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.

NELL NEWTON, *et al.*,

Respondents.

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

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF EVANGELICALS, CAMPUS CRUSADE FOR CHRIST, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, AND BETA UPSILON CHI IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. NAE believes that religious freedom is a gift of God, and is vital to limiting the government which is our American constitutional republic.

Campus Crusade for Christ ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. CCC also operates Student Venture, a ministry geared towards high school students. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." Matthew 28:19-20.

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[*] Counsel of record were notified on May 27, 2009 of *amici's* intent to file this brief. The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the a*mici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students. At numerous public universities, CCC student groups have been threatened with denial of equal access to meeting space, funding, and other benefits because they set religious criteria for their leadership.

InterVarsity Christian Fellowship/USA ("IVCF") has as its purpose to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 855 chapters on 556 campuses in the United States, including chapters at 299 public universities and colleges. Many IVCF student chapters at public universities have been threatened with denial of equal access to meeting space because they set religious criteria for their leadership.

Beta Upsilon Chi ("BYX") is the largest Christian fraternity in the United States. It is headquartered in Fort Worth, Texas, with twenty-four chapters on college and university campuses in eleven states. BYX's purpose is to establish brotherhood and unity among college men based on

the common bond of Jesus Christ. Over the past several years, college and university administrators – in states such as Florida, Georgia, and Missouri – have refused to recognize chapters of BYX, because the chapters call upon their officers and members to share the fraternity's Christian beliefs and to strive to live true to those beliefs.

ARGUMENT

This is an important case about religious liberty affecting the First Amendment expressive association rights of thousands of religious student groups at university campuses throughout the nation. The question presented is highly significant: *May government universities condition access to a public forum or benefit on a student religious group's abandonment of religious membership requirements and its right of self-definition?* The court below held that officials at the University of California Hastings College of Law could exclude a chapter of the Christian Legal Society (CLS) from operating at their campus, because the officials believed that the CLS chapter's statement of faith requirements conflict with the school's nondiscrimination policies.

The issue is a recurring one; the decision of the Ninth Circuit is in direct conflict with the decision of the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006); and the decision also conflicts in principle with a long line of this Court's decisions recognizing the First Amendment right of expressive association of groups to define their identity and membership – rights that clearly extend to religious student groups at state universities. *See, e.g., Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Amici include organizations with student religious groups whose ability to meet on college campuses for religious discussion, fellowship,

evangelism, and mutual support are directly threatened by the decision below. *Amici* strongly urge this Court to grant the writ of certiorari in this case to resolve the conflict in the lower courts and to clarify the vital First Amendment rights at issue here. We cannot emphasize too strongly the importance of this issue, its regularly recurring nature, the likelihood that the decision below will encourage *more* such actions at other state universities, and the enormous implications this issue has for the life and vitality of campus religious groups.

In this brief, we offer two straightforward legal points for this Court's consideration: First, campus religious groups possess the freedom of expressive association in their doctrinal and membership decisions, a freedom well-recognized by this Court's decisions. Second, we submit that the logical implication of this Court's "equal access" decisions in *Rosenberger* and *Widmar* upholding the rights of student religious groups to meet and use state university facilities and resources is that state university officials may not condition a religious group's access to campus facilities on relinquishment of its religious identity, including such group's expressive association right to define its religious doctrinal and membership requirements. We submit that these points demonstrate that the judgment below is erroneous, and highlight the importance of the issue and the need for this Court's review.

We offer a third, practical point supporting review in this particular case: This case frames this essential issue in about as clean and square a

fashion as it is possible to imagine. The facts are plain and simple: a campus law student Christian group has a statement-of-faith membership requirement; the state law school construes its "nondiscrimination" requirements as prohibiting the use of such a statement of faith by a student religious group at the law school. The issue is uncluttered by factual concerns involving allegations of improper conduct by any person or group. Moreover, because the issue takes place at the university level – indeed, at a law school level – there is no conceivably legitimate issue of student immaturity or of deference to a mistaken perception of state endorsement. *Widmar*, 454 U.S at 274 n.14. *See also Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 250 (1990). Finally, there is no conceivable question of public school curriculum policy. In sum, this case makes an excellent vehicle for consideration of the important constitutional issue presented.

