NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

San Diego State University has stipulated that its nondiscrimination policy allows recognized student organizations to restrict membership and leadership to students who agree with their beliefs, *unless those beliefs are religious in nature*. Pursuant to its policy, the University denied recognition to a Christian fraternity and sorority solely because they require their members and leaders to agree with their religious viewpoints. Therefore, this case does not involve a nondiscrimination policy like the one reviewed by this Court in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), which required *all* student organizations seeking access to a speech forum to open their membership and leadership to *all* students.

1. Does the University violate the free speech and free association rights of religious student organizations by denying them access to a speech forum because they require their members and leaders to agree with the groups' religious beliefs, while at the same time granting access to nonreligious groups that require their members and leaders to agree with the groups' nonreligious beliefs?

2. Does the University violate the Free Exercise Clause by expressly targeting religious student groups for exclusion from a student organization speech forum and by burdening their religious practice pursuant to a policy that is neither neutral nor generally applicable?

PARTIES TO THE PROCEEDING

Petitioners are Alpha Delta Chi-Delta Chapter ("ADX"), a sorority at San Diego State University; Alpha Gamma Omega-Epsilon Chapter ("AGO"), a fraternity at San Diego State University; Melissa Perea and Jackie Lewis, two former officers of ADX; and James Rosenberg and David Shokair, two former officers of AGO.

Respondents are Charles B. Reed, Chancellor of the California State University, in his official capacity; Steven L. Weber, President of San Diego State University ("SDSU" or "the University"), in his official capacity; and Douglas Case, Coordinator of Fraternity and Sorority Life at SDSU, in his individual and official capacities.

CORPORATE DISCLOSURE STATEMENT

Petitioners Alpha Delta Chi-Delta Chapter and Alpha Gamma Omega-Epsilon Chapter are unincorporated student organizations, with no parent or publicly held company owning 10% or more of their stock.

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INTRODUCTION

The Courts of Appeals are divided on whether a state university can deny recognition to a religious student organization because the group requires its officers and voting members to adhere to its core beliefs, even though the same university recognizes secular organizations with identical membership policies. The petitioners in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), brought this split to the Court's attention, and the Court deemed the issues presented in that case to be certworthy. Petition for Writ of Certiorari at 18-22, *Christian Legal Society v. Martinez* (No. 08-1371). But due to a peculiar (and perhaps unanticipated) facet of the record in that case, the Court's opinion did not resolve the split, nor did it bring much-needed clarity to this area of the law. This case presents an ideal vehicle for doing both.

In *Martinez*, the majority "decline[d] to address" the significant constitutional questions presented in this petition because the parties stipulated that Hastings' nondiscrimination policy required all student groups to open their membership and leadership to all students—what this Court called an "all-comers" policy. 130 S. Ct. at 2982 & 2984 n.10. This Court made clear that its "opinion . . . considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution." *Id.* at 2984. By contrast, the four dissenters viewed the stipulation differently and saw the Hastings' policy, not as an "all comers" policy, but as unconstitutional, viewpoint discrimination.

SDSU's nondiscrimination policy is not an all-comers policy; the parties have stipulated that, unlike in *Martinez*, the university allows secular groups to "restrict membership 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." App. 101a, Stip. No. 35. Yet SDSU also stipulated that it denied recognition to Petitioners—a Christian sorority and fraternity—because they require their "members and/or officers to profess a specific religious belief." App. 133a, Stip. No. 215. Thus, under SDSU's policy *all* student groups may exclude students from membership and leadership who do not agree with the groups' beliefs, *except religious student groups.*

Squarely addressing the questions left open in *Martinez*, the Ninth Circuit held that SDSU's application of its nondiscrimination policy to prohibit only religious belief-based membership and leadership policies does not violate a religious student group's free speech, free association, free exercise, and equal protection rights.

If permitted to stand, the Ninth Circuit's decision will do significant and irreparable harm to religious liberty on public university campuses and beyond. The Ninth Circuit's decision authorizes public universities to evade this Court's repeated rulings that the First Amendment mandates equal access for religious groups to government-created

speech forums[1] simply by banning religious organizations that require members to be co-religionists, as most religious organizations do. And since nothing in the Ninth Circuit's decision limits it to the public university context, it could easily be extended to cancel equal access rights for religious groups in all contexts. Further, it may very well be extended to exclude all religious organizations from any government-created benefits or programs.

It is an unsettling irony that the Ninth Circuit found that laws forbidding discrimination on the basis of "religion" justify this discriminatory treatment of religious groups and individuals. The Ninth Circuit has effectively transformed laws designed to protect individuals and groups from discrimination based on their religion into tools to punish, penalize, and exclude individuals and groups because of their religion. Further, the Ninth Circuit's decision transmutes a widely-practiced and necessary concomitant to the free exercise of religion—religious groups maintaining a coherent religious identity by requiring their members and leaders to share their religious beliefs—into religious "discrimination" subject to state penalty.

This Court should grant certiorari and reverse this dangerous precedent.

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[1] *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

DECISIONS BELOW

The district court's ruling granting the University's summary judgment motion is reported at 597 F. Supp. 2d 1075 and reprinted in the Appendix (App.) at 31a-80a. The Ninth Circuit panel opinion is reported at 648 F.3d 790 and reprinted at App. 1a-30a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its panel decision on August 2, 2011. On October 4, 2011, Petitioners obtained an extension of time, up and until November 14, 2011, to file the petition for writ of certiorari. On October 26, 2011, Petitioners obtained a second extension of time to file the petition, up and until December 14, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND UNIVERSITY REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found at App. 81a. The University's policies governing the registration of student organizations are set forth at App. 82a-85a.

