No. 11-744

In the

Supreme Court of the United States

ALPHA DELTA CHI-DELTA CHAPTER, ET AL.,
Petitioners,

v.

CHARLES B. REED, ET AL.,
Respondents.

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

BRIEF FOR *AMICI CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE AND INTERVARSITY CHRISTIAN FELLOWSHIP/USA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for *amici* in cases involving a host of constitutional issues, primarily under the First Amendment. In particular, ACLJ Chief Counsel Jay Alan Sekulow argued before this Court the equal access cases of *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). ACLJ attorneys have also litigated a number of equal access cases in the lower courts.

InterVarsity Christian Fellowship/USA ("InterVarsity") is a Christian campus ministry that establishes and advances witnessing communities of students and faculty. InterVarsity ministers to students and faculty through small group Bible studies, large gatherings on campus, leadership training, thoughtful discipleship, and conferences and events. InterVarsity ministers to 36,675

[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties have consented to the filing of this brief. Copies of the parties' written consent are being filed herewith. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* have no parent corporations, and no publicly held company owns 10% or more of their stock.

students annually on hundreds of campuses nationwide.

Since this Court's decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), *amicus* InterVarsity has encountered dramatically increased resistance to organizational recognition on public university campuses. Crucially, universities have not applied "all comers" policies like the policy at issue in *Martinez* but have instead threatened to deny or actually denied recognition on the basis of relatively standard non-discrimination policies. Such policies were not at issue in *Martinez* but in fact govern student organizations on all but the tiniest few public university campuses.

If allowed to stand, the decision below, which wrongly applies *Martinez* not to an all-comers policy but instead to a more standard non-discrimination policy, threatens to eliminate the presence of InterVarsity and other religious groups from these campuses based not on any evidence of misconduct, or even discrimination, but solely on the organizations' religious viewpoints, in clear violation of their constitutional rights.

SUMMARY OF ARGUMENT

This case represents a virtual mirror image of the Court's recent decision in *Martinez*. Whereas Martinez dealt with the constitutionality of a stipulated "all-comers" policy that required all student groups to be open to all students in membership and leadership, this case involves a non-discrimination policy that is stipulated to place unique burdens on religious student groups. Whereas *Martinez* involved a unique (for a public

university) policy, this case involves the core constitutional issue that universities and religious groups confront on the vast majority of campuses – the conflict between standard non-discrimination rules and free speech and free association.

In *Martinez*, the dissenting justices expressed concern that the Court's decision would "arm[] public educational institutions with a handy weapon for suppressing the speech of unpopular groups." 130 S. Ct. at 3001 (Alito, J., dissenting). At the same time, however, the majority went out of its way to note that its holding applied only to an all-comers policy, not to non-discrimination policies like those at San Diego State. *Id.* at 2984.

The Ninth Circuit's opinion represents the *Martinez* dissent's fears fulfilled and the majority's express reservations ignored. Rather than protecting students and student groups from viewpoint discrimination – an obligation the *Martinez* majority emphatically reaffirmed, *id.* at 2987-88 – the Ninth Circuit's opinion ratifies disparate and discriminatory treatment of religious and nonreligious viewpoints.

This case provides the Court with an ideal opportunity to decisively address the primary question reserved in *Martinez* and to thereby deal with the actual constitutional conflict on campus rather than the unusual mid-litigation tactical alteration engineered by Hastings Law School.

Moreover, despite the express reservations of *Martinez*, *amicus* InterVarsity has experienced direct and wrongful application of the case as part of blatant attempts to exclude its viewpoint from

campus. The stakes are high. Given the number of universities with standard non-discrimination policies in place, religious campus organizations could face marginalization to the point of virtual eradication from the public college campus if this Court does not grant the writ and correct the Ninth Circuit's error.

ARGUMENT

I. THE POLICY AT ISSUE IN THIS CASE SQUARELY PRESENTS THE VIEWPOINT ISSUE RESERVED BY THE *MARTINEZ* COURT AND RUNS AFOUL OF ESTABLISHED FIRST AMENDMENT PRINCIPLES.

