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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case is an ideal vehicle for addressing the issue this Court specifically reserved, and initially granted certiorari to resolve, in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)—whether it violates the First Amendment for a public university to deny religious student groups the same opportunity as other groups to limit members and leaders to those who are likeminded. It is ideal because Respondents have stipulated that this is exactly how they enforce their nondiscrimination policy.

Respondents raise many reasons why this Court should deny review of this critical question through this fully stipulated record, yet none withstand scrutiny.

First, Respondents read *Martinez* so broadly that it effectively cancels religious groups' free speech, expressive association, and free exercise rights on university campuses, even if an "all-comers" policy is not present. In fact, Respondents' argument that *Martinez* forecloses Petitioners' First Amendment claims under the very circumstances it reserved for another day underscores the need for this Court's review. Universities and students need clarity on the critical question of First Amendment law left open in *Martinez*.

Respondents' mootness argument—predicated on a sudden tactical shift *made seven days after the petition was filed*—is just an attempt to escape this Court's review. Their mootness claim fails because

Petitioners seek nominal damages in addition to injunctive and declaratory relief. Compl. ¶G, 9th Cir. ER 3926. Further, Respondents have not ceased their illegal conduct, as their "new" approach to nondiscrimination *retains* an expansive exemption for gender discrimination—not present in *Martinez*—that applies to at least half of all student groups. Nothing has changed. The case is not moot.

Respondents also claim the petition is based on disputed facts, and that the narrow remand will help resolve them. Not true. *Over 200 stipulated facts* constitute the full record in this case. There is nothing left for the district court to do.

ARGUMENT

I. The Circuit Split Between The Decision Below And The Seventh And Second Circuits, And Its Conflict With This Court's Precedent, Remain Intact.

Respondents wrongly claim that *Martinez* resolved the circuit split between the decision below and *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), and *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). Opp. 16-20. They even assert that *Martinez* eliminated a religious group's ability to bring equal access, expressive association, and free exercise claims against policies like SDSU's, even when there is no "all-comers" policy and where myriad groups may exercise their associational rights, while religious groups may not. Opp. 20-25, 29-30.

The only way Respondents can make these errant claims is to treat *Martinez* as if it decided the very question that it reserved. Respondents ignore that *Martinez* was expressly limited to "whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution." 130 S. Ct. at 2984. They also ignore *Martinez*'s critical context: the CLS chapter sought "not parity with other organizations, but a preferential exemption from Hastings' policy." *Id*. at 2978.

Here, Petitioners seek parity to operate their groups like others do. SDSU has stipulated that under its policy recognized student groups may "restrict membership . . . to those individuals who agree with the particular ideology, belief, or philosophy the group seeks to promote." App. 101a, Stip. No. 35. Many groups restrict membership in this manner. App. 101a-105a, Stip. No. 35(a-n).

SDSU further stipulated that it denied Petitioners recognition because they select their members and leaders based on shared religious beliefs. App. 133a, Stip. No. 215 (SDSU will not grant "recognition 'to a fraternity or sorority that requires members and/or officers to profess a specific religious belief'"); App. 142a-143a, Stip. Nos. 358, 360 (ADX and AGO denied recognition because they require members and leaders to "agree with [their] statement[s] of faith"). Respondents again admit this in their Opposition. Opp. 7 (Petitioners denied "recognition on the ground that their 'requirement that their members and officers profess a specific religious belief' violated the non-discrimination

policy"). Thus, Petitioners' claims arise in the exact opposite context as CLS's: they seek *equal*, not preferential, treatment. The above stipulations squarely present the question deemed certworthy yet reserved in *Martinez*.