I. CAMPUS RELIGIOUS STUDENT GROUPS POSSESS THE FIRST AMENDMENT RIGHT OF EXPRESSIVE ASSOCIATION.

This case concerns religious liberty. Specifically, it concerns the right of religious groups to define and maintain their doctrinal identity through their decisions about membership – in particular, the beliefs and conduct that define the religious group. In terms of this Court's precedent, this case concerns the First Amendment freedom of "expressive association," as it applies to religious persons and groups.

The freedom of expressive association is recognized in a great many of this Court's cases. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees,* 468 U.S. 609 (1984); *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981); *Healy v. James,* 408 U.S. 169 (1972).

This freedom is also specially recognized as an aspect of religious liberty under the Free Exercise Clause. As this Court noted in *Employment Division v. Smith,* 494 U.S. 872, 882 (1990),

> it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

See also Roberts, 468 U.S. at 622-623 (noting that the freedom, among others, of persons "to worship" would not be adequately "protected from interference by the State unless a correlative freedom to engage

in group effort toward those ends were not also guaranteed" and stating that "[t]here 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. Such a regulation may impair the ability of the original members to express only those views that brought them together.").

The right of expressive association is the right of a group to define its identity and its message, by defining the membership – and membership requirements – of the group. As this Court held in *Democratic Party v. Wisconsin*, "the freedom to associate for the common advancement of political beliefs . . . *necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only* . . . ". 450 U.S. at 122 (emphasis added) (quotation marks, citations, and footnote omitted). As Justice O'Connor expressed it in her concurrence in *Roberts*: "[A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. . . . Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

A campus student religious group – clearly, an expressive association – enjoys these same rights. A religious group's identity is undeniably constituted

by the "content of its message and the choice of its members." *Id.* What the religious group *stands for* – its message and identity – is a function of the faith commitments shared by the group's membership. For a fairly traditional Christian group (like the Christian Legal Society), this naturally may involve a *Christian* "statement of faith" to which it expects its members to adhere, and other Christian doctrinal requirements and standards of conduct. To be sure, not all of society will agree with those beliefs; a Christian organization's beliefs and standards may conflict with secular society's values in meaningful ways. This may well be true with regard to matters of sexual conduct. (The doctrine, faith, and conduct requirements of many of the world's great religious faiths take religious and moral positions against homosexual conduct.) But that is simply part of what defines the religious identity of that particular student group.

As a practical matter, this *of course* "excludes" persons who do not adhere to the beliefs or standards of conduct of that particular community of faith. But only in the most strained sense of the terms do such requirements "discriminate" against such "excluded" persons. The religious groups in question are simply exercising their First Amendment freedom to define themselves and their collective expression. In a sense, the persons thereby "excluded" exclude themselves by virtue of the exercise of *their* First Amendment rights: they do not agree with the group, and so exercise their right to differ in their beliefs and conduct.

There is no doubt that campus student organizations are covered by this Court's cases protecting the freedom of expressive association. They possess all the characteristics of such groups generally; they simply are limited to their respective campus student bodies. Indeed, arguably the leading case in this line of decisions, *Healy v. James*, 408 U.S. 169, involved a campus group, the Students for a Democratic Society, and rejected the state university's claimed authority to deny that group recognition because its views conflicted with the university's stated values. *Healy* well states the controlling principles that apply here:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. . . . The mere disagreement of the [university] President with the group's philosophy affords no reason to deny recognition. As repugnant as these views may have been, . . . the mere expression of them would not justify the denial of First Amendment rights. . . . The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

408 U.S. at 184, 187-188.

II. A STATE UNIVERSITY MAY NOT CONDITION A STUDENT RELIGIOUS GROUP'S ACCESS TO CAMPUS FACILITIES OR RESOURCES ON RELINQUISHMENT OF THE GROUP'S RIGHT TO DEFINE ITS MESSAGE AND IDENTITY THROUGH ITS MEMBERSHIP STANDARDS.

