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Rebecca D. Ryan

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## Why Non-discrimination Policies in Higher Education Require a Second Look: The Battle for First Amendment Freedom in the University Setting

### Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A. 2008, Westmont College. The author wishes to thank Professor Robert Destro for his insight, thoughtful commentary, and advice, as well as Tim Chandler at the Blackstone Legal Fellowship for his direction and inspiration in pursuing this piece. A special thanks to my husband, Ben, and my family for their love and support—and to my mom an additional thanks for years of support and editorial review.

# WHY NON-DISCRIMINATION POLICIES IN HIGHER EDUCATION REQUIRE A SECOND LOOK: THE BATTLE FOR FIRST AMENDMENT FREEDOM IN THE UNIVERSITY SETTING

Rebecca D. Ryan<sup>+</sup>

Chief Justice John Roberts recently articulated,

the First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.<sup>1</sup>

Although Chief Justice Roberts' words reflect the traditional importance of First Amendment freedoms, the application of such freedoms in the university setting is fading.<sup>2</sup> State universities' interests in non-discrimination and diversity policies have trumped students' First Amendment claims of freedom of speech, freedom of religion, and freedom of expressive association.<sup>3</sup> Student groups that advocate messages contrary to the public norm are confronted with increasing pressure to alter their messages and membership requirements.<sup>4</sup> Should they fail to do so, these student groups must forgo the

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1. *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). In *Stevens*, the Court struck down a statute that banned depictions of animal cruelty for commercial use. *Id.* at 1592.

2. Craig B. Anderson, *Political Correctness of College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171, 175–77 (1992) (foreshadowing the “rise of a political correctness on college campuses” that “threatens to severely limit” First Amendment rights).

3. See *infra* Part IV.A; see also Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 663 (1996).

4. See, John Roberts, *Professor Says Vanderbilt Suppressing Christian Student Groups Amid Shutdown Threats*, FOXNEWS.COM (Sept. 26, 2011), <http://www.foxnews.com/us/2011/09/26/professor-says-vanderbilt-suppressing-christian-student-groups-amid-shutdown/> (noting the struggle at Vanderbilt, where student organizations cannot require their leadership to adhere to the group's beliefs and that “[c]arried to its full extent, [this] means an atheist could lead a Christian group, a man a woman's group, a Jew a Muslim group or vice versa”).

benefits of official recognition in the university setting.<sup>5</sup>

Whether to concede to this pressure is a difficult decision for these student groups to make, and it is likely unconstitutional for universities to force these student groups to decide. Yet, criticizing a university's non-discrimination and diversity policies in any forum is a daunting challenge. Universities have a valid educational interest and government prerogative in promoting diversity and non-discrimination.<sup>6</sup> American society's cultural approval of non-discrimination also endorses these universities' policies.<sup>7</sup> This support helps justify the choice to pursue radical equality, permitting society and the courts to shy away from close scrutiny of the reasoning behind—and implementation of—such policies.<sup>8</sup> However, while non-discrimination policies serve an essential purpose, “those purposes are contravened when non-discrimination policies are misused.”<sup>9</sup> Therefore, the courts must resolve this nuanced and multifaceted conflict between expressive association and non-discrimination in a manner that addresses its complexity and rejects oversimplification. Due to the important constitutional rights at stake, close scrutiny of non-discrimination policies is critical and entirely proper.<sup>10</sup>

The Supreme Court recently denied certiorari in a Ninth Circuit Court of Appeals case, *Alpha Delta Chi-Delta Chapter v. Reed*, bypassing an important opportunity to address the analysis and rationale behind state universities' choice to value non-discrimination over diversity, and conformity over First

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5. See, e.g., *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

6. See Christian Andrew D. Brown, *Do As I Say, Not As I Do: The Myth of Neutrality in Nondiscrimination Policies at Public Universities*, 91 N.C. L. REV. 280, 303–04 (2012); Legal Soc'y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2989–90 (2010) (describing an “all-comers policy” as one that “encourages tolerance, cooperation, and learning among students”); *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (affirming a school's “compelling interest in securing the educational benefits of a diverse student body”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (stating that diversity “is a constitutionally permissible goal” that promotes a “robust exchange of ideas”).

7. See Richard Thompson Ford, *Moving Beyond Civil Rights*, N.Y. TIMES, Oct. 27, 2011, at A31.

8. See, e.g., *Martinez*, 130 S. Ct. at 2990–91 (stating that a university may promote policies favoring “state-law proscriptions on discrimination”).

9. Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners at 5, *Alpha Delta*, 123 S. Ct. 1743 (9th Cir. Jan. 17, 2012) (No. 11-744) [hereinafter CLS Brief]; see also Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 403 (1994) (cautioning against “diversity that is achieved by coercing dissenters into conforming”).

10. See, Paulsen, *supra* note 3, at 669 (stating that state universities are applying university or local non-discrimination laws to religious-affiliated student organizations, the appreciation of which threatens the organizations' First Amendment rights); see also, Bainbridge, *supra* note 9, at 369.

Amendment freedoms.<sup>11</sup> Previously, the Supreme Court decided *Christian Legal Society v. Martinez*, a prominent limited forum case, in which the Court approved a state university's "all-access" non-discrimination policy that applied to student associations.<sup>12</sup> The policy prohibited student associations from establishing eligibility requirements for voting membership and leadership positions based on compliance with the groups' missions or beliefs.<sup>13</sup> Upholding the constitutionality of the policy, the Court highlighted the reasonable relationship between the policy and the school's academic mission.<sup>14</sup> *Martinez*, however, addressed only the specific question posed in the petition for certiorari<sup>15</sup> and left several key questions unresolved:<sup>16</sup> (1) was the university's "all-access" policy non-discriminatory in design and implementation?<sup>17</sup> and (2) whether the university had a "selective non-discrimination" policy, and if so, was such a policy constitutional?<sup>18</sup>

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11. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1743 (2012).

12. *Martinez*, 130 S. Ct. at 2995. An "all-access" policy as defined in *Martinez* mandates the acceptance of all students into all student groups. *Id.* at 2979.

13. *Id.* at 2979–80.

14. *Id.* at 2991. A reasonable relationship is a key part of the First Amendment analysis with respect to limited forums. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804–06 (1985)) ("Once it has opened a limited forum, however, the State . . . may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum . . .'").

15. The questions posed were: (1) Whether a state university can deny a religious affiliated organization recognition because the group requires members to affirm their belief with the group's faith; and (2) "Whether the Ninth Circuit erred when it held . . . that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints." Petition for Writ of Certiorari, *Martinez*, 130 S. Ct. 2971 (No. 08-1371).

16. The majority upheld the Ninth Circuit's holding that the university's all-access policy was viewpoint neutral and reasonable. *Martinez*, 130 S. Ct. at 2981–82. The dissent disagreed, noting that CLS did not claim that its application was denied due to a violation of an "accept-all-comers policy," but because its "bylaws did not comply with the Nondiscrimination Policy." *Id.* at 3005 (Alito, J., dissenting).

17. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding that "[f]acial neutrality is not determinative" and the Free Exercise Clause and the Establishment Clause "forbid[] subtle departures from neutrality . . . [and] covert suppression of particular religious beliefs"). Government action targeting religious groups must be neutral both on its face and as applied. *See id.* (discussing how "distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality . . . [as] [t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt").

18. "Selective" non-discrimination policies are somewhat paradoxical in name. By definition, these policies are facially discriminatory. *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 805 (9th Cir. 2011) (Ripple, J., concurring), *cert. denied*, 132 S. Ct. 1743 (2012). As a result, these policies rest on a claim that a state university has significant authority to regulate many First Amendment freedoms. *See id.* At 800. However, selective non-discrimination policies also raise questions of equal protection. *See Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 327 (1986); William E. Thro & Charles J. Russo, *A*

Of particular importance is the unanswered question of the constitutionality of selective non-discrimination policies,<sup>19</sup> which are policies that prohibit discrimination based on categories such as “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”<sup>20</sup> Recently, the Ninth Circuit addressed the issue in *Alpha Delta v. Reed* and held that such selective non-discrimination policies were constitutional.<sup>21</sup> This ruling is in stark contrast to a 2006 opinion by the Seventh Circuit Court of Appeals, in which the court held that selective non-discrimination policies constitute patent viewpoint discrimination and violate the First Amendment.<sup>22</sup> Given the split among the circuits on the constitutionality of such specifically delineated non-discrimination policies,<sup>23</sup> this issue remains ripe for Supreme Court review.<sup>24</sup>

This Note discusses the Ninth Circuit’s recent holding in *Alpha Delta* and analyzes how the holding diverges from prior cases on the constitutionality of university non-discrimination policies that affect religiously affiliated student organizations. This Note begins by tracing the development of limited forum jurisprudence and the affirmative defenses that have been raised to legitimize states’ restrictions within such forums. This Note then analyzes the impact of *Martinez* on First Amendment freedoms and closely examines the Supreme Court’s holding on non-discrimination policies in a limited forum. Next, this Note discusses the most recent circuit court case on the issue, *Alpha Delta*, and examines its implications. Finally, this Note proposes that the Supreme Court

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*Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 EDUC. L. REP. 473, 476 (Dec. 2010).