Respondents are wrong that *Martinez* resolves the circuit split between the decision below and *Walker* and *Hsu* for a simple yet important reason: the nondiscrimination policies in those cases were not all-comers policies. Rather, like SDSU's, they permitted groups to impose restrictive membership policies on any basis not prohibited by the policies (including the many ideological bases not covered by them). *Walker* and *Hsu* are thus "parity," not "preferential treatment" cases, and are on all fours with the decision below, not with *Martinez*. The circuit split that motivated this court to grant certiorari in *Martinez* remains.[1]

Respondents' argument that this Court's expressive association cases are inapplicable to this case, Opp. 21, is wrong for similar reasons. *Martinez* was expressly limited to a policy where all groups received the same treatment. Here, SDSU has stipulated that nonreligious student groups may exercise their associational rights, and that religious

[1] In essence, Respondents' argument is that *Martinez* means that students shed their right of association at the university gates, regardless of whether an all-comers policy is involved. Respondents' errant claims about *Martinez*'s scope demonstrate another critical reason why this Court should hear this case. It provides an excellent opportunity and vehicle to rein in the mischievous notion that *Martinez* cancelled associational rights on public university campuses before it spreads.

groups may not. *Martinez* simply does not say that this Court's expressive association cases may never apply in circumstances such as this, where the government is playing favorites with the exercise of this critical freedom.

Respondents also argue that *Martinez* forecloses any claim that SDSU's nondiscrimination policy is viewpoint discriminatory. Opp. 22. Hardly. The majority limited its opinion to the constitutionality of an "all-comers" policy, noting that it was not deciding whether it was constitutional for a policy to allow, "[f]or example, [a] political . . . group [to] insist that its leaders support its purposes and beliefs," while a "religious group cannot." *Martinez*, 130 S. Ct. at 2982. And the four dissenters in *Martinez* viewed a policy like SDSU's as resulting in clear-cut viewpoint discrimination. *Id*. at 3010 (Alito, J., dissenting). *See also id*. at 2999 (Kennedy, J., concurring) (*Martinez* would "likely [have] ha[d] a different outcome" if CLS could have shown that Hastings' policy was "content based either in its formulation or evident purpose").

SDSU's viewpoint discrimination is clear. Respondents stipulated that SDSU grants recognition to nonreligious groups that restrict membership and leadership to students who agree with their beliefs, yet denies recognition to religious groups that seek to restrict members and leaders to their religious beliefs. *See supra*. This is viewpoint- and content-based discrimination under *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and this Court's many other

decisions striking down such discrimination. Pet. 19-26, 35-36.

II. This Controversy Is Live.

Respondents have defended the constitutionality of their nondiscrimination policy for over six years, importantly, continue to defend its constitutionality before this Court, and won numerous court victories upholding the policy. Now, *seven days after this petition was filed*, they claim (inaccurately, *see infra*) to have suddenly, and by fiat, adopted an "all-comers" policy that moots this case. This is nothing more than a naked attempt to escape this Court's review.

Respondents' tactics further highlight the need for this Court's review now. Respondents urge this Court to wait for a different case to decide the issue reserved in *Martinez*, Opp. 20, but their eleventh-hour bid to avoid review of the issue, if successful, would virtually assure that it would never be heard. If Respondents can defend enforcement of a policy that squarely presents the issue reserved in *Martinez* for years and then escape review for their many years of constitutional violations at the last minute by simply adopting a supposed "all-comers" policy, every university will follow suit.

Moreover, the Chancellor's recent announcement that CSU has adopted an "all-comers" approach, even if credible, would not moot this case. Opp. 1. First, Petitioners seek nominal damages, Compl. ¶G, 9th Cir. ER 3926, which prevents dismissal for mootness. *See Carey v. Piphus,* 435 U.S. 247, 266-67

(1978) (plaintiff can seek nominal damages in the absence of other damages for constitutional violation under § 1983); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978) (claim for damages "saves this cause from the bar of mootness"); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) ("A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit"); 13C Charles A. Wright et al., *Federal Practice & Procedure* § 3533.3 (3d ed. 2011) ("Nominal damages also suffice to deflect mootness"). Respondents are thus wrong that this Court cannot grant Petitioners "any effectual relief." Opp. 11.