STATEMENT OF THE CASE

The material facts of this case are undisputed. The parties entered into a Joint Statement of Undisputed Facts governing all of the key facts

relevant to this petition. Relevant excerpts from the Joint Statement are set out at App. 86a-144a.[2]

A. Factual Background

1. SDSU's Student Organization Speech Forum

SDSU operates a forum for student organization expression. The purpose of this forum is to "encourage[] students to organize independent, private organizations to advocate ideas on campus." App. 95a, Stip. No. 11. SDSU "does not endorse the viewpoints of recognized student organizations." App. 96a, Stip. No. 14. *See also id.*, Stip. No. 16 (disclaiming student groups' "actions and opinions").

SDSU grants access to its speech forum through its student organization recognition process. All organizations desiring recognition must submit a Student Organization On-Campus Recognition Application at the beginning of each fall semester. App. 96a-98a, Stip. Nos. 15 & 20. SDSU also requires student groups seeking recognition to include its nondiscrimination policy in their bylaws. App. 97a, Stip. No. 19. In determining whether to

[2] Plaintiffs Every Nation Campus Ministries at San Diego State University, Every Nation Campus Ministries at Long Beach State University, Trevor Stokes, Gwendolyn Davis, and Haley Hawthorne, did not participate in the appeal to the Ninth Circuit. Accordingly, the stipulations related to these former plaintiffs have been omitted from the Joint Statement appearing in the Appendix. Also, since the plaintiffs whose claims arose from the policies and actions of California State University, Long Beach did not participate in the appeal, the stipulations specific to the Long Beach Campus have also been omitted.

grant recognition, SDSU reviews a student group's application, constitution, and bylaws. App. 98a & 100a, Stip. Nos. 23 & 32. Between 2004 and 2006, SDSU denied recognition to only three student groups, all of which were Christian organizations, and two of which are Petitioners ADX and AGO. App. 105a, Stip. No. 36.

SDSU's forum is open to the widest possible range of ideas and groups. SDSU's Student Organization Handbook states: "It is essential to the functions of San Diego State University that ideas be freely presented to students. No idea should be repressed merely because it is considered unpopular and unwise." App. 95a, Stip. No. 13. In July 2006, SDSU's forum included approximately 115 different student organizations. App. 98a, Stip. No. 22. The groups included, among many others, San Diego Socialists, Social Action Committee, Young Democrats, College Republicans, Baha'i Club, Immigrant Rights Coalition, Lesbian, Gay, Bisexual, Transgender Student Union, and Campus Anti-War Network. App. 101a-105a, 146a-181a.

SDSU grants recognized student groups access to myriad communication channels and benefits. Recognition includes access to, among other things: 1) two free uses of Aztec Center facilities for meetings and events (and substantially reduced rental rates thereafter);[3] 2) informational tabling on

[3] Unrecognized groups typically pay *10 times the amount* as compared to recognized groups for the same room rental. For example, after using its two free rentals, a recognized student group pays $150 to rent Montezuma Hall, while an

Aztec Center Walkway;[4] 3) weekly meeting space at Aztec Center; 4) banner placement on Aztec Center Walkway; 5) sign posting at Aztec Center Food Court; 6) student organization fairs at Welcome Week and Explore SDSU, where student groups recruit new members; 7) listing on SDSU's website; and 8) consideration for student activity fee funds. App. 107a-114a, Stip. Nos. 44-77.

In addition to these benefits, recognized fraternities and sororities also receive access to "Rush Week," which is a week-long recruitment event where recognized fraternities and sororities recruit new members via tables placed along Aztec Center Walkway. App. 124a-125a, Stip. Nos. 177-79. Rush Week is "the primary means by which sororities and fraternities market themselves to students and recruit candidates for membership." App. 124a, Stip. No. 178. Recognized fraternities and sororities are also permitted to participate in activities and events sponsored by any of SDSU's four fraternity and sorority Councils. App. 114a-115a, Stip. Nos. 78-82. SDSU excludes unrecognized groups from all of the above benefits. App. 51a n.11.

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unrecognized student group pays *$1500* for the same room. App. 109a, Stip. No. 52.

[4] SDSU stipulated that Aztec Center is "SDSU's student union" and the "'central hub of activity' on campus," App. 108a, Stip. No. 45, and that Aztec Center Walkway is the "most traversed walkway on campus by students," App. 125a, Stip. No. 180.

2. SDSU's Nondiscrimination Policy Targets Religious Groups for Exclusion

SDSU's nondiscrimination policy provides as follows:

> On-campus status will not be granted to any student organization whose application is incomplete or restricts membership or eligibility to hold appointed or elected student officer positions in the campus-recognized chapter or group on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law.

App. 97a, Stip. No. 18.[5] To gain access to SDSU's speech forum, student groups' membership and leadership policies must comply with this policy. App. 93a, Stip. No. 6.

Under this policy, recognized student groups may "restrict membership 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." App. 101a, Stip. No. 35. Myriad recognized groups in fact do so. App. 101a-105a, Stip. No. 35(a-n) (listing groups and

[5] SDSU's policy is consistent with a regulation of the Board of Trustees of California State University, whose regulations govern SDSU and all other universities within the CSU System. App. 92a-93a, Stip. Nos. 2-5.

their restrictive policies). Among many others, the National Organization for Women requires members to "subscribe[]" to its purpose of "further[ing] the goals of feminism," App. 103a-104a, Stip. No. 35(j), and the Lebanese Club limits membership to those students "willing to cooperate and walk the road toward success and toward an independent Lebanon," App. 101a, Stip. No. 35(a).