The First Amendment rights of speech and association apply to campus student *religious* groups as well as political and other groups. That principle is firmly settled by this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and more recently in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). The clear, necessary implication of those decisions – upholding religious campus group's right of access to campus fora for expressive activity – is that state officials may not exclude such a group from such benefits *on the basis of the group's religious identity or message.*

If it is true, as this Court's expressive association cases affirm, then that the selection of membership is an integral part of a group's ability to maintain its message or identity, it follows that government officials at state universities may not condition access to campus fora on a group's relinquishment of that right of expressive association. *See generally* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*,

29 U.C. Davis L. Rev. 653 (1996) (collecting cases and developing this argument at length). Thus, state officials may not impose – whether under the rubric of generic "nondiscrimination" requirements or in some other form – restrictions on a campus religious student group's message or membership requirements.

While there may be extreme, limiting cases involving expressive conduct (or mis-conduct) the state has a compelling interest in prohibiting, *see* Paulsen, *supra*, at 691-697, a religious group simply defining its membership in terms of its religious beliefs and standards of conduct does not remotely approach such circumstances. Specifically, any assertion that the state has a "compelling" interest in interfering with the expressive identity and message of a Christian religious group by requiring that it include persons engaged in sexual conduct or lifestyles contrary to the group's understanding of its religious tenets, would appear to be foreclosed by this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). In that case, the Court unanimously rejected the application of a state anti-discrimination requirement (forbidding discrimination on the basis of homosexuality) that would have the effect of requiring the inclusion in a group's parade of unwanted members who would alter the original group's message:

> Under [the state's] approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so

> that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 573, 579.

So too here: the use by state officials of nondiscrimination requirements essentially to transform the student Christian Legal Society into a public accommodation whose views would be shaped by persons *not* sharing their views – or else to forbid CLS's expression and association on campus entirely – violates the fundamental rule of the First Amendment that a speaker has the autonomy to control the content of its own message. So to condition a campus religious group's rights of expression on a relinquishment of its right to control its own expressive identity and to define its own principles grates on the First Amendment.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR ADDRESSING THIS IMPORTANT AND RECURRING ISSUE.

The reasons why this case presents an appropriate opportunity for deciding the important issues presented are well set forth in the Petition for Certiorari: the decision below presents a square conflict with the decision of the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006); the decision below conflicts in principle with this Court's expressive association decisions and with *Widmar* and *Rosenberger*; and the issue is important and recurring.

As noted, we believe that other factors make this case an especially apt vehicle for addressing the question presented. There are no factual complications. The issue is presented in a straightforward manner – state university officials take the position that they may exclude Christian Legal Society from Hastings Law School because they believe that CLS's statement of faith and membership practices conflict with the school's nondiscrimination requirements; CLS maintains that its membership decisions and faith requirements are protected features of its First Amendment rights of freedom of expressive association, and that it cannot be denied campus rights on such a ground. The situation takes place at a state university law school – presenting none of the complicating or potentially distracting issues that might be thought present in a public high school

context. And there is no question of misconduct, harm, disruption, or conflict with a curriculum choice in any fashion.

To be sure, the opinion of the Ninth Circuit was a summary disposition, relying on an earlier Ninth Circuit panel opinion and circuit practice generally requiring one panel to follow the precedents of another. One might have preferred to see substantive discussion of the issues by members of the panel below. But the issue remains squarely presented, addressed substantively by the district court, and well-briefed. In many ways, it presents a cleaner case than the decision on which the panel below relied, which is also the subject of a pending petition for certiorari. The facts in *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007), *withdrawn*, 524 F.3d 957 (9th Cir. 2008), *amended by* 542 F.3d 634 (9th Cir. 2008), *reh'g denied*, 551 F.3d 850 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 10, 2009) (No. 08-1130), arise in a high school setting and involve an interpretation of the Equal Access Act, 20 U.S.C. §§ 4071-4074, thus making its applicability to the matter here less than apt. *Amici* would recommend granting both cases together, for the light that one may help shed on the other. Alternatively, this Court could grant the writ in the instant case and hold the other (or vice versa). But at all events, *amici* submit that the instant case makes an excellent vehicle for addressing and resolving an important issue that has divided the lower courts and that has enormous consequences for religious student groups throughout the nation.

CONCLUSION

Amici respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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