In *Martinez*, the Christian Legal Society ("CLS"), a religious student organization, challenged the Hastings "all-comers" policy as a violation of the group's speech, association, and free exercise rights under the First Amendment. *Id.* at 2978. This Court upheld the policy, explaining that because Hastings interpreted and applied its policy to require *all* student organizations to accept *all* interested students as members and leadership candidates as a condition on access to the school's Recognized Student Organization forum, a fact to which the parties stipulated, CLS sought "not parity with other organizations, but a preferential exemption from Hastings' policy." *Id.*

Here, by contrast, SDSU has stipulated that its Policy does not apply equally to all student groups because (in the words of its own stipulation) "some officially recognized student groups" may, without violating the Policy, restrict membership and/or

leadership candidacy to students "who believe in the group's purpose or 'agree with the particular ideology, belief, or philosophy the group seeks to promote.'" 648 F.3d at 800 (quoting parties' stipulation). As a practical matter, nonreligious groups remain free to impose belief-based litmus tests on leaders, but religious organizations enjoy no such ability. *Id.* at 800-01. Unlike the "all-comers" policy upheld in *Martinez*, SDSU's "some-comers" Policy unmistakably "draws [a] distinction between groups based on their message or perspective." 130 S. Ct. at 2993.

To be sure, SDSU requires all recognized student organizations to comply with the terms of the Policy as written, such that no group will be recognized if it restricts membership or leadership candidacy on the enumerated bases (*i.e.*, "race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition"). 648 F.3d at 796. The critical – and constitutional – problem, however, lies precisely in the list of enumerated non-discrimination categories within the Policy, as only one is inherently viewpoint-based: religion.[2] The list of forbidden criteria does *not* include politics, philosophy, or

[2] If the term "religion" meant only the historical religious background of the family into which an individual was born, rather than the individual's espoused beliefs and values, this would not be so. According to SDSU's stipulation, however, and its application of the Policy to Petitioners, the University interprets and applies the term "religion" within the Policy to prohibit recognized student organizations from restricting membership and leadership candidacy on the basis of the latter, not just the former.

ideological leanings. Groups are free to "discriminate" on these grounds to maintain organizational identity. Groups may not, however, observe boundaries based upon *religious* perspectives. Thus, any SDSU-recognized student organization dedicated to the furtherance and promotion of, or adherence to, the tenets of a particular viewpoint or ideology may take steps to protect the group's mission and purpose through membership and leadership restrictions, *unless* the viewpoint to be protected through such restrictions is a religious one.

While "[a]n all-comers condition on access to [recognized] status" may be "textbook viewpoint neutral," 130 S. Ct. at 2993, there can be no doubt that SDSU's "some-comers" Policy, which prohibits religious membership or leadership restrictions but allows such restrictions based on any other viewpoint (*e.g.,* political or philosophical beliefs), is textbook viewpoint-discriminatory, in contravention of settled First Amendment principles.[3]

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[3] Petitioners urge that the limited public forum standard of review applied in *Martinez* is inapplicable here because SDSU, in opening its campus facilities for routine use by registered student organizations, created a designated public forum such that Petitioners' exclusion from that forum is subject to strict scrutiny. *See* Petition for Writ of Certiorari at 35-36, *Alpha Delta Chi-Delta Chapter v. Reed*, No. 11-744 (Dec. 16, 2011) ("Pet. for Writ of Cert.") (relying on *Widmar v. Vincent*, 454 U.S. 263, 267, 270 (1981)). Petitioners may be correct, but SDSU's application of the Policy fails even under the lesser standard of review because exclusions from a limited public forum must be both "reasonable and viewpoint neutral," 130 S. Ct. at 2984 (citing cases), to withstand constitutional scrutiny.

Missing this point entirely, the Ninth Circuit misapplied this Court's prior decisions, concluding that the Policy is facially viewpoint neutral because its purpose is to target discriminatory membership criteria rather than organizational viewpoints. 648 F.3d at 801-02. This outcome cannot be squared with established First Amendment precedent, including the *Martinez* decision.