Moreover, the approach recently announced by the Chancellor is not an "all-comers" policy like the one in *Martinez*. Importantly, *Martinez* did not address a policy that included a gender exemption. And, here, Respondents' "new" approach *retains the actual policy's exemption for gender-based discrimination by fraternities and sororities.* Opp. 10 ("except that a social fraternity or sorority or other university living group may impose a gender limitation"). This is an enormous exemption, considering that *approximately 50 percent* (58 out of 115) of the registered student organizations at SDSU are gender-based fraternities or sororities. App. 146a-181a. Respondents cannot claim mootness when even their "new" approach has built-in exceptions that cover, *at a minimum*, half of all student groups. There are no mootness concerns here whatsoever.

Notably, Respondents could not satisfy the voluntary cessation test even if they had ceased their

illegal conduct. "It is well-settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Under this rule, the party claiming mootness has the "formidable burden" of establishing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189-90 (2000).

Respondents cannot possibly satisfy this burden. Again, they have defended the constitutionality of their policy and actions for years and continue to do so before this Court, have won many court victories, and "changed" their policy *seven days* after this petition was filed. Under such circumstances, there is no certainty at all—let alone the required *absolute* certainty—that Respondents will not continue treating religious groups differently, especially considering that even the "new" approach continues to do so. This Court and others have rejected mootness under similar (yet far less egregious) circumstances. *See, e.g., Aladdin's Castle*, 455 U.S. at 289 (rejecting mootness despite City's removal of challenged language from ordinance); *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (rejecting mootness where university changed its unlawful policy "more than a year after the commencement of litigation" and continued to defend the constitutionality of the prior policy).

In fact, CSU's actual nondiscrimination regulation is still on the books. There has been no

legislative policy change, simply a last minute edict from the Chancellor. Such orders are easily altered, as already demonstrated here. Courts often reject mootness claims in circumstances like these, where the government's "changed" policy is not "the result of substantial deliberation," but rather appears to be "simply an attempt to manipulate jurisdiction." *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1310 (11th Cir. 2011).

This case is not moot.

III. The Record Is Fully Developed Through Over 200 Fact Stipulations.

Respondents are wrong that the questions presented in the petition turn on disputed facts. Opp. 3, 27, 30. The petition asks whether SDSU violates Petitioners' First Amendment rights by enforcing its nondiscrimination policy in a manner that allows all student groups, except religious groups, to employ belief-based selection criteria for members and leaders. As stated, the parties have stipulated that this is precisely how SDSU enforces its policy. These key stipulations, plus over 200 additional stipulated facts, App. 86a-144a, provide all the evidence this Court needs to answer the critical constitutional question this Court initially granted certiorari in *Martinez* to answer, yet ultimately reserved. Indeed, this is likely the cleanest and clearest record the Court will ever have to decide that question.

Notably, in the lower court, both the panel majority and the concurring judge agreed that the stipulated record squarely presented the question reserved in *Martinez*.[2] And the panel majority directly answered that question (wrongly). App. 15a, 22a-23a.

Despite all this, Respondents claim that granting certiorari would be inappropriate. But their arguments depend on ignoring their own stipulations and exaggerating the lower court's narrow remand. Their chief argument is that there is a difference between SDSU's nondiscrimination policy as written and Petitioners' description of how it is applied, and that the remand would resolve this dispute. Opp. 25-26. This is simply untrue.

First, SDSU's stipulations cover the policy as written *and* as applied. For example, Respondents take issue with Petitioners' statement that under SDSU's policy the only belief-based groups that lose the right to restrict members and leaders to shared beliefs are religious groups. Opp. 3, 27. But this is precisely what SDSU stipulated to. *See* § I, *supra*. In *Martinez*, this Court chided CLS for its "unseemly attempt to escape from the [all-comers] stipulation." 130 S. Ct. at 2984. Here, Respondents are trying to duck all of theirs. But as with CLS, Respondents are "bound by the factual stipulations [they] submit[]." *Id*. at 2983.