In sharp contrast with the treatment of nonreligious groups, SDSU denies religious student groups access to its speech forum if they exclude from membership and leadership persons who do not agree with their core religious beliefs. App. 133a, Stip. No. 215 (Board's nondiscrimination policy prohibits SDSU from "granting recognition 'to a [student organization] that requires members and/or officers to profess a specific religious belief'"). Moreover, "in applying the nondiscrimination policy, 'most of [SDSU's] concern [is] based around religious organizations.'" App. 99a-100a, Stip. No. 30.

3. ADX's and AGO's Religious Commitments

Petitioner ADX is a Christian sorority at SDSU. App. 131a, Stip. Nos. 207-08. ADX is a collegiate chapter of the national Christian sorority Alpha Delta Chi, founded in 1925. ADX's goals include strengthening the Christian spiritual lives and testimonies of its members resulting in service and outreach to others, and providing fellowship among university students living a Christian lifestyle and active in Christ's service. App. 183a. To achieve these goals, "ADX believes that its members and officers must be students who agree with ADX's

Christian beliefs and standards of conduct." App. 131a, Stip. No. 208.

ADX maintains its Christian mission and message through its membership and leadership restrictions. For example, since all ADX members "have voting power regarding numerous issues that impact the identity, purpose, and advocacy of the sorority, including voting on pledges, officers, and amendments to bylaws," App. 138a, Stip. No. 238, ADX requires its members to share its religious beliefs. Similarly, since ADX officers are "expected to be . . . role model[s] to the members of ADX, uphold the beliefs and standards of conduct of ADX, and actively encourage the members of ADX to grow in their Christian faith and commitment and to share their faith with others," App. 138a-139a, Stip. No. 240, ADX requires its officers to agree with its religious beliefs.

AGO is a Christian fraternity at SDSU. App. 121a, Stip. Nos. 161-62. It is a local chapter of the national Christian fraternity, Alpha Gamma Omega, founded in 1927. AGO's goals include winning others to a saving knowledge of Jesus Christ, promoting Christian fellowship, presenting Christian ideals in word and deed, and deepening the spiritual lives of its members. App. 182a. AGO believes that to attain these goals, it must require its officers to agree with its religious beliefs. App. 121a, Stip. No. 162.

AGO ensures officer commitment to its religious mission and expression by requiring candidates to submit a "Personal Statement of Faith and Practice,"

which, among other things, must include the candidates' "views on Jesus Christ, the Bible, the Christian Church, and eternity." App. 122a, Stip. No. 165. To be eligible for an AGO officer position, the candidate's views must be "consistent with orthodox Christian beliefs." App. 122a, Stip. No. 168.

AGO requires its officers to share its religious beliefs because they bear full responsibility for maintaining AGO's Christian identity and expression. As AGO's Officer Manual explains: "Alpha Gamma Omega is, and must be kept, a Christ-centered fraternity. AGO believes it is essential, therefore, for each chapter to have Christian leadership dedicated to godliness." App. 121a, Stip. No. 162.

4. SDSU Denies Recognition to ADX and AGO

In August 2005, ADX president Melissa Travis (now Perea) sought recognition by submitting a student organization recognition application and a copy of ADX's constitution and bylaws to SDSU. App. 132a, Stip. No. 212. AGO sought recognition a year earlier. App. 123a-124a, Stip. Nos. 173-74. As the Ninth Circuit correctly noted, there is no dispute that SDSU denied ADX and AGO recognition "because of [their] requirement that their members and officers profess a specific religious belief, namely, Christianity." App. 6a-7a.

Indeed, as the parties stipulated, SDSU's nondiscrimination policy prohibits it from "granting recognition 'to a fraternity or sorority that requires

members and/or officers to profess a specific religious belief.'" App. 133a, Stip. No. 215. *See also* App. 142a-143a, Stip. Nos. 358, 360 (SDSU denied ADX and AGO recognition based on their policies requiring members and leaders to "agree with [their] statement[s] of faith").

B. Procedural History

1. District Court

ADX and AGO filed suit in federal district court on November 28, 2005. Petitioners sought to vindicate their federal constitutional rights to free speech, free association, free exercise of religion, and equal protection of the laws. The district court had jurisdiction under 28 U.S.C. § 1343 and 28 U.S.C. § 1331. On cross-motions for summary judgment, the district court granted summary judgment in favor of SDSU on all of Petitioners' claims. App. 80a.

2. Court of Appeals

ADX and AGO timely appealed to the Ninth Circuit. After briefing was completed, but before oral argument was scheduled, this Court granted certiorari in *Martinez*. *Christian Legal Society v. Martinez,* 130 S. Ct. 795 (2009). After this Court issued its opinion in *Martinez*, the Ninth Circuit ordered supplemental briefing on its impact on this case and held oral argument shortly thereafter.

All members of the panel agreed that this case squarely presents the precise issue this Court

reserved in *Martinez*. App. 4a (question reserved in *Martinez* "is the issue before us in this case"); App. 28a ("[T]his case presents an important issue of First Amendment jurisprudence, which the Supreme Court explicitly reserved in" *Martinez*) (Ripple, J., concurring). On that issue, the Ninth Circuit held that—despite the critical differences between SDSU's nondiscrimination policy and the all-comers policy in *Martinez* noted *supra*—SDSU's policy is "not materially different" from the "all-comers policy approved in *Christian Legal Society*." App. 23a. Having found *Martinez* controlling, the Ninth Circuit ruled that SDSU's policy did not violate Petitioners' rights to free speech or expressive association because it was viewpoint neutral and reasonable. App. 15a, 22a-23a. The Ninth Circuit likewise rejected Petitioners' free exercise and equal protection claims. App. 26a.[6]

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[6] The Ninth Circuit also remanded on the narrow question of whether SDSU selectively enforced its nondiscrimination policy by granting exemptions to some groups whose membership policies violated the policy while failing to extend an exemption to ADX and AGO. App. 25a. But this narrow question is not material to the issues raised in this petition for at least two reasons. First, this petition asks whether SDSU violates the First Amendment 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. This question is squarely presented by way of SDSU's stipulation that this is precisely how it enforces its policy. Second, the face of SDSU's policy already establishes selective enforcement, as fraternities, sororities, and other university living groups are exempted from the prohibition on gender discrimination. App. 82a, 5 C.C.R. § 41500. The existence of a question over *additional* instances of discriminatory enforcement is thus immaterial.