SDSU's Policy is not the "nominally neutral" all-comers policy at issue in *Martinez*, 130 S. Ct. at 2994, whereby "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." *Id.* at 2981 (citations omitted). Whereas the policy analyzed and upheld in *Martinez* prohibited *all* membership and leadership restrictions based on status or beliefs, not only for religious student organizations but also for nonreligious groups such as the Democratic Caucus, which could not permissibly "bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization," *id.* at 2982 (citing parties' Joint Stipulation), SDSU's "some-comers" Policy allows Democrats to bar Republican leaders, Vegans to bar hunters, African-Americans to bar white supremacists, but not Christians to bar atheists. The state has no valid interest in advancing and enforcing such a disparity.

The Ninth Circuit acknowledged:

> [T]he Immigrant Rights Coalition requires members to "hold the same values regarding immigrant rights as the organization." The San Diego Socialists at San Diego State require students to be in "agreement with our purpose." The Hispanic Business Student

> Association opens membership to those "who support the goals and objectives" of the organization.

648 F.3d at 800-01 (quoting parties' stipulations). Similarly, Petitioners' organizations restrict membership and leadership candidacy to individuals who adhere to their Christian beliefs and values. *Id.* at 795. Yet because the University's professed *purpose* for the Policy was not to discriminate on the basis of viewpoint, the Ninth Circuit overlooked its undeniable (and facially apparent) discriminatory effect and held that SDSU could constitutionally exclude Petitioners from the recognized organization forum while including the Immigrant Rights Coalition, the San Diego Socialists, and the Hispanic Business Student Association. This Court's precedent forecloses such a result.

In *Healy v. James*, this Court unequivocally held that a public university may not withhold official recognition of a student organization on the basis of the group's viewpoint. 408 U.S. 169 (1972). In *Widmar v. Vincent*, this Court, relying on *Healy*, held that a public university could not constitutionally exclude a religious student organization from use of the university's facilities for the group's religious activities while permitting other registered student organizations to use those facilities for nonreligious purposes. 454 U.S. 263 (1981).

The *Widmar* Court had no difficulty recognizing that the university's disadvantageous treatment of the student group on the basis of religion constituted clear discrimination in violation of the group's First Amendment rights. *Id.* at 270.

Based on these principles, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court held the selection of a religious student publication for disfavorable treatment within a university forum was unconstitutional viewpoint-based discrimination. 515 U.S. 819 (1995). As the *Rosenberger* Court explained, "[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Id.* at 829.

Drawing on the above line of cases, the *Martinez* Court held that "Hastings' requirement that student groups accept all comers . . . '[was] justified without reference to the content [or viewpoint] of the regulated speech.'" 130 S. Ct. at 2994 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This was so because the "policy aim[ed] at the *act* of rejecting would-be group members *without reference to the reasons motivating that behavior*." *Id.* (second emphasis added). By contrast, because SDSU's Policy prohibits the act of rejecting would-be members only if the reasons motivating that behavior are religious, it is aimed squarely at religious viewpoints.

SDSU's recognized student organization forum includes permission from the University for organizations to restrict membership and leadership candidacy to "those individuals who agree with, support, or believe in the purpose that brought the group together, or to those individuals who agree with the particular ideology, belief, or philosophy the group seeks to promote." Pet. for Writ of Cert. at 8 (quoting parties' stipulation). Having set this specific boundary within the forum, SDSU must respect it by applying it equally to all student organizations, including those that impose such restrictions on the

basis of religion. This Court should grant the writ to make unmistakably clear that the First Amendment tolerates nothing less.

II. THE DECISION BELOW THREATENS THE CONTINUED EXISTENCE AND VITALITY OF RELIGIOUS STUDENT ORGANIZATIONS ON PUBLIC UNIVERSITY CAMPUSES.

The Ninth Circuit's decision is not only legally incorrect but also practically dangerous for religious campus organizations because SDSU's "some-comers" Policy represents the norm for university campuses across the nation. The policy upheld in *Martinez*, with its "all-comers" requirement, was unique among public universities.

