

No. 08-1371

IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY
OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether individuals lose their right to freedom of association when they become students at a public educational institution.

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INTEREST OF THE *AMICUS CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case raises important issues regarding the freedom of association and thus is of central concern to Cato.

STATEMENT OF FACTS

The Christian Legal Society Chapter of the Hastings College of the Law ("CLS") is a small group of about a dozen law students who share religious views. In 2004, CLS applied to become a "registered student organization" at Hastings, a California public institution of higher learning that has about 426 students per class. Hastings has long followed a policy that offers recognition and tangible support to all student organizations on a nondiscriminatory basis. After an internal review, Hastings refused to allow

¹ Letters from all parties consenting to the filing of this brief have been submitted to the Clerk. No counsel for any party authored this brief in whole or in part, and no persons other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

CLS to become a registered organization. That registration would have allowed CLS to receive a variety of benefits that were afforded to about 60 other student organizations that hold widely disparate views on the full range of legal, political, social, and moral issues that confront American society. These benefits include the use of the Hastings name and logo, the use of its bulletin boards and email systems, funding for activities and travel, and office space on the campus.

Hastings refused to register CLS because certain provisions of the organization's basic charter conflicted with the school's internal antidiscrimination policy. CLS requires that its members and officers abide by key tenets of the Christian faith and comport themselves in ways consistent with its fundamental mission, which is to "encourage those who identify themselves as followers of Jesus Christ to more faithfully live out their commitment in their personal and academic lives, to prepare members for future lives as Christian attorneys, and to provide a witness and outreach for Jesus Christ in the Hastings community." CLS believes that this commitment requires its members and officers to abstain from extra-marital sexual relations and bars from membership any person who engages in "unrepentant homosexual conduct." CLS imposes these restrictions only on membership and governance. Its meetings have always been open to all members of the Hastings community.

Hastings denied registration to CLS because of its own "policy against legally impermissible, arbitrary or unreasonable discriminatory practices," which includes discrimination "on the basis of race, color religion,

national origin, ancestry, disabilities, age, sex or sexual orientation.” By way of offset, Hastings was prepared to allow CLS to use its facilities for certain meetings, but refused to go any further. On September 23, 2004, CLS lawyers sent Hastings a letter demanding full recognition. This suit followed when that demand was rejected. As there were no disputed issues of fact, both CLS and Hastings filed motions for summary judgment. On May 19, 2006, the district court granted Hastings’s motion on the ground that its antidiscrimination policy represented a compelling state interest that trumped the associational, religious, or speech claims that CLS raised under the U.S. Constitution. The Ninth Circuit affirmed that decision in a short unreported decision. This Court granted certiorari on December 7, 2009.

SUMMARY OF ARGUMENT

This case tests the extent to which an antidiscrimination policy announced by a public institution of higher education can limit individual rights to speech, religion, and association protected under the U.S. Constitution. All three of these interests are clearly implicated in connection with “expressive” organizations of which CLS is indubitably one. CLS’s claims of expressive association are at the highest level because its members interact with each other only on speech and religious issues; deeply spiritual issues that define the jealously guarded area of “intimate human relationships.” *See Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984). Speech rights are implicated because the Hastings

policy burdens the communications that members have with each other and with the rest of the world. Free exercise claims arise because CLS has an exclusively religious focus, which is restricted by a conscious state preference in favor of a wide range of other groups, many of which have missions strongly opposed to CLS's. These tripartite claims properly understood trump any purported state interest in the enforcement of Hastings's nondiscrimination policy, which is sadly misaligned with any legitimate state objective. The explicit viewpoint discrimination embedded in the Hastings policy—ironically a part of its “nondiscrimination” policy—dooms it under this Court's decisions in cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). See also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). In each of these decisions, state efforts to prevent religious groups from accessing limited public forums on university or school property were struck down as an impermissible form of viewpoint discrimination. That same conclusion follows here.

In an effort to deflect these decisive precedents, Hastings takes a wrong turn by claiming that it may impose whatever terms and conditions it wants on groups within the Law School, so long as potential group members can avoid these restrictions by going elsewhere. Its aggressive position necessarily acknowledges that this Court's decisions in cases like *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), have explicitly held that a state antidiscrimination law must yield to the claims of private expressive groups of

freedom of speech and association on such intimate matters as personal codes of moral conduct. In reaching this result, *Dale* explicitly held that the Court had to “give deference to an association’s assertions regarding the nature of its expression [and] to an association’s view of what would impair its expression.” *Id.* at 653.

Whatever power the state may have with respect to expressive organizations with “large and basically unselective groups” such as the Jaycees, *see Roberts*, 468 U.S. at 621, the state has no compelling interest in securing the massive disruption of the internal operation of any organization dealing with intimate personal arrangements. Yet just that forbidden result is achieved by a policy that necessarily forces CLS to admit to membership or to elect as officers people who fundamentally disagree with their program. “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.” *Id.* at 623. In striving to uphold the Hastings policy, the district court inexcusably fails to mention CLS’s rights of “intimate” association, or to distinguish CLS from large public service organizations like the Jaycees that receive a lower level of constitutional protection for their expressive activities.