Judge Ripple concurred in the result solely because he believed the Ninth Circuit's previous decision in *Truth v. Kent School District*, 542 F.3d 634, 645-47 (9th Cir. 2008), "require[d] [him] to do so." App. 28a. At the same time, however, he opined on the need for this Court's review, stressing that SDSU's policy discriminatorily targets religious groups:

> The . . . policy . . . marginalize[s] in the life of the institution those activities, practices and discourses that are religiously based. While those who espouse other causes may control their membership and come together for mutual support, others, including those exercising one of our most fundamental liberties—the right to free exercise of one's religion—cannot, at least on equal terms.

App. 30a.

REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve the split identified in the *Martinez* petition and to answer a First Amendment question of exceptional importance that was reserved in that case, namely, whether a public university may deny recognition to religious student groups because they require their members and officers to share their religious beliefs, while granting recognition to secular student groups that require their members and leaders to share their nonreligious beliefs.

The Ninth Circuit's decision that SDSU did not violate Petitioner's free speech, free association, and free exercise rights by enforcing its nondiscrimination policy in the manner described above directly conflicts with decisions from the Seventh and Second Circuits. It also conflicts with decisions of this Court in multiple ways.

While this Court's review is warranted for these reasons, at least two additional considerations make review all the more necessary. First, the Ninth Circuit's decision eviscerates religious groups' well-established First Amendment equal access rights by allowing their exclusion from speech forums pursuant to a nondiscrimination policy that includes the term "religion" (as virtually all nondiscrimination laws do) if they exercise their associational right to exclude nonadherents (as virtually all religious organizations do). At hundreds of state universities within the Ninth Circuit, thousands of religious students can no longer exercise their speech and associational rights to select members and leaders who share their religious views, even while all other groups may impose nonreligious belief-based restrictions on those who speak for their groups. It is imperative that this Court answer the critical question left open in *Martinez* now, before the Ninth Circuit's decision does even more damage to the speech and associational rights of religious student groups across the country.

Second, the Ninth Circuit's decision has dangerous implications for religious liberty that extend far beyond the public university campus.

Under its reasoning, equal access rights for religious groups can be eliminated in all contexts, not just on public university campuses. And if the government can exclude religious groups from speech forums because they restrict membership and leadership to those who share their religious beliefs, it can also eliminate religious groups from any government program or benefit through the simple expedient of requiring adherence to a nondiscrimination regulation.

I. The Ninth Circuit's Decision Conflicts with Decisions from the Seventh and Second Circuits Regarding the Rights of Student Groups to Select Members and Leaders Based on Shared Beliefs.

Both the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), and the Second Circuit in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996), dealt squarely with the issue confronted by the Ninth Circuit below, and both courts came to diametrically opposite results.

At issue in *Walker* was a Southern Illinois University School of Law nondiscrimination policy virtually identical to SDSU's. 453 F.3d at 858 (SIU policy prohibited discrimination based on "race, color, religion, sex, national origin, age, disability, status as a disabled veteran of the Vietnam era, sexual orientation, or marital status"). Pursuant to this policy, the university denied recognition to a Christian Legal Society chapter based on its requirement that its members and officers share its

religious beliefs. *Id*. at 857-58. The Seventh Circuit held that the denial of recognition violated the CLS chapter's right to expressive association, finding that the "only apparent point" of "forcing CLS to accept members whose activities violate its creed" is to "induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id*. at 863.

Hsu involved the application of a school district's nondiscrimination policy to deny recognition to a Christian club based on its requirement that its officers share its religious convictions. 85 F.3d at 850. The Second Circuit held that the school district violated the Equal Access Act, 20 U.S.C. § 4071, by denying the club recognition on this basis. Relying on First Amendment case law explicating the right to expressive association, the court explained that "the Act contains an implicit right of expressive association." *Hsu*, 85 F.3d at 859.[7] The court stressed that "one of the principal ways in which [student] clubs typically define themselves [is] by requiring that their leaders show a firm commitment to the club's cause." *Id*. at 860. Observing that the district would allow other clubs at the school to restrict their leaders to students committed to their beliefs, the court held that providing "equal access" in this context required the district to allow religious

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[7] As this Court has recognized, the Act is an extension of *Widmar*'s free speech protection of college religious student groups to secondary schools. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 235 (1990). The Second and Ninth Circuits agree. *Hsu*, 85 F.3d at 856-57 (the Act "creates an analog to the First Amendment[]"); App. 20a-21a, n.5 (the Ninth Circuit relies on "First Amendment cases" in interpreting the Equal Access Act).

student clubs to similarly define themselves through religious belief-based leadership restrictions. *Id.*

There is simply no way to reconcile this case with *Walker* and *Hsu*. All three cases involved access to a public forum in an educational setting. The nondiscrimination policies at issue in all three cases are substantively identical. In all three cases, the policy prevented religious organizations, but not similar secular organizations, from conditioning membership on adherence to the organization's core beliefs. The Second and Seventh Circuits held that the policy at issue violated First Amendment rights; the Ninth Circuit upheld the policy.