In fact, the "all-comers" policy was not even the *written* policy of Hastings. It was a litigation stipulation and thus the "all-comers" requirement, rather than the actual written policy, was at issue in *Martinez*. 130 S. Ct. at 2984 (rejecting CLS's focus on "Hastings' policy as written" and considering only the "all-comers" policy to which the parties stipulated). The SDSU Policy, however, with its disparate treatment of religious student organizations, is the type of policy that regularly confronts such groups on public university campuses.

As the Ninth Circuit acknowledged, for example, the entire California State University system is governed by a non-discrimination regulation virtually identical to the SDSU Policy. 648 F.3d at 796. The Regulation, in relevant part, provides as follows: "No campus shall recognize any . . . student organization which discriminates on the basis of

race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability." 5 Cal. Code Regs. tit. 5, § 41500.

To take another example, the University of Maryland requires all registered student organizations to include within their constitutions the following nondiscrimination provision: "[Name of organization] does not restrict membership or discriminate on the basis of race, color, creed, sex, sexual orientation, gender identity, gender expression, marital status, personal appearance, age, national origin, political affiliation, physical or mental disability, or on the basis of rights secured by the First Amendment of the United States Constitution."[4]

Among the requirements for recognized student organizations at the University of Michigan-Dearborn is inclusion of the following constitutional language: "The __________ club/organization is committed to a policy of equal opportunity for all persons and does not discriminate on the basis of race, color, national origin, age, marital status, sex, sexual orientation, gender identity, gender expression, disability, religion, height, weight, or veteran status."[5]

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[4] Univ. of Maryland Guidelines to Become a Registered Student Organization, available at https://www.stars.umd.edu/regguide.html.

[5] Univ. of Michigan-Dearborn Reference Guide for Student Organizations, p. 5, available at

In describing the rights and responsibilities of recognized student organizations on campus, a University of Kansas publication states: "The established policy of the Board of Regents of the State of Kansas prohibits discrimination on the basis of sex, race, religious faith, national origin, age or physical handicap within the institutions under its jurisdiction. All fraternal and campus-related organizations shall follow this policy in the selection of their members . . . ."[6]

Ohio State University requires registered student organizations to include within their constitutions a "[s]tatement of nondiscrimination prohibiting discrimination on the basis of age, color, disability, gender identity or expression, national origin, race, religion, sex, sexual orientation, or veteran status."[7]

In recent months, InterVarsity and other religious student groups have faced exclusion from each of these campuses (aside from the University of Kansas, at least so far), with administrators relying on *Martinez* to justify enforcement of "some-comers"

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http://sao.umd.umich.edu/fileadmin/template/emsl/files/SAO_Documents/Policies/Reference_Guide_Final.pdf.

[6] University of Kansas, Student Group Handbook, p. 9, available at http://www.silc.ku.edu/pdf_files/ku_stuorg_resource_guide_10-11.pdf.

[7] Ohio State University 2011-2012 Student Organization Registration Guidelines, p. 4, available at http://www.ohiounion.osu.edu/posts/documents/doc_10192011_74034380.pdf.

policies rather than the "all-comers" policy at issue in that case. InterVarsity has faced recognition problems on up to fifteen campuses this semester, none of which have a true "all-comers" policy for members and leaders. While those disputes are in varying stages of campus dispute resolution processes, this record number signals a disturbing trend.

Ironically enough, InterVarsity has an "all comers" policy for membership. In fact, it goes to great lengths to welcome members from a variety of beliefs and faith backgrounds. Largely because of this policy, which results in many non-Christians joining the organization, it is particularly important for InterVarsity to have the ability to impose belief-based requirements for its leaders so that it can maintain its unique identity in accordance with its religious principles. Otherwise, temporary majorities could easily transform the purpose of the organization and stifle its unique voice.