19. *Alpha Delta*, 648 F.3d at 795–96 (acknowledging that the *Martinez* Court “expressly declined to address whether [the] holdings would extend to a narrower non-discrimination policy that, instead of prohibiting *all* membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation”).

20. See *e.g.*, *id.* at 796 (prohibiting group membership requirements that violate the school’s non-discrimination policy).

21. *Id.* at 805.

22. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006)

23. Compare *Alpha Delta*, 648 F.3d at 805 (holding that the selective non-discrimination policy is constitutional), with *Walker*, 453 F.3d at 866 (holding that, even if the selective non-discrimination policy is viewpoint neutral on its face, the policy is not viewpoint neutral in its application).

24. See also *Alpha Delta*, 648 F.3d at 805 (Ripple, J., dissenting) (“[I]t may well be that, at some later point, this case will be an appropriate case for further Supreme Court review.”). Interestingly, in February 2013, the University of Michigan ejected the Asian chapter of InterVarsity Christian Fellowship because they required members to sign a statement of faith. Eric Owens, *University of Michigan Allegedly Ejects Christian Group in the Name of Tolerance*, DAILY CALLER (February 5, 2013) <http://dailycaller.com/2013/02/05/university-of-michigan-allegedly-ejects-christian-group-in-the-name-of-tolerance/#ixzz2LXyPnqjy>. InterVarsity’s National Director commented that “The university is sending the message that religious voices are suspect and should be marginalized. . . . I think it sends the message that the university does not understand the nature of religious beliefs and the convictions of religious students.” *Id.*

address the issue of selective non-discrimination clauses and argues that stricter scrutiny must be applied to the university's affirmative defense.

### I. FIRST AMENDMENT PROTECTIONS

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>25</sup> Protecting freedom of religion, freedom of speech, and freedom of association ensures an avenue for the advocacy of ideas in petitioning the government and marketing ideas in the public and private squares.<sup>26</sup> Heightened application of First Amendment protection is crucial when the ideas expressed are inconsistent with majority and mainstream views—specifically those ideas that are controversial, divisive, or unorthodox.<sup>27</sup> This protection is especially required in the university setting, which is the next generation's "market place of ideas."<sup>28</sup>

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25. U.S. CONST. amend. I.

26. See *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981) ("[T]he freedom to associate for the common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."); see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–61 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 572–73 (1995) (finding that state-mandated inclusions of members in a private organization alters the expressive content of a group's message); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

27. Ryan C. Visser, *Collision Course?: Christian Legal Society v. Kane Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies*, 30 *HAMLIN L. REV.* 449, 461–62 (2007); see also *Dale*, 530 U.S. at 647–48 (stating that First Amendment rights are "crucial in preventing the majority from imposing its view on groups that would rather express other, perhaps unpopular ideas").

28. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (explaining that First Amendment rights extend to students within the "schoolhouse gate"); see also *Keyishian v. Bd. of Regents for the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (noting that America's future depends on its youth and their exposure to ideas in the classroom); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (finding that to "impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation"); Jessica B. Lyons, *Defining Freedom of the College Press After Hosty v. Carter*, 59 *VAND. L. REV.* 1771, 1794 (2006) (arguing that "the need for a viable marketplace of ideas is the underlying principle of most First Amendment protections, both within the university and the greater community"); Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 *Cath. U. L. Rev.* 895, 902 (2012) (highlighting the Court's student speech jurisprudence post-*Tinker*).