This Court’s general prohibition on government regulation of intimate associations is content neutral. The Boy Scouts in *Dale* were allowed to claim it for their moral beliefs on gay rights. 530 U.S. at 659. Likewise, a religious gay rights organization could exclude from its membership any individual who

rejected the sanctity of same-sex marriage. The same associational norms apply to expressive organizations that hold positions deeply antithetical to each other. In matters of faith, belief, and practice, it is not for government to adjudicate the soundness of conflicting substantive positions. Nor should the level of constitutional protection afforded to any group be dependent on whether its beliefs are judged either moderate or extreme by some common social metric. The right of expressive association grants the same measure of independence from state control to all groups that fall within its ambit.

Hastings cannot evade these ironclad constitutional principles by claiming that it “merely” imposes restrictions on admission to its law school, such that those persons who do not like the restrictions remain free to go elsewhere. That position necessarily rests on the false premise that the venerable doctrine of unconstitutional conditions has no place whatsoever in dealing with expressive organizations that wish to meet on state property. *See* Am. Summ. J. Order 41 n.7. That proposition is clearly false. Governments may own public streets and highways, but cannot condition entry onto those bodies in ways that favor one political or religious viewpoint over another. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939). Current law lets the government rule out inappropriate places—*e.g.*, the median-strip on a public highway—from all speech or religious practice on content-neutral grounds. It may impose reasonable content-neutral restrictions that address issues of safety on the use of traditional public sites that have long been regarded as amenable to public speech. But

at no point can it decide to let in speakers to any public forum, *i.e.*, any government owned common property, with one point of view while excluding speakers who hold different points of view. The state's proprietary power over these forums does not carry with it the unlimited power to exclude; that is the hallmark of private property. Viewpoint discrimination is not tolerated in open public forums.

To be sure, Hastings's facilities are not open generally to all members of the public. In its "limited public forum," Hastings may quite properly restrict entry only to students and others who have an educational reason to be on its premises. It can also refuse to extend use of its facilities to any political or social group organized by its members. But, most emphatically, it cannot evade its constitutional obligations to all of its students with the facile argument that it is "merely imposing" conditions that students can evade by not attending the school. Nor are these viewpoint-sensitive conditions justified on the ground that other Hastings students will be forced to "subsidize" positions they reject. That argument assumes that all revenues are manna from heaven when in fact they are raised by student activity charges imposed on all students equally. It is an impermissible penalty on CLS students to deny them standard privileges otherwise available to all while asking them to foot the bill when those privileges are extended to others. It is equally impermissible to adopt other forms of differential treatment—such as waiving the fees—to make good on the exclusion of CLS from the school's programmatic benefits.

As a public entity, Hastings does not have the power to discriminate among its student organizations simply because it can exclude the public at large from its premises. The only justifications that work are those that permit the state to limit the private activities of individuals and organizations. These are typically narrow. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), for example, the Court held that the United States could punish the burning of draft cards because its need to preserve the integrity of the Selective Service system was held to be “unrelated to the suppression of free expression”, or content-neutral. No such justification is remotely possible here. Similarly, in *Healy v. James*, 408 U.S. 169 (1972), this Court held that a state college was *not* justified in excluding members of SDS from the use of campus facilities when it could not show how their activities presented imminent threats of violence. By refusing to distinguish intimate from large expressive associations, the district court badly botched what should be an easy case. The Hastings nondiscrimination policy must fall before CLS’s constitutionally protected rights of intimate expressive association.

ARGUMENT

I. A Broad Principle of Freedom of Association Serves a Vital Function for the Preservation and Prosperity of a Society of Free and Responsible Individuals.

One common thread that runs through this Court’s decisions on associational freedom is the fundamental

role this freedom plays in the life of an organized society. See, e.g., *Dale*, 530 U.S. 640; *Roberts*, 468 U.S. 609. At the outset, it is critical to state the philosophical principles that give texture and justification to this common assertion. The starting point for this analysis is, consistent with the nation's first principles, the position of individuals in the state of nature, each with his or her own desires and interests. The basic challenge of political theory is to determine how these persons should interact with each other. At root, there are only two ways in which that human interaction can take place—either through coercion or cooperation. The first must necessarily be ruled out as the basic mode of social organization because it allows an individual to make himself better off at the expense of another person. Slavery is only the most extreme version of this coercive principle.