The underlying circuit conflict pre-dates this case and was brought to the Court's attention by the petitioners in *Martinez*. But, as it turned out, *Martinez* proved to be an imperfect vehicle for resolving the split. Upon close examination of the record in that case, the Court determined that the policy at issue applied equally to religious and secular groups alike. It was thus distinguishable from the policies at issue in *Hsu* and *Walker* in a key—and for at least one member of the majority a constitutional significant—way. *See Martinez*, 130 S. Ct. 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"). Accordingly, the Court had no opportunity to address the issue that continues to divide the circuits. This case is an ideal vehicle for resolving that issue and for bringing much needed clarity to this important area of law.

II. The Ninth Circuit's Decision Eviscerates the Equal Access Rights of Religious Groups by Upholding their Viewpoint Discriminatory and Unreasonable Exclusion From Speech Forums.

The prohibition on religious viewpoint discrimination is a critical component of the First Amendment's protection of religious speech and speakers. A trio of this Court's decisions—*Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)—have firmly established this fundamental principle.

In *Lamb's Chapel,* this Court held that a school district that had broadly opened its facilities for community uses committed viewpoint discrimination when it prohibited a church from using its facilities to show a film about child-rearing and family values because of the religious perspective of the film. 508 U.S. at 393-94. In *Rosenberger,* this Court held that the University of Virginia committed viewpoint discrimination when it denied funding to a student group based on the "religious editorial viewpoints" expressed in its publication. 515 U.S. at 831. In *Good News Club*, this Court held that a school district that had opened its facilities to community groups committed viewpoint discrimination when it prohibited a religious club from using school facilities to teach morals and character development to children from a religious perspective. 533 U.S. at 107-10.

In finding that SDSU's application of its nondiscrimination policy to ADX and AGO was viewpoint-neutral, App. 23a, the Ninth Circuit has rendered toothless each of the above critical decisions concerning religious equality. Under its reasoning, the church in *Lamb's Chapel*, the university student group in *Rosenberger*, and the community group in *Good News Club* could have been permissibly excluded if the governmental entities had simply adopted policies banning religious groups whose members and leaders are limited to co-religionists. By failing to apprehend the viewpoint discriminatory nature of SDSU's policy, the Ninth Circuit effectively has ended the equal access rights of religious groups.

Indeed, it would be hard to find a more perfect example of discrimination against a religious viewpoint. The parties have stipulated that SDSU grants access to its speech forum to student groups that restrict membership and leadership to students who "agree with the particular ideology, belief, or philosophy the group seeks to promote." App. 101a, Stip. No. 35. For example, VOX Voices for Planned Parenthood limits membership to students who are "dedicated to protecting reproductive freedom," App. 104a-105a, Stip. No. 35(m), and the Immigrant Rights Coalition requires members to "hold the same values regarding immigrant rights as the organization," App. 103a, Stip. No. 35(i). Yet SDSU denied recognition to ADX and AGO because they require their members and/or officers to "agree with [their] statement[s] of faith." App. 142a-143a, Stip. Nos. 358, 360. Thus, SDSU grants speech forum access to groups whose membership and leadership

policies express a secular viewpoint, but prohibits access to groups whose membership and leadership policies express a religious viewpoint. This is indistinguishable from the viewpoint discriminatory exclusions condemned in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*.

This viewpoint discrimination is rendered all the more egregious by the fact that SDSU favors the Baha'i Club's religious views over the Petitioners'. SDSU stipulated that it granted recognition to the Baha'i Club despite its religious belief-based membership requirement, App. 103a, Stip. No. 35(h) ("The Baha'i Club constitution states that a person may 'join and remain a member by assenting to its principles and purposes as stated within this constitution.' The Baha'i Club's purpose is to 'further the tenets of the Baha'i Faith by promoting unity; and to foster understanding, love and fellowship by sponsoring lectures, info. booths, service projects, discussions, social gatherings, and public mtgs; to invite those interested to investigate the Baha'i Faith for themselves'"), yet denied recognition to ADX and AGO.

SDSU's viewpoint discrimination is further demonstrated by the fact that it forces only religious groups to endure the message-changing impact of accepting nonadherents into membership and leadership positions. It is well-settled that requiring a private association to accept members who do not share its views changes that group's message. As this Court explained in *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958),

> [the NAACP] and its members are in every practical sense identical. The Association, which provides in its constitution that "(a)ny person who is in accordance with (its) principles and policies * * *" may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.

Because the views of a group's members define the group's voice, forcing a group to accept members who reject its views necessarily changes the viewpoint it expresses. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express").

In sum, membership is message. And as with the NAACP, ADX and AGO are but the medium through which their members and officers speak. SDSU's following stipulations regarding ADX confirm this:

- ADX believes it has a religious duty to spread the Christian message of salvation—that salvation is attained through faith alone in Jesus Christ—at SDSU.

- ADX believes that an individual cannot effectively and credibly advocate this message unless he or she believes it to be true.

- Thus, ADX requires its officers and members—those responsible for advocating

> this message on campus—to be Christians who have professed their faith in Jesus Christ and to have an interest in leading others to Christ.

App. 139a, Stip. Nos. 242-44. SDSU made similar stipulations as to AGO. *See* App. 130a, Stip. Nos. 202-04. For both ADX and AGO, their members and officers provide the groups their distinctive Christian voices, and are responsible for expressing their distinctive Christian messages.