### A. Defining the Limited Public Forum

The constitutionality of constraining First Amendment freedoms depends on the type of forum that is restricted.<sup>29</sup> In discussing the states' ability to restrict a forum, it is essential to distinguish between traditional public forums and limited forums.<sup>30</sup> Spaces that are used by the public to assemble and discuss public questions, such as streets, parks, and open spaces, are defined as traditional public forums.<sup>31</sup> In a traditional public forum, the government is forbidden from engaging in viewpoint discrimination—defined as the preference of one message over another.<sup>32</sup> Therefore, any restriction in the forum must be narrowly tailored to accomplish a compelling government interest.<sup>33</sup> Further, the Supreme Court has held that all ideas “having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”<sup>34</sup>

In contrast to a traditional public forum, a limited public forum is an area typically not open for public use but used by a certain group or open for discussion of particular subjects.<sup>35</sup> In a limited forum, the space has been opened for a specific purpose, and, therefore, the government may impose greater restrictions on its use.<sup>36</sup> However, having established a forum's

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29. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (delineating the characteristic forums and the protections afforded in them).

30. *See id.*

31. *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (discussing what constitutes a traditional public forum); Nathan W. Kellum, *If It Looks Like a Duck . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 3–5 (2005) (noting the traditional forum analysis derives from a seminal Supreme Court case from 1939, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)).

32. *Carey v. Brown*, 447 U.S. 455, 463 (1980). When determining whether a State is acting within the set forum limits, a distinction is drawn between content discrimination and viewpoint discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 819–20 (1995). Content discrimination, which limits speech because of its subject matter, is permissible only when it furthers the forum's purpose. *Id.* Viewpoint discrimination, however, is presumed impermissible due to its restrictions on the speaker's ideology, opinion, or perspective. *Id.*

33. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (noting that the government may “exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest”); *Carey*, 447 U.S. at 464–65.

34. *See Roth v. United States*, 354 U.S. 476, 484 (1957) (discussing how the protection of speech is paramount, even when discussing a criminal obscenity statute).

35. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (“We have held that a government entity may create ‘a designated public forum’ if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.”); Kellum, *supra* note 31, at 6–7 (discussing the various types of restrictions that can be placed on a limited public forum).

36. 16A AM. JUR. 2D *Constitutional Law* § 542 (2009).



“openness,” the government must constrain any regulations of the forum within the boundaries it has set for itself.<sup>37</sup>

A state university may create a limited forum for specific purposes, which can be limited to use by certain groups and for discussion of certain topics.<sup>38</sup> Because the space has a dedicated purpose, the state may impose restrictions on its use to foster the university’s purpose for creating the forum.<sup>39</sup> Such a restriction is constitutional if it is “(1) reasonable in light of the purpose of the forum; and (2) viewpoint neutral.”<sup>40</sup> Because the forum’s purpose limits the state’s ability to restrict speech, establishing the mission and boundaries of the university’s limited forum is essential.<sup>41</sup> As a result, many of the cases involving a limited forum in a university setting center on how the university’s mission sets forth the forum’s boundaries.

Unfortunately, the tension between students’ First Amendment freedoms and state universities’ educational interests is not new. Over the past five decades, state universities have defended a variety of restrictive policies that sought to curtail abhorrent speech,<sup>42</sup> abide by the Establishment Clause,<sup>43</sup> prevent religious entanglement,<sup>44</sup> or eradicate discrimination.<sup>45</sup> The arguments addressing non-discrimination policies go to the heart of the tension between the First Amendment—which prohibits discrimination on the basis of what people believe, say, congregate to discuss, or raise with public authorities—and the non-discrimination norms of the Fourteenth

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37. See *Rosenberger*, 515 U.S. at 829 (stating that a state can restrict speech in a limited forum only where the limitation furthers the limited forum’s purpose); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (acknowledging that a state can limit a forum for certain groups or topics; however, viewpoint discrimination is impermissible and the restrictions must reasonably relate to forum’s purpose); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 46, 49 (1983) (recognizing that the government may not restrict speech on the basis of viewpoint).

38. See *Pleasant Grove City*, 555 U.S. at 470; *Widmar v. Vincent*, 454 U.S. 263, 265–67 (1981) (discussing a university’s decision to disallow a student organization from participating in religious worship and discussion on university property).

39. 16A AM. JUR. 2D *Constitutional Law* § 542. Such restrictions must be viewpoint neutral and serve a rational purpose. *Id.*

40. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2988 (2010).

41. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649 (9th Cir. 2008) (analyzing an organization’s constitution to determine whether its restrictions were reasonable in light of the forum’s purpose), *overruled on other grounds by L.A. Cty. v. Humphries*, 131 S. Ct. 447 (2010), *as recognized in Stone v. Advance Am., Cash Advance Cntrs. Inc.*, 08-CV-1549-AJB WMC, 2011 WL 5377638 (S.D. Cal. Nov. 7, 2011).