Cooperation has exactly the opposite consequences—provided all know that they can decide *not* to associate with others. “Freedom of association therefore plainly presupposes a freedom not to associate.” *Roberts*, 468 U.S. at 623. The exercise of these rights has consequences that differ dramatically from those of coercion. Self-interested individuals will tend to associate with others to achieve private gain. When two parties do this through a simple contract, they are both better off, and their increased wealth creates opportunities for third persons who were not involved in the original association. That principle of association, backed by the right not to associate, is not limited to groups of two people, of course. So long as a society is able to keep the transaction costs for forming voluntary associations low, group membership can

become far more inclusive. Those individuals who are excluded from one organization (by the right not to associate) are of course free to form other organizations for their own mutual advantage, which are in turn protected against subversion by the same right not to associate with others. Individuals, moreover, have this right over the full range of human wants and interests, be they economic, political, charitable, or spiritual. They are the persons who decide what goals to value and what to reject. The greater the level of activity, the higher the overall level of social welfare, as measured by the welfare of *all* members of society. There is nothing in the basic theory of association that is tied to some narrow view of “possessive individualism.” *Contra* C.B. Macpherson, *The Political Theory of Possessive Individualism* (1964) (assuming falsely that the protection of individual rights is necessarily antithetical to the good of the community as a whole).

There are, of course, limitations on the principle of freedom of association, even when stated in the unqualified form articulated in *Roberts*. The principle has never been applied to protect agreements to kill, maim, or steal because of the obvious negative consequences for third persons whose personal autonomy and private property is necessarily violated. Nor has it ever been invoked to protect cartels, for the simple reason that monopolistic arrangements reduce, rather than advance, overall social welfare. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). And finally, there has been a long common law tradition that subjects common carriers to a variety of reasonable and nondiscriminatory forms of

regulation to control their use of monopoly power. See *Allnutt v. Inglis*, (1810) 104 Eng. Rep. 206 (K.B.), which has worked itself explicitly into American law. *Munn v. Illinois*, 94 U.S. 113, 127 (1876). See also *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (stating the modern synthesis). Nor was the principle of freedom of association ever applied to block, under the police power, bona fide regulations of health and safety. On the other hand, a broad definition of the “morals” head of the police power at one time justified the stringent regulation of all forms of sexual mores and behavior—including homosexual conduct. Such regulation fits uneasily, however, with the basic principle of associational freedom, except in those cases where the conduct in question poses health and safety risks, as in the spread of AIDS or venereal diseases.

It follows, therefore, that the only relevant limitations on freedom of association recognized as a matter of general theory relate to the risks of coercion, cartelization, monopoly, and health and safety. Consistent with this theory, the decisions of this Court in the so-called *Lochner* era (named after *Lochner v. New York*, 198 U.S. 45 (1905)) did not hedge the principle of freedom of association (or contract) with other limitations on grounds of paternalism or any supposed inequality of bargaining power. In line with that outlook, *Lochner*-era courts struck down minimum wage and collective bargaining legislation, see *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), on the ground that it encouraged the socially destructive monopolistic practices that antitrust laws rendered illegal in other

contexts. Yet at the same time the morals head of the police power was construed to allow extensive government regulation of marriage and all forms of sexual practices. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding Georgia's anti-sodomy statute constitutional and representing the last gasp of the broad morals power) with *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers*).

As *Lawrence* makes clear, post-New Deal case law has inverted this Court's earlier decisions in both the economic and the moral realm. Today a high level of judicial scrutiny is imposed on decisions that regulate intimate personal behavior, while only a low level of scrutiny is given to economic regulation. Thus on the economic frontier, the Court overturned the *Lochner*-era prohibitions on labor legislation by allowing extensive regulation of minimum wage, maximum hours, and collective bargaining agreements under such statutes as the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1935), and the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1938). See *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage for women only).

Consistent with the gradual decline of the morals head of the police power, the freedom of association found new life in connection with intimate associations that had previously been heavily regulated under that power. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut law prohibiting the sale and use of contraceptives). This novel set of developments amounted to the application of the

generalized principle of freedom of association to intimate human relationships. Nothing whatsoever in the New Deal decisions has undermined the proposition that voluntary association generates gains in all areas of social life. That principle of associational freedom has therefore survived in all sorts of noneconomic contexts (*see* cases cited in *Roberts*, 468 U.S. at 619), dealing with such issues as political association, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); marital privacy, *Griswold*, 381 U.S. 479; possession of obscene materials, *Stanley v. Georgia*, 394 U.S. 557 (1969); parental control over education, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); family living arrangements, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); adoption, *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977); and decriminalization of homosexual behavior, *Lawrence*, 539 U.S. 558.

CLS is entirely within its constitutional rights when it seeks to preserve the integrity of its own institutions. At the same time, it would be wholly inconsistent with fundamental principles of freedom of association for CLS to ask Hastings not to recognize groups supporting same-sex marriage on the ground that the practice offends its members' deeply held vision of sound family life. No area of individual freedom is secure if the mere offense of others, however intense, is sufficient to justify restrictions on personal liberty, as was made clear in the flag-burning cases. *See Texas v. Johnson*, 491 U.S. 397 (1989) (rejecting claim that serious audience offense is sufficient to justify restrictions on flag burning). Yet, regrettably in this case, one intervenor, Hastings

Outlaw, rests its demand that activities fees not be used to support CLS on the argument that the views of CLS members are offensive.² Cert. Pet. 10-11.