Under SDSU's policy, the right of student groups to control their messages through membership restrictions is respected, except for religious groups. SDSU does not require the Immigrant Rights Coalition to open its membership and leadership to students who reject amnesty for illegal immigrants, nor does it require the Planned Parenthood group to open its membership to students who oppose abortion. But SDSU requires religious groups, like ADX and AGO, to admit students who reject their religious views. Allowing all groups to maintain organizational identity by insisting upon adherence to organizational principles and beliefs, except religious groups, is blatant viewpoint discrimination.

The Ninth Circuit stated that Petitioners' viewpoint discrimination claim was "compelling at first glance," yet ultimately rejected it. App. 18a. The court did so because it found that Petitioners had failed to prove that SDSU "implemented its nondiscrimination policy for the *purpose* of suppressing Plaintiffs' viewpoint." *Id.* But this Court has repeatedly rejected requiring proof of

illicit motive to prevail in First Amendment cases. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting argument that discriminatory treatment "is suspect under the First Amendment only when the [government] intends to suppress certain ideas"); *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment") (citations omitted). This same rule applies here: Petitioners need not prove motive to succeed on their viewpoint claim.

The Ninth Circuit also rejected Petitioners' viewpoint discrimination claim based on its erroneous view that SDSU's nondiscrimination policy only "incidentally burdens" ADX and AGO. App. 18a. This is wrong both as a legal and factual matter. Legally, there is no such thing as *de minimis* viewpoint discrimination. Factually, this finding directly conflicts with SDSU's stipulations. Among other things, SDSU stipulated that revoking the recognition of a student organization "is the most severe sanction" it can impose on a group for violating University policy. App. 106a, Stip. No. 41. Denial of recognition cannot be both the "most severe sanction" SDSU can impose and a mere "incidental burden." It is one or the other, and here SDSU has stipulated that the harm caused by denial of recognition is "severe."

By targeting religious groups for exclusion from its student organization speech forum, SDSU also undercuts the very purpose of its forum, thereby imposing an unreasonable restriction on ADX's and AGO's speech. As SDSU stipulated, its forum exists to "encourage[] students to organize independent, private organizations to advocate ideas on campus" and to "increase the range of viewpoints advocated in the marketplace of ideas on campus." App. 95a, Stip. Nos. 11, 12. SDSU has thus embraced the very purpose of the First Amendment—"to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981) (citation omitted)—as the defining purpose of its forum. Denying religious student groups access to this forum directly conflicts with its purpose, and skews debate in favor of nonreligious over religious ideas. *Rosenberger*, 515 U.S. at 831 ("debate is skewed in multiple ways" when university discriminates against religious viewpoints in funding).

The Ninth Circuit virtually ignores SDSU's stipulations regarding the purpose of its forum (briefly mentioning one of them in a footnote), and instead proposes one of its own creation: to "promot[e] diversity and nondiscrimination." App. 14a. But the forum does not serve the purpose of "diversity and nondiscrimination." Diversity is ensured—not threatened—by allowing the unlimited array of student groups permitted access to the forum to form around shared beliefs. Further, it would be both patently unreasonable and self-refuting for SDSU to pursue the purported goals of

"diversity and nondiscrimination" exclusively against religious student groups.

This Court's review and reversal is necessary to ensure the continued and vigorous protection of religious groups' equal access rights.

III. The Ninth Circuit's Decision Conflicts with this Court's Decisions Protecting the Right of Expressive Associations to Limit Membership and Leadership to Individuals who Agree with their Messages and to Access the Benefits of Recognition.

SDSU's application of its nondiscrimination policy to ADX and AGO violates their free association rights by forcing them to choose between accepting members and leaders who will significantly impair their messages, *Dale*, 630 U.S. at 648, or forfeiting recognition and its benefits, *Healy v. James*, 408 U.S. 169 (1972). And, as noted in § I, *supra*, the Ninth Circuit's rejection of Petitioners' free association claim creates a conflict with the Seventh and Second Circuits.

A. The Ninth Circuit's Decision Allows Public Universities to Dictate the Membership Standards of Religious Student Groups.

Petitioners' expressive association claim arises in a much different context than the expressive association claim this Court rejected in *Martinez*. There, this Court stressed that, because of the all-comers stipulation, the CLS chapter sought "not

parity with other organizations, but a preferential exemption from Hastings' policy." 130 S. Ct. at 2978. Here, SDSU has stipulated that all student groups may exercise their associational rights, *except religious groups*. ADX and AGO thus seek parity with other groups in relation to the exercise of associational rights, not a preferential exemption.

And critically, this Court's "cases leave no doubt that the First Amendment rights of speech *and association* extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) (emphasis added). This Court has also long recognized the pivotal role the freedom of association plays in perpetuating First Amendment freedoms. Indeed, "[t]he ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

At its core, the freedom of association protects the right of organizations to adopt membership and leadership policies requiring adherence to their missions and views. As this Court has said, "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981). Accordingly, the First Amendment protects "expression and association without regard to the race, creed, or political or

religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

The government can violate a group's associational rights in many ways, including regulations that require an association to accept members or leaders whose inclusion "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 630 U.S at 648. Violations of associational rights will survive constitutional scrutiny only if they "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

In *Dale*, this Court found that New Jersey's application of its Law Against Discrimination to force the Boy Scouts to accept a gay scoutmaster violated its associational rights. The Boy Scouts advocated the viewpoint that "homosexual conduct is not morally straight," *id.* at 651, and this Court found that forcing the Scouts to accept a gay scoutmaster would "surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," *id.* at 654. This Court also found that the State's interest in prohibiting discrimination "do[es] not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659.

Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557,

575 (1995), this Court found that Massachusetts' application of a nondiscrimination law to compel parade organizers to include a pro-homosexual contingent violated their right to choose "not to propound a particular point of view." The Court also found that the law of expressive association required the same result, observing that if a parade was treated as a private association, it could exclude the parade contingent "just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id*. at 581. This Court again rejected the State's interest in eliminating discrimination as sufficient to justify the infringement of the parade organizers' speech and associational rights. *Id*. at 578.

There is no question that compliance with SDSU's nondiscrimination policy would significantly impair ADX's and AGO's ability to promote their public and private viewpoints. As set out in the Statement of the Case, § A.3, *supra*, the groups employ belief-based selection criteria for the individuals responsible for promoting and perpetuating their religious missions and beliefs. Requiring ADX and AGO to cede control over the identities and messages of their groups to members and leaders who reject their core religious commitments plainly violates their associational rights.

Other examples further demonstrate SDSU's violation of Petitioners' associational rights. For instance, ADX and AGO operate Big Sister and Big Brother programs, respectively, in which they pair a

mature Christian member or officer with a member of their pledge classes. App. 128a & 138a, Stip. Nos. 196 & 236. The Big Sister/Brother is responsible for "mentoring [the pledge] in the Christian faith," which includes, among other things, weekly meetings, praying together, and "training [the pledges] to share and defend the Christian faith." *Id.* Requiring ADX and AGO to utilize Big Sisters/Brothers who reject their Christian beliefs would significantly impair their ability to express the Christian viewpoints they seek to promote via these programs. Also, as noted in § II, *supra*, ADX and AGO require their members and leaders to agree with their Christian views regarding salvation because they rely on their members and leaders to express this message to the campus community. *See* App. 130a & 139a, Stip. Nos. 202-04 & 242-44. Members and leaders who disagree with or reject those views obviously make poor witnesses; yet SDSU would require ADX and AGO accept them as representatives.

Under the well-established case law regarding the right to expressive association, SDSU violated Petitioners' associational rights. And this violation is all the more egregious in a forum like SDSU's, where the government is playing favorites in relation to the exercise of these critical rights.

B. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Healy* that Denying Student Groups Recognition and its Benefits Violates their Associational Rights.

In addition to violating Petitioners' associational rights under this Court's membership regulation line of cases, SDSU is also violating their associational rights by denying them recognition and its many benefits. In *Healy*, this Court held that a university's "denial of official recognition, without justification, to college organizations burdens or abridges [its] associational right[s]." 408 U.S. at 181. And the Court identified the "denial of use of campus facilities for meetings and other appropriate purposes" as the "primary impediment to free association flowing from nonrecognition." *Id.* The Court continued:

> If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.

Id. at 181-82.

Just as in *Healy*, SDSU's denial of recognition cuts ADX and AGO off from the primary avenues of communication used by student groups. As unrecognized groups, ADX and AGO lose access to the substantial benefits of recognition listed in § A.1 of the Statement of the Case, *supra*. This includes, among many other things, the inability to participate in "Rush Week," which is a critical, week-long, twice a year event at which fraternities and sororities recruit new members. App. 124a-125a, Stip. Nos. 177-79.

Despite the wholesale exclusion of ADX and AGO from every meaningful channel of communication on campus, the Ninth Circuit said that SDSU allows them significant alternative avenues of communication. App. 14a-15a. Once again, this determination cannot be squared with the stipulated facts. The court found that ADX and AGO can "use campus facilities for meetings," App. 15a, but it is undisputed that they pay approximately 10 times more than recognized groups for the same rooms, *see* pp. 6-7 n.3, *supra*; App. 109a, Stip. No. 52. This effectively bars ADX and AGO from using University facilities at all, especially since they are also denied access to any student activity fees. The court also found that ADX and AGO can "set up tables and displays in public areas," App. 15a, but SDSU stipulated that they may not engage in "informational tabling," which is a "primary means of communication available to recognized student organizations at Aztec Center." App. 110a, Stip. Nos. 53-55. SDSU also stipulated that in the Spring of 2006 its officials told AGO to leave an informational table it was sharing with a

recognized student group because AGO "is not officially recognized." App. 125a, Stip. No. 182.

The Ninth Circuit's view that ADX and AGO have significant alternative communication channels diminishes the reality of the extent of harm caused by denial of recognition. The Court's view is akin to finding that prohibiting an advertiser access to national television is permissible because a local newspaper is available as an alternative channel of communication. The Ninth Circuit clearly erred in finding no violation of the Petitioners' associational rights under *Healy*.

IV. The Ninth Circuit's Decision Conflicts with this Court's Decisions Regarding the Free Exercise of Religion.

The government violates the Free Exercise Clause when it "impose[s] special disabilities on the basis of religious views or religious status." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

In finding that SDSU's nondiscrimination policy "does not target religious belief or conduct," App. 26a, the Ninth Circuit simply ignored SDSU's blatant targeting of religious student groups. SDSU's nondiscrimination policy expressly uses "religion" as a factor for denying student groups

access to its speech forum. App. 97a, Stip. No. 18. SDSU stipulated that "in applying the nondiscrimination policy, '*most of [its] concern [is] based around religious organizations*." App. 99a, Stip. No. 30 (emphasis added). SDSU also stipulated that it requires religious student groups to open their membership and leadership to students who reject their religious beliefs, App. 133a, Stip. No. 215, while at the same time permitting nonreligious student groups to restrict membership and leadership to students who share their nonreligious beliefs, App. 101a, Stip. No. 35. This targeted religious discrimination violates Petitioners' free exercise rights.

