we decide the constitutionality
24 of that?

25 MR. McCONNELL: Not facially, but as applied

1 to CLS, yes. Several other points, I know --

2 JUSTICE SCALIA: Could you talk about -- I had
3 understood from your brief that CLS did not have a -- a
4 policy of excluding people with homosexual disposition,
5 but that it was only homosexual conduct.

6 MR. McCONNELL: That's correct as
7 stipulated to, undisputed.

8 JUSTICE SCALIA: Well, you -- but your
9 complaint said otherwise. Your -- your --

10 MR. McCONNELL: That's -- that's because we
11 -- the complaint is accepting the -- Hastings'
12 definition of sexual orientation. We were told that our
13 conduct rule, our nonmarital conduct rule, violated their
14 sexual orientation provision, and therefore we sought
15 relief from their sexual orientation provision. It was
16 nothing more than that.

17 There -- it is -- it is stipulated in Joint
18 Stipulation 40, I believe it is, that -- that CLS's rule
19 is based on conduct --

20 JUSTICE SCALIA: Oh, okay.

21 MR. McCONNELL: -- not orientation.

22 Several other points: My friend twice in
23 his presentation stated that the all-comers policy is
24 simply their way of implementing the nondiscrimination
25 policy. But if so, it is so absurdly overbroad as to be

1 unconstitutional. There is no reason to stop the
2 environmentalist club from leading -- from requiring its
3 leaders to share environmentalist views --

4 JUSTICE GINSBURG: Mr. McConnell --

5 MR. McCONNELL: -- in order to --

6 JUSTICE GINSBURG: Mr. McConnell, you don't
7 challenge that there are universities, including four
8 law schools, that have an all-comers policy?

9 MR. McCONNELL: So far as we've been able
10 to tell, there is no public university law school in the
11 country that has such a policy.

12 JUSTICE GINSBURG: There are private
13 universities.

14 MR. McCONNELL: There are some private
15 universities that, according to the AALS, have such a
16 policy. We know nothing about them. They are not in
17 the record, and, frankly, I'd be a little bit
18 surprised, because the policy is so absurd.

19 Think of how it would apply to the law
20 school itself, and this policy does apply to the law
21 school itself. Does Hastings really mean to say it is
22 committing itself to an all-comers policy when it hires
23 faculty or admits students? Do they not care about the
24 belief of its dean of admissions, about beliefs of --
25 about, say, affirmative action? The very idea of it is

1 preposterous.

2 JUSTICE BREYER: It's not totally, if -- but
3 it's imaginary, it's fantastical. The -- you could imagine
4 a school in the '60s that said that we think the way to
5 advance learning is everyone gets together in a nice
6 discussion group and hugs each other and talks, all
7 right?

8 (Laughter.)

9 JUSTICE BREYER: Now, that's a possible
10 educational theory.

11 MR. McCONNELL: It's possible, but --

12 JUSTICE BREYER: They say that we are going to
13 apply that to everybody because that's how we do it. And --

14 MR. McCONNELL: Yes, but Hastings has --

15 JUSTICE BREYER: -- if there are any
16 ideological organizations that suffer --

17 MR. McCONNELL: But Hastings has --

18 JUSTICE BREYER: -- so be it, but it's
19 fantastical, and therefore --

20 MR. McCONNELL: Hastings has a perfectly
21 conventional RSO program just like the ones in Healy,
22 and Widmar and Rosenberger. They just have a policy
23 that is destructive of that --

24 JUSTICE BREYER: Well, my --

25 MR. McCONNELL: -- of that program.

1 JUSTICE BREYER: -- my question is, if I can
2 think of this policy -- but I tend to sympathize with
3 your view that it's so hard to believe that they really
4 hold it, maybe they do, I don't know about it -- what do
5 I do with this case?

6 How can I say whether this, let's call it
7 "hug your neighbor policy" is -- to put a label on it
8 that's catchy --

9 MR. McCONNELL: What can --

10 JUSTICE BREYER: -- how do I -- how do I
11 evaluate that?

12 MR. McCONNELL: What you can say is that
13 Healy v. James requires a substantial justification for
14 exclusion of a student group from a registered student
15 activity forum, and this is not a substantial
16 justification; it is a silly justification. If it is
17 silly, crazy, and preposterous, it is not even reasonable,
18 let alone compelling or substantial.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 McConnell.

21 The case is submitted.

22 (Whereupon, at 11:05 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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