II. The Protection of the Expressive Rights of Intimate Association Announced in *Roberts* and *Dale* Apply with Full Force to the Hastings Antidiscrimination Policy.

The twists and turns in the judicial acceptance of the principle of freedom of association have presented this Court with the difficult task of fencing off the new concern with personal liberties and associational freedoms in ways that would do justice to the cases cited above, without re-opening the door to *Lochner*-era decisions, however faithful those may have been to our constitutional tradition of limited government and freedom of association. Most critically, the analytical framework that was once used in connection with economic liberties survives with respect to all intimate expressive associations, and the principles that support that framework require a reversal of the lower court here.

The major effort to achieve the modern synthesis is found in *Roberts*, 468 U.S. 609, which does not even

² The Hastings Outlaw mission statement reads as follows: “To promote a positive atmosphere at Hastings for lesbians, gay men, bisexuals, transgendered, and queer students. This includes educating the community at large in order to alleviate and eradicate homophobia and other affronts to human dignity.” Hastings OUTLAW, <http://www.uchastings.edu/student-services/student-orgs/OUTLAW.html> (last visited Jan. 25, 2010).

cite *Lochner*. *Roberts* draws a careful distinction between two forms of associational freedom outside the economic arena. It gives high value to the intensely personal arrangements involved here, and intimates quite clearly that the antidiscrimination law could not apply to those situations because “the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Id.* at 617-18.

By way of an explicit and immediate contrast, the *Roberts* Court had no hesitation in applying Minnesota’s public accommodation law, Minn. Stat. §§ 363.01 et seq. (1982), to the Jaycees, a broad-based service organization that exhibits none of the characteristics of small cohesive groups like CLS that hold clear substantive commitments and beliefs. *Roberts*, 468 U.S. at 621-23. The theory behind this distinction is that subjective values count for much more in intimate settings than in larger all-purpose organizations lacking such focused beliefs. *Roberts* thus held that within the class of expressive associations, those that involved intimate matters of personal belief could not be trampled by the state because of the greater violence that state action would wreak upon members of such groups. At the same time, the broader and more diffuse social and charitable objectives of the Jaycees, however worthy in themselves, received a lower level of constitutional protection.

This critical difference in the weight of the individual interests was then quickly cashed out in evaluating the strength of the competing state interest. The Court concluded that the interest against discrimination by private parties justified the application of the public accommodations law to the Jaycees, thereby forcing them to admit women. It applied a similar analysis in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), holding that a California antidiscrimination law bars Rotary Club's discrimination against women. *Dale* delineated the side of this conceptual line on which to place the Boy Scouts, a large organization with a set of moral principles more focused than that of the Jaycees. See 530 U.S. at 649-50 (listing Boy Scout principles). The New Jersey Supreme Court had rejected the Boy Scouts' claim of intimate association because its "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1221 (1999), *quoted in Dale*, 530 U.S. at 646. The New Jersey Supreme Court also held that "the reinstatement of Dale does not compel the Boy Scouts to express any message." *Dale*, 734 A.2d at 1229, *quoted in Dale*, 530 U.S. at 647.

A five-to-four majority of this Court held, however, that the core moral commitments of Scout membership counted for more than the size and diversity of its membership. Thus, the Court extended the rights of

intimate association to this group. The district court claimed that the Supreme Court did not “blindly accept” the Scouts’ claim for an intimate association, but “examined the evidence” on that point. Am. Summ. J. Order 32. Yet the district court studiously avoided quoting those passages in *Dale* that evidence the low level of scrutiny this Court gave to the Scouts’ articulation of its own premises. This Court emphatically and repeatedly stated that the evaluation of the group’s goals and purposes necessarily resided with the group itself; and it refused to reject that position, pointing to the internal divisions within the group’s ranks that led from time to time to deviations in practice from its core principles. *Dale*, 530 U.S. at 648-49 (giving extra scrutiny to the findings of the New Jersey Supreme Court to ensure that its “judgment does not unlawfully intrude on free expression”). More concretely, this Court quoted from the Boy Scouts’ mission statement and took that as unassailable proof of its core beliefs. *Dale*, 530 U.S. at 649. It further held that the Scouts’ right of intimate association was not lost because the Scouts had declined to include references to its opposition to homosexual activity in its handbook. Instead, the Court held that the terms “morally straight” and “clean” could cover the Scouts’ opposition to homosexual activity. Far from involving the strict scrutiny that the district court applied to CLS, this Court gave the Scouts virtual *carte blanche* to define its own purposes: “The Boy Scouts says it [homosexual activity] falls into the latter category” because it is not “morally straight” or “clean.” *Id.* at 650.