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[2] *See* App. 4a (question reserved in *Martinez* "is the issue before us in this case"); App. 28a (same) (Ripple, J., concurring).

Notwithstanding their stipulations, Respondents claim the policy does not target religion because it prohibits discrimination based on other categories. Opp. 24. But these other categories (race, color, national origin, etc.) of nondiscrimination *are not ideological*, and thus have no impact on groups desiring to limit members based on beliefs. Moreover, the policy *permits* restrictive membership policies on any basis *not* listed in the policy, thereby allowing restrictive membership policies on virtually every conceivable ideology or belief (except religious beliefs). SDSU's stipulations establish that its nondiscrimination policy, as written and as applied, uniquely disables religious groups from insisting upon mission loyalty.

Second, Respondents' claim that the lower court's narrow remand will help resolve their manufactured tension between the policy as written and as applied is untrue. Opp. 27. The remand has nothing whatsoever to do with whether, under SDSU's policy, secular groups may restrict members and leaders on the basis of beliefs while religious groups may not. Rather, the remand deals solely with the narrow issue of whether SDSU has "exempted certain student groups from the nondiscrimination policy." App. 25a. Yet we already know SDSU grants exemptions. It so stipulated, *and* the face of its policy exempts fraternities, sororities, and other university living groups from the prohibition on gender discrimination. App. 82a.[3] SDSU also stipulated that it granted recognition to

[3] SDSU retains this exemption in its "new" approach to regulating membership in private groups. *See* § II, *supra*.

the Baha'i Club, a religious group that requires members to assent to its religious principles. *See* App. 103a, Stip. No. 35(h). A remand to determine whether SDSU grants *additional* exemptions would be fruitless.

IV. Petitioners' Free Exercise Question Warrants Review.

Despite Respondents' assertions to the contrary, Opp. 29, the petition makes clear that the free exercise question is predicated on a conflict between the decision below and this Court's free exercise decisions. Pet. 33-35.

Respondents also claim that this Court should deny review of the free exercise question because it "turns on disputed facts." Opp. 30. Once again, this is not true. The fully stipulated record squarely presents Petitioners' free exercise question, as well as the question reserved in *Martinez*.

This Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* 132 S. Ct. 694 (2012), further underscores the need for this Court's review. There, the Court unanimously reaffirmed the critical protection the Free Exercise Clause provides religious groups in selecting those responsible for "conveying [their] message and carrying out [their] mission," and held it unlawful for the government to interfere with such decisions. *Id*. at 708-09. SDSU stipulated that Petitioners' members and officers perform message and mission conveying functions similar to those of the lay

teacher involved in *Hosanna-Tabor*. App. 121a-122a, Stip. Nos. 162-168; 128a-131a, Stip. Nos. 196-204, 208; 138a-139a, Stip. Nos. 236-244. In fact, both groups have officers with ministerial titles and duties,[4] and the parties stipulated that all officers in each group are responsible for conveying and role-modeling the groups' religious beliefs. *See* App. 138a-139a, Stip. No. 240; App. 129a-130a, Stip. No. 199. SDSU's requirement that Petitioners accept members and leaders who disagree with their religious beliefs as a condition to accessing a speech forum violates their free exercise rights, especially when SDSU does not demand the same of nonreligious groups. SDSU's application of its nondiscrimination policy is the epitome of a non-neutral and non-generally applicable law that targets religious groups for special disabilities. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). And SDSU's "new" policy continues this discrimination, through its broad exemption for gender discrimination with no similar exemption for religious groups.

CONCLUSION

Petitioners respectfully request that this Court grant review.

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[4] The AGO Chaplain is "responsible before God for the spiritual life of the chapter" and "shall conduct Bible studies periodically and encourage Fraternity prayer life." 9th Cir. ER 1974. The ADX Devotional Chairwoman is "charged with the spiritual guidance of the sorority," which she does by leading "Monday evening devotions," encouraging "daily bible study and prayer among all members," and "urg[ing] the girls to witness at every opportunity." *Id.* at 2350.

Respectfully submitted,

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