42. See *Healy v. James*, 408 U.S. 169, 187 (1972) (discussing a state college’s attempt to deny official recognition of a local chapter of Students for a Democratic Society).

43. See *Widmar*, 454 U.S. at 270–71 (recalling the state university’s argument that offering its facilities to religiously-affiliated organizations would violate the Establishment Clause).

44. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

45. See *Martinez*, 130 S. Ct. at 2979 (outlining the University of California, Hastings College of Law’s “all-comers” policy).

Amendment.<sup>46</sup> Therefore, it is not surprising that the courts have reached different conclusions on very similar facts.<sup>47</sup>

*B. Established Prohibitions and Failed Affirmative Defenses for First Amendment Restrictions in a Limited Forum*

*1. Viewpoint Discrimination*

The Supreme Court's jurisprudence on the First Amendment and the corresponding limits on a university's restrictive policies began with the prohibition of viewpoint discrimination in *Healy v. James*.<sup>48</sup> *Healy* addressed whether a state university could justify its official non-recognition of a student group based on the group's philosophy.<sup>49</sup> Central Connecticut State College, a state-supported school, denied official recognition of Students for a Democratic Society, stating that the group's alleged philosophy of disruption and violence was in discord with university policy.<sup>50</sup> The Supreme Court held that college officials may forbid a group from organizing where it poses a threat to campus safety regulations, but registration could not be denied based solely on the group's abhorrent philosophy.<sup>51</sup> The Court further held that a state university that denies official recognition of a student group to prevent disruption has the "heavy burden" of proving the restriction's legitimacy.<sup>52</sup>

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46. *See infra* Part III.

47. *Compare Martinez*, 130 S. Ct. at 2995 (holding that an all-access non-discrimination policy is constitutional), *with* *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (finding that a more narrow non-discrimination policy, which delineates specified areas of prohibited discrimination, is unconstitutional), *and* *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804–05 (9th Cir. 2011) (holding that a narrow non-discrimination policy, similar to the policy addressed in *Walker*, is constitutional and serves a compelling state interest), *cert. denied*, 132 S. Ct. 1743 (2012).

48. *Healy v. James*, 408 U.S. 169, 170–71, 187–88 (1972). Today, it is well established that "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828; *see also* *Police Dep't. of Chic. v. Mosley*, 408 U.S. 92, 96 (1972) (holding that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). The government must refrain from regulating speech based on viewpoint discrimination, "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (1995).

49. *See Healy*, 408 U.S. at 187 (discussing the university's claim that the organization's philosophy was abhorrent).

50. *Id.*

51. *Id.* at 187–89 (holding that mere expression of an idea did not justify denial of First Amendment rights, and quoting Justice Hugo Black in *Communist Party v. Subversive Activities Control Board* as stating, "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." (quoting 367 U.S. 1, 137 (1961) (Black, J., dissenting))).

52. *Id.* at 184 (characterizing the burden as "heavy").

## 2. Affirmative Defense: The Establishment Clause

*Widmar v. Vincent* further expanded the scope of First Amendment rights in a limited forum.<sup>53</sup> In *Widmar*, a religious student group brought suit after a state university denied the group recognition because of the religious content of its speech.<sup>54</sup>

The university argued that it had a compelling and constitutional interest in the separation of church and state in compliance with the Establishment Clause.<sup>55</sup> The Supreme Court held that a university policy providing for equal treatment of secular and religious campus groups does not offend the Establishment Clause if the policy has “a secular legislative purpose; . . . its principal or primary effect . . . neither advances nor inhibits religion . . . ; [and] the [policy] . . . [does not] foster ‘an excessive government entanglement with religion.’”<sup>56</sup> According to the Court, a state’s interest in avoiding entanglement with the Establishment Clause within the limited forum, however valid, was not a compelling interest that justified content-based or viewpoint discrimination.<sup>57</sup> The Court ultimately held that once a school has created a limited forum that is open to student groups, any exclusion from—or regulations within—that forum must be content-neutral.<sup>58</sup> Against that standard, the university was unable to justify the group’s exclusion on constitutional grounds.<sup>59</sup>

## 3. Affirmative Defense: Religious Disentanglement

Despite the prohibition against viewpoint discrimination and assurance that equal access for religious groups does not violate the Establishment Clause,<sup>60</sup>

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53. 454 U.S. 263 (1981); see Paulsen, *supra* note 3, at 655 (discussing *Widmar*’s holding).