The dissent in *Dale* followed the line of the New Jersey Supreme Court. But even if its logic had prevailed in that case, this case should come out exactly as *Dale* did. The CLS chapter at Hastings is small and cohesive. It has no ambiguity about its meaning or purposes. It falls squarely within the class of intimate associations that every justice of this Court recognized in *Roberts* and in *Dale*. The district court sought in part to evade this obvious conclusion by insisting that the protection afforded to intimate associations extended only to speech and not to conduct. *See* Am. Summ. J. Order 8, 11-15, 20, 25. But this creative reinterpretation of the case completely misreads both *Dale* and *Roberts*. As noted earlier, *Roberts* found explicitly that the ability to accept or exclude other individuals lies at the heart of the right of associational freedom. *Roberts*, 468 U.S. at 621-23. And the entire issue in *Dale* was whether the Scouts could terminate Dale's service even though he was a model Scout in all other respects. It is thus impossible to insist that a set of prohibitions against CLS for the way in which it organizes its internal operations counts as an innocent restriction of conduct that falls within the *O'Brien* caveat—conduct of an “interest unrelated to the suppression of free expression.” *United States v. O'Brien*, 391 U.S. 367, 377 (1968). And in any event, the First Amendment's Free Exercise Clause necessarily protects all sorts of conduct that individuals exercise in accordance with their religious beliefs. It takes no citation to understand that this protection covers ritual forms of conduct as well as words. There is no question, then, that CLS enjoys strong associational, speech, and

religious interests that are protected as intimate expression associations.

III. The Doctrine of Unconstitutional Conditions Prohibits Hastings from Conditioning CLS's Access to Hastings's Limited Public Forums on Its Surrender of Its Expressive Rights of Intimate Association, Speech, and Religion.

The argument thus far has examined the tension between intimate rights of association and the state's antidiscrimination law only in the context of direct regulation of private group activities on state property. Accordingly, the district court took the position that *Roberts* and *Dale* were inapplicable because the state here "merely" wishes to exclude CLS from Hastings, but has no power or interest in preventing them from doing as they please on private property. Am. Summ. J. Order 12-13, 24, 31. Yet this seductive position ignores the entire doctrine of unconstitutional conditions, which treats the government differently from private parties for two reasons: its monopoly control over certain key aspects of public life, and its ability to tax individuals and spend the proceeds of those taxes on a wide range of public purposes. See Richard A. Epstein, *Bargaining with the State* 10-11 (1993). The doctrine of unconstitutional conditions, which the district court wrongly dismissed out of hand, Am. Summ. J. Order 41 n.7, developed to respond to just these dual risks.

To expose the district court's error it is necessary to proceed in three stages. Accordingly, the first part of the argument articulates the classical doctrine of

unconstitutional conditions as it applied to economic interests. The second part shows how this same framework survives the demise of economic liberties in dealing with First Amendment rights of speech, association, and religion on public streets, highways, and other open public forums. The third part shows that the same logical structure applies to limited public forums such as Hastings.

A. The Classical Doctrine of Unconstitutional Conditions Limits the Power of the State to Require the Forfeiture of Constitutional Rights as a Condition for Gaining Access to Publicly Owned Property.

In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926), this Court applied the doctrine of unconstitutional conditions in connection with the economic use of public highways by private commercial carriers. At issue was whether the California Railroad Commission could tell the private carrier defendant that it could gain access to state-owned roads only if it agreed to be regulated as a common carrier, *i.e.*, one that agreed to take all traffic under the applicable state regulations. This Court acknowledged that California could either keep the defendant's trucks off the roads or let them on as it saw fit—as had been decided in *Buck v. Kuykendall*, 267 U.S. 307 (1925)—but held that California could not use its power to exclude to force the defendant to accept any and all forms of state regulation in order to access the system. *Frost*, 271 U.S. at 599. So

construed, *Frost* worked as a counterweight to California's effective transportation monopoly through its ownership of all key elements of the transportation grid. The state could not, however, use its power to promote an illicit form of economic protectionism. "Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved." *Id.* at 591.

That proposition summarizes the classical structure of the doctrine. At the time, the police power surely allowed for the protection and conservation of the highways, but it had never been construed to allow the state legislature to convert a competitive industry into a monopolistic one. If the legislature could not achieve a given regulatory objective directly, it could not use its power to admit or exclude from the highways to achieve that same illicit end. Under that rationale, for example, the common practice of giving out a single monopoly for bus or tram service to one preferred firm would not be permissible. Multiple parties would have to be allowed to operate without favoritism. If there were genuine capacity constraints on the road, every firm would have an equal opportunity to obtain the franchise, whether it is allocated by bid or by lot. No first-mover advantage is ever allowed to lock in a permanent preference with respect to the use of any common resource.

On economic matters that logic no longer holds, unfortunately, under today's broader conception of the police power in economic matters—which makes it abundantly clear that the state may use its direct powers to convert competitive industries into

monopolies. But the doctrine continues to hold with respect to all rights that currently receive a higher level of constitutional protection.

B. The Doctrine of Unconstitutional Conditions Carries Over to Limit the Power of the Government to Require the Surrender of Any Individual Constitutional Right as a Condition for Gaining Access to Public Property That Is Suitable for Use as a Public Forum.