SDSU also violates the Free Exercise Clause because its policy burdens religious practice and is neither neutral nor generally applicable. *See Lukumi*, 508 U.S. at 546. Critically, in *Martinez* it was the general applicability of Hastings' policy that led this Court to reject CLS's free exercise claim. The Court found that the all-comers policy was a law of "general application" and that "[i]n seeking an exemption from Hastings' across-the-board all-comers policy, CLS . . . seeks preferential, not equal, treatment." *Martinez*, 130 S. Ct. at 2995 n.27. Here, the exact opposite is true. ADX and AGO seek equal, not preferential, treatment, because they seek to do what SDSU allows all other groups to do: restrict their members and leaders to those who share their beliefs and views.

SDSU's nondiscrimination policy also lacks general applicability because it grants a broad exemption from its prohibition on gender

discrimination to fraternities, sororities, and other university living groups, App. 82a, 5 C.C.R. § 41500, yet fails to extend a similar exemption to religious groups. In addition, SDSU stipulated that it granted recognition to the Baha'i Club despite its religious belief-based membership policy, App. 103a, Stip. No. 35(h), thereby granting it an exemption from the prohibition on religious discrimination, yet failing to grant such an exemption to ADX and AGO. SDSU's policy is not neutral, not generally applicable, and even plays favorites *among* religious groups, all while burdening Petitioners' religious beliefs and practices. This is a clear violation of Petitioners' free exercise rights.

V. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Widmar* that Excluding Religious Speakers from Student Organization Speech Forums is Content-Based Discrimination.

SDSU also violated Petitioners' rights under *Widmar v. Vincent*, 454 U.S. 263 (1981), by excluding them from a designated public forum based on the religious content of their speech.

The Ninth Circuit's finding that SDSU's student organization speech forum is a limited public forum, App. 11a, directly conflicts with this Court's decision in *Widmar*. There, this Court found just one piece of SDSU's forum—access to university facilities—to be a designated public forum. *Widmar*, 454 U.S. at 265, 267 (university "routinely provid[ing] . . . facilities for the meetings of registered organizations" created designated public forum). *See also Hazelwood Sch.*

Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (noting that educational institutions create designated public fora when they open their facilities to "some segment of the public, *such as student organizations*") (emphasis added).

Further, SDSU embraces the First Amendment ideal of public universities as a "marketplace of ideas," *Healy*, 408 U.S. at 180, as the sole purpose of its forum. Indeed, SDSU stipulated that it created its forum to "encourage[e] students to organize independent, private organizations to advocate ideas on campus," App. 95a, Stip. No. 11, and its Student Organization Handbook welcomes all beliefs and ideas within the forum, *id.*, Stip. No. 13 ("No idea should be repressed merely because it is considered unpopular or unwise").

If anything does, SDSU's policy and practice of broadly opening its facilities to the widest possible expression should create a designated public forum, such that its exclusions from that forum would be judged under strict scrutiny. *Widmar*, 454 U.S. at 270. Yet the Ninth Circuit's contrary ruling implies that it does not acknowledge the continuing viability of this legal category.

This case thus presents this Court an excellent opportunity to clarify the law regarding designated public fora. Here, SDSU has clearly created such a forum, and its exclusion of Petitioners from the forum based solely on the religious nature of their belief-based membership restrictions, and pursuant to a policy that targets religion, is content-based discrimination that violates *Widmar*.

VI. Public Universities Denying Religious Student Groups Recognition because they Require their Members and Leaders to Share their Religious Views is a Recurring Problem Nationwide that Requires this Court's Attention.

Like SDSU, public universities across the country often target religious student groups for denial of recognition and its benefits because of their religious belief-based membership and leadership policies. Indeed, denial of recognition to religious student groups for this reason is frequently litigated in federal court. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009); *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *vacated*, 586 F.3d 908 (11th Cir. 2009); *Univ. of Wis.-Madison Roman Catholic Found. v. Walsh*, No. 06-C-649-S, 2007 WL 765255 (W.D. Wis. Mar. 8, 2007); *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04CV00765, 2005 WL 1720903 (M.D.N.C. Mar. 2, 2005), *dismissed as moot*, 2006 WL 1286186 (M.D.N.C. May 4, 2006); *Beta Upsilon Chi v. Adams*, No. 06-104 (M.D. Ga. 2006); *Disciple Makers v. Spanier*, No. 04-2229 (M.D. Pa. 2004); *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, No. 05-7126 (N.D. Ohio 2005); *Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook*, No. 04-197 (S.D. Ohio 2004); *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, No. 04-4120 (D. Kan. 2004); *Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn.

2003); *Intervarsity Multi Ethnic Christian Fellowship v. Rutgers*, No. 02-06145 (D.N.J. 2002).

Against this backdrop of actions taken against religious student groups, the Ninth Circuit's decision arms public universities with all they need to justify the wholesale exclusion of such groups from their campuses. Nearly every public university (if not all) imposes some type of nondiscrimination policy on its student organization speech forum. Under the Ninth Circuit's decision, if a university's nondiscrimination policy includes the term "religion" (as all such policies likely do), it may permissibly exclude religious student groups from its forum, even if it allows all other student groups to exercise their speech and associational rights to restrict membership and leadership to students who share their nonreligious beliefs.

As the numerous cases cited above amply demonstrate, religious student groups are in desperate need of an answer from this Court regarding the critical constitutional question posed in this petition. This case squarely presents that issue, and it does so, ironically, via a factual stipulation that is the polar opposite of the all-comers stipulation that truncated this Court's review in *Martinez*. This Court should not wait for years and years of more litigation to unfold before it answers this question. Waiting will only exacerbate the negative impact of the Ninth Circuit's decision on university religious student groups. And there may never again be an opportunity for this Court to address this critical question via factual stipulations

that so clearly and cleanly present the precise issue left open in *Martinez*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review.

Respectfully submitted,

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