Yet even as InterVarsity has faced potential exclusion, other groups with different viewpoints exist unchallenged. For example, the Constitution of Students for Islamic Awareness at the University of Michigan-Dearborn requires each executive board member to "[a]dhere to the teaching of the Holy Qur'an and the family of the Prophet Muhammad."[8] The Baha'i Club at the University of Maryland requires its members to "assent[] to its principles

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[8] http://www.sia-umd.org/index.php?option=com_content&view=article&id=160&Itemid=168.

and purposes as stated within [its] constitution."[9] And Maryland's Asian American Student Union (AASU) requires its members to "agree with AASU's mission" of "provid[ing] service, representation and advocacy for the A[sian] P[acific] A[merican] community at the University of Maryland."[10] The Maryland at Peace (MAP) organization requires its members to "be in accordance with MAP's mission statement: To engage the Muslim, Jewish, and otherwise-interested communities on campus in meaningful interaction; MAP will break down stereotypes and build friendships by educating and discussing our cultures in an unbiased manner while working towards a common goal."[11] The list goes on.

The "some-comers" policies allow administrators to play favorites through creative categorization (are Muslim groups "religious" or "cultural"?), *see Rosenberger*, 515 U.S. at 830-31, and result in manifest absurdities. For example, what conceivable state interest is served by permitting an Asian-American group to require fidelity to its mission but not a Christian group? Is the mission of "breaking down stereotypes" more worthy of protection than the same mission from a distinctly religious perspective?

"Some-comers" policies are all the more indefensible in light of the ease with which a university may craft a policy that appropriately

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[9] https://www.stars.umd.edu/orgs/org_details.aspx?id=51.

[10] https://www.stars.umd.edu/orgs/org_details.aspx?id=45.

[11] https://www.stars.umd.edu/orgs/org_details.aspx?id=20645.

protects against invidious or arbitrary discrimination while simultaneously respecting the associational rights of student organizations. Indeed, several schools have responded to litigation by doing just that.

For example, expressly recognizing that "[s]tudent rights to equal opportunity and freedom from discrimination must . . . be honored in concert with student First Amendment rights to freedom of association," the official recognition policy for student organizations at the University of North Carolina at Chapel Hill provides as follows:

> Membership and participation in the organization must be open to all students without regard to age, race, color, national origin, disability, religious status or historic religious affiliation, veteran status, sexual orientation, gender identity, or gender expression. Membership and participation in the organization must also be open without regard to gender, unless exempt under Title IX.
>
> Student organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs, so long as no student is excluded from membership or participation on the basis of his or her age, race, color, national origin, disability, religious status or historic

> religious affiliation, veteran status, sexual orientation, gender identity, gender expression, or, unless exempt under Title IX, gender.

Official Recognition of Student Organizations Non-Discrimination Policy, University of North Carolina at Chapel Hill, available at http://www.unc.edu/campus/policies/studentorgnondiscrim.html. *See also* University of Wisconsin Student Organization Code of Conduct, available at http://cfli.wisc.edu/guide/hb_conduct_discipline_rsos.htm#code (same); University of Florida Student Organization Handbook, p. 18, available at https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Organizations/student_org_handbook.pdf (stating policy of non-discrimination on protected bases but explaining that an organization "whose primary purpose is religious" may "limit[] membership or leadership positions to students who share the religious beliefs of the organization" without violating the non-discrimination policy).

This Court has long held that the university is "peculiarly the marketplace of ideas." *Healy*, 408 U.S. at 180 (quotations omitted). The Ninth Circuit's misreading and misapplication of *Martinez* endangers that marketplace and ratifies the very viewpoint discrimination that the *Martinez* majority rightly condemned and the dissent presciently feared. Four decades of Supreme Court precedent – stretching from *Healy* to *Widmar* to *Rosenberger* to *Southworth* and to *Martinez* – should have compelled the Ninth Circuit to reject SDSU's "some-comers" policy. Instead, the Ninth Circuit's correctible error

may now undermine the university's historic role as a center of debate and free inquiry.

CONCLUSION

A public university policy prohibiting religious student organizations from limiting membership and leadership positions on belief-based grounds, while permitting nonreligious student organizations to do so, violates the First Amendment's requirement of viewpoint-neutrality and presents exactly the legal question the *Martinez* court reserved. *Amici* request that the Petitioner's Writ be granted.

Respectfully submitted,

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