The basic principle in *Frost* retains its direct and profound application in modern cases under the Bill of Rights even after economic liberties have been stripped of their constitutional protection. Thus, the state cannot condition admission to public roads (or even to buy things shipped on public highways) on the willingness of individuals to surrender, say, their general protections against unreasonable searches and seizures or self-incrimination. Individuals, acting rationally and alone, could easily conclude that the need to access public roads and the goods and services shipped on them is so pressing that they would eagerly waive some portion of their constitutional rights in exchange for such access. But the unconstitutional conditions doctrine has blocked states from using their ownership of the roads to eviscerate the Bill of Rights. It necessarily follows that the only conditions that should be allowed are those that are fairly directly related to the government's legitimate ends or interests, which here include the payment of tolls for maintenance and upkeep, a willingness to obey the

rules of the road, and a willingness to submit to the jurisdiction of the state for torts disputes arising out of the use of the highways (but not those arising outside the state). *See Opinion of the Justices*, 147 N.E. 681 (Mass. 1925).

These principles carry over without a hitch when public streets and parks are used as a public forum to express opinions on public issues. Thus, in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), the Court struck down a Jersey City municipal ordinance requiring union members who wished to conduct meetings and distribute literature in public streets and parks to first obtain a city permit. “Wherever the title of streets and parks may rest, they 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.” *Id.* at 515. The notion of the public trust effectively negates any state claim to absolute power over the public roads and parks.

Years later, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), this Court addressed the allocation of space on the commons with regard to the placement of news racks on public streets. It held that, even though the state had a legitimate interest in controlling clutter and appearance on public ways, it could not parlay that legitimate interest in time, place, and manner regulation into an explicit preference for larger papers at the expense of smaller commercial publications, which Cincinnati asserted had lower speech value. *Id.* at 430.

The limitations on state power with respect to types of paper apply, *a fortiori*, to any state effort to impose a system of viewpoint discrimination. Unlike the situation in *Discovery Network*, there is in this case not the slightest suggestion that Hastings has any scarcity constraint in the allocation of the benefits accorded to its registered organizations. But if it did, it would have to make its allocation consistent with *Discovery Network's* dictates. State ownership of streets does not give the government any greater right to distort competition between rival media than does direct regulation. Nor does state ownership of a law school.

Closer at hand is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). At issue in *Hurley* was whether the South Boston Allied War Veterans Council had to admit into its St. Patrick's Day parade the GLIB group to march as a separate contingent under its own banner as part of the Council's larger St. Patrick's Day celebration. As in the instant case, this case pitted a private organization's First Amendment associational rights against a Massachusetts statute that banned discrimination on account of sexual orientation. See Mass. Gen. Laws ch. 272, § 98 (1992). The Massachusetts Supreme Judicial Court held that the lack of a unified theme in the Council's parade meant the state could require it to include the GLIB contingent with its own float under its own banner that expressed solidarity with other gay, lesbian, and bisexual groups. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1295-98 (Mass. 1994).

This Court reversed that decision in ways that reflect the principled limitations on the state's power to regulate the use of public facilities for expressive purposes. Any regulations that needed to assure that the parade is "peaceful and orderly" fall within the traditional power of government. But in this instance the GLIB wanted to impose its message on that of the Council, which it was not allowed to do because "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The Court refused to undertake any independent substantive examination to see if the Council's decision to exclude the GLIB was in any sense justified as a matter of political morality.

Hurley is, moreover, a stronger case than *Roberts* for the protection of the expressive interest because the only issue at stake in *Hurley* was the expressive interests of the Council on this one occasion. This Court's logic ensured that this public forum was open to all groups on equal terms. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. The proper remedy for the GLIB was not to free-ride on the Council's efforts, but to organize its own parade.

Nor on this score did the Court draw any relevant distinction between speech and conduct, for it regarded the parade itself as an explicitly expressive activity; so too it concluded that GLIB's "participation as a unit in the parade was equally expressive." *Id.* at 570. To be sure, in *Hurley* the petitioners "disclaim[ed] any intent

to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.” *Id.* at 572. Therefore, so long as gay participants did not offer their own public message, they could not be excluded from the parade solely on the ground of their sexual orientation. For at that point, their activity no longer constituted a protected form of expression such that the Massachusetts antidiscrimination law could apply.

The relevance of these distinctions to the instant case cannot be denied. Members of CLS do not wish to travel incognito at Hastings. They wish to be recognized as an organization whose speech and conduct is constitutionally protected, at least if the logic of *Roberts*, *Dale*, and *Hurley* carries over to limited public forums, as it surely does.

C. Viewpoint Discrimination Is Not Allowed with Respect to Expressive Activities That CLS Wishes to Undertake in a Limited Public Forum—the Hastings College of the Law.

The last stage of the argument shows that the same relationship between intimate expressive rights and a state policy against antidiscrimination carries over from open to limited public forums, including the Hastings College of Law. Hastings does not conduct its law school on the public streets, of course, but does so in buildings that are dedicated for that purpose. It

claims, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995), that *Dale* and *Hurley* raise “entirely distinct” issues, see Hastings Cert. Opp’n 28, “because they take place in the context of limited public forums, which Hastings can ‘confine’ to whatever topics it sees fit, so long as ‘the restrictions are reasonable in light of the purpose served by the forum and viewpoint-neutral.’”

Hastings is undoubtedly a limited public forum, governed by distinctive rules needed to cover the situation. But the rule, although generally phrased, is highly viewpoint-sensitive given the disproportionate burden it places on CLS. Hastings is entirely wrong to ignore the powerful place accorded to intimate expressive associations even in limited public forums.

As an initial premise, all parties agree that no academic institution, Hastings included, could accomplish its educational mission unless it were able to limit admission to its facilities to persons connected with that mission. Yet at the same time, it does not follow that the protection of associational rights stops at Hastings’s doors. Instead, it has long been established that even though Hastings may control who enters its facilities, it does not, as an instrument of the government, have the same degree of control over the activities that take place on its premises as a private owner has. The faculty and administration can decide whom to hire, whom to admit, and what to teach. And, as a limited public institution, Hastings can wall off certain subject matter areas as inappropriate to the school. It need not open its rooms to discussions of winemaking or quantum mechanics. Nor need it schedule any extracurricular activities that

disrupt its ordinary academic program. Yet by the same token, once it opens its doors to any general subject matter area, it cannot engage in any form of viewpoint discrimination. “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Rosenberger*, 515 U.S. at 829. The very proposition that Hastings quotes to oppose certiorari exposes the weakness of its own substantive position.

Ironically, Hastings’s position is decisively undermined by *Rosenberger* and the other cases on which it relies. In *Rosenberger*, the University of Virginia was not obligated to fund any student publications at all. But once it decided to fund some publications from its student activity fund, it could not refuse to cover the printing costs of an explicitly Christian publication if it were prepared to fund printing costs for other campus publications dealing with similar religious and social issues. *Id.* at 834-35. To the extent that the university was not engaged in its distinctive academic mission, it had to treat all groups in the same fashion, without discrimination. Similarly, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court struck down a decision of the University of Missouri at Kansas City that denied religious groups access to its facilities after hours when it held those same facilities open to nonreligious groups to convey their messages. *Id.* at 265. On the question of justification, the Court held that the state could not override this expressive interest solely by its wish to promote a greater separation of church and state, for the principal effect of doing so was to “inhibit[]

religion,” *id.* at 271 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)), even if the policy had both a strong secular purpose and did not foster excessive entanglement with religion. *Widmar*, 454 U.S. at 271.

The result in that case would not have changed if the university had sought to buttress its decision with an internally generated policy against discrimination similar to Hastings’s.

In *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the same basic principles prevented the Central Moriches school district from refusing to let Lamb’s Chapel use its facilities after hours to run a religiously oriented film series that stressed the importance of family values. As a limited public forum, the district did not need to allow any group to use its facilities after hours. *Id.* at 389. But once the district opened its doors to some outside organizations, it could not discriminate against others. Thus, the Court held, first, that the equal access policy to this limited public forum did not create an establishment of religion, and, second, that the district’s rules impermissibly authorized viewpoint discrimination that cut against Lamb’s Chapel. *Id.* at 392-93. The articulation of formal regulations here did not save the policy.

These principles transfer easily to the present case. The privileges that Hastings denied to CLS in no way went to Hastings’s own intellectual mission. Just as common carriers cannot exclude passengers from seats on a train or rooms at an inn, see *Rex v. Ivens*, (1835) 173 Eng. Rep. 94, 96 (N.P.) (cited in *Hurley*, 515 U.S. at 571), so Hastings cannot exclude CLS from room assignments or bulletin board spaces when it lets other

groups with divergent viewpoints use them. Thus, this principled accommodation allows the university to maintain control over its curriculum and faculty hiring, but does not allow it to play favorites among groups in conducting its routine ministerial work.

Persuaded by Hastings, the district court ignored the relevance of the unconstitutional conditions doctrine, offering this flimsy rationale: “Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations.” Am. Order of Summ. J. 24 (relying on *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006)). That rationale wholly misses the point: Hastings remains a limited public forum for many purposes. Surely, Hastings could not use that rationale to exclude members of CLS from the Law Review.

Hastings is not a private institution that may admit or exclude other individuals as it chooses. Private churches and schools could not survive if they had to admit all comers. Their success lies in their ability to use their own resources to advance the substantive doctrines they believe. Those who do not agree with the message can find alternative organizations to join. There is no question, therefore, that if Hastings were a private institution it could exclude CLS if its mission were incompatible with Hastings’s own, just as a CLS law school could exclude groups that were incompatible with *its* mission.

The district court is also incorrect to maintain that Hastings should not be put into a position of having to “subsidize” beliefs that it does not hold. Am. Summ. J.

Order 24 (citing *Evans*, 129 P.3d at 402). If a subsidy is involved in cases of this sort, it must be applied even-handedly. The subsidy cannot be given to groups whose views Hastings supports while being withheld from others. Thus, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court held that the state could not offer a real estate tax exemption to individuals who were willing to sign loyalty oaths while denying the same privilege to those who were not. And in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court struck down an Arkansas statute, Ark. Stat. Ann. § 84-1904(f) (1980), that gave tax exemptions to “religious, professional, trade, and sports” journals while denying them to general-purpose magazines. Even in the absence of clear viewpoint discrimination, the basic principle remains “better safe than sorry.” A uniform tax works well enough: So long as one group got benefits that the other was denied, there was an implicit subsidization of one group in violation of the prohibition against viewpoint discrimination.

Indeed, the systematic view of this question shows that the language of “subsidy” is always inappropriate when an instrumentality of government gives a differential advantage to one group that it selectively denies to another. In this case, for example, all members of CLS contribute through taxation revenues that help support Hastings. All other law students at Hastings know that their taxes will allow them to receive the full benefits of attendance at Hastings. CLS members know all too well that they will not receive any tax or tuition rebate if they refuse to attend Hastings for reasons of conscience. Equally well, they know that Hastings has deliberately denied

them the full range of benefits made available to all other enrolled students. The burdens and benefits of state power must be evaluated as a package. Cross-subsidization on grounds of religious beliefs is flatly forbidden, even when done through the mechanism of selective exclusion from government benefits. CLS receives no subsidy when it is treated in the same fashion as all other groups whose members provide financial support to run Hastings's operations.

IV. Hastings Offers No Compelling Justification for Limiting CLS's Right of Intimate Association.

In light of the above analysis, it follows, as in the other cases just considered, that Hastings must offer a compelling justification for denying CLS, an intimate expressive association, the standard package of benefits that it routinely extends to all other groups, regardless of their point of view. Yet apart from its recitation of its general antidiscrimination policy, which proved unavailing in *Dale*, Hastings has offered none. The case clearly does not present any issues that relate to actual or incipient violence that could bring it within the rule on burning draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968). There is no extra cost that CLS imposes on Hastings by running its own meetings. There is no possibility that CLS will take advantage of this standardized package of benefits to disrupt order within the school or to wield disproportionate influence over the law school's educational mission. Nor is there any risk that outsiders will be misled that Hastings as an institution

supports the policies of CLS just because it has granted CLS the standard package of privileges granted to all other groups.

Most importantly, the Hastings policy is not saved, as the district court thought, because Hastings was prepared to allow the group to use its space for meetings even though it denied CLS other privileges. Am. Summ. J. Order 26. That policy is an open admission that the total exclusion of CLS from the premises, because of CLS's refusal to follow Hastings's nondiscrimination policy, is constitutionally indefensible. It is unclear by what logic Hastings can insist that CLS should be relegated to second class status—to sit, as it were, in the back of the bus—solely because its members wish to act on the strength of their deep religious beliefs. Hastings has conceded by its conduct that it can survive when it makes limited concessions to CLS. But it offers no explanation as to how its internal operations are compromised if it extends the same operating principles to CLS as it does to Hastings Outlaw.

Requiring a government agency to adhere to a nondiscrimination principle represents no exotic departure from established principles of constitutional law. Treating Hastings as a limited public forum leaves the school free to organize its instructional program as it sees fit. It need not operate its classrooms as though they were public highways. But Hastings also conducts many activities that do not demand that same high level of discretion. If a railroad can assign seats to all comers on the basis of price or by lottery, a law school can assign bulletin board space or office space along the same lines. The

cardinal virtue of the nondiscrimination principle is that it does not require the Court to dictate how public law schools govern the use of their facilities. That choice Hastings can make for itself. But through the nondiscrimination principle, this Court has effective tools to curb the public officials' discretion without having to second-guess each and every decision they make.

This nondiscrimination principle has, for example, wide application in Dormant Commerce Clause cases whereby states are not allowed to discriminate in favor of their own producers in ways that would allow economic protectionism—the very issue at stake in *Frost*—to run wild. See *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926). In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), for example, this Court struck down a Madison ordinance that required all milk to be pasteurized within five miles of the city limits. The city had put forward a justification for its ordinance based on the idea of public health, which this Court promptly slapped down. “In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison [cannot discriminate] against interstate commerce . . . even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives . . . are available.” *Id.* at 354.

The nondiscrimination principle also applies to taxation of newspapers and other media outlets protected by the First Amendment. The state may impose whatever tax it chooses on all newspapers, but cannot impose a higher tax on larger newspapers in

ways that alter the competitive balance among them. See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983). The principle organizes much of the law under the Establishment Clause. The state may not admit the Christmas tree but exclude the menorah even if it is able (at least in some circumstances) to exclude both. *Lynch v. Donnelly*, 465 U.S. 668 (1984). The current Hastings rules work well with the other organizations that are allowed to use them. There is no question that they would work every bit as well if CLS were given equal access rights. Hastings has at best threadbare justifications for imposing its “nondiscrimination” policy in ways that consciously discriminate against CLS’s exercise of its constitutionally protected rights as an intimate expressive association. The district court never once used the word “intimate” in its opinion, which has strayed far from the principles long defended in this Court.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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