54. *Widmar*, 454 U.S. at 264–65. The student group had previously registered as a student organization. *Id.* at 265.

55. *Id.* at 270; see also U.S. CONST, amend. I (“Congress shall make no law respecting an establishment of religion”).

56. *Widmar*, 454 U.S. at 274–77 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). The Establishment Clause protects from “‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

57. *Widmar*, 454 U.S. at 276.

58. *Id.* at 277.

59. *Id.*

60. In 1984, Congress utilized the Equal Access Act to address the Establishment Clause issue discussed by the Supreme Court in *Widmar*. 20 U.S.C. § 4071 (1984). Under the Equal Access Act, Congress declared that if a public secondary school created a limited forum that students were allowed to associate, it was then prohibited from discriminating against students on the basis of “religious, political, philosophical, or other content of the speech.” § 4071(a), (b). A “limited open forum” exists whenever a public secondary school “grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time.” § 4071(b). Through the Equal Access Act, the Court provided protection and rights for secondary school students to engage in religious speech, debate, and association within public schools’ limited forum. See, e.g., *Bd. of Educ. of Westside Cmty. Sch.*

First Amendment issues in the limited forum continued to be contentious.<sup>61</sup> In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court again addressed the issue of discrimination against a religious group within a limited forum of the university setting.<sup>62</sup> In *Rosenberger*, a student-run newspaper, Wide Awake Productions, was denied payments for printing because of the newspaper's religious perspective.<sup>63</sup> The university argued that the paper's Christian perspective, by "promot[ing] or manifest[ing] a particular belie[f] in or about a deity or an ultimate reality," violated the university's Student Activities Fund guidelines.<sup>64</sup>

The students filed suit, arguing that withholding payment owed to the newspaper violated the students' First Amendment rights.<sup>65</sup> The university claimed that within a limited public forum, the school has the ability and duty to confine a forum to legitimate purposes that further its educational mission.<sup>66</sup> While acknowledging that the university could constitutionally define its mission, the Court held that the viewpoint discrimination in this case was unconstitutional.<sup>67</sup> The Court found that when a university treats religiously

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v. Mergens, 496 U.S. 226 (1990) (holding that the Equal Access Act was intended to forbid discrimination against a student group on the basis of religion and that the Act did not violate the Establishment Clause). The Act provides that

"It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."

§ 4071(b).

61. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822–23 (1995) (challenging a university's denial of funds to a student Christian newspaper).

62. *Id.*

63. *Id.* at 822–23, 825.

64. *Id.* at 822–23, 827. Guidelines stated that the Student Activities Fund should be used to support extracurricular activities that are "related to the educational purpose of the University," including publications related to "student news, information, opinion, entertainment, or academic communications media groups." *Id.* at 824. Activities not reimbursed by the Fund included "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses." *Id.* at 825. Although both parties agreed that the student newspaper, Wide Awake Productions, was not a "religious organization," the University argued that they were engaged in "religious activities." *Id.* at 826–27.

65. *Id.* at 827.

66. *Id.* at 833. This was a case of viewpoint discrimination because of the focus on the students' specific motivating ideology. *Id.* at 832.

67. *Id.* at 834 (finding that the University engaged in viewpoint discrimination in withholding funding); see also *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 3007 (2010) (Alito, J., dissenting) (discussing the majority's emphasis on funding and noting that First Amendment rights are more than just a matter of funding because, "[t]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the

affiliated organizations differently, even within a limited forum, the university's unconstitutional acts are not protected by furthering an educational mission.<sup>68</sup>

C. *Christian Legal Society v. Martinez: A Primer on Limited Public Forum and Non-Discrimination*

*Christian Legal Society v. Martinez* presents the most recent Supreme Court analysis of the tension between First Amendment rights within a university's limited forum and non-discrimination policies.<sup>69</sup> *Martinez* arose out of a claim brought by the Christian Legal Society (CLS), a student group at the University of California, Hastings College of Law (Hastings), which was denied official recognition because of its bylaws.<sup>70</sup> To receive official recognition, Hastings required student groups to be non-commercial, to limit membership to Hastings students, to submit bylaws to Hastings for approval, and to comply with Hastings' "Policies and Regulations Applying to College Activities, Organization and Students."<sup>71</sup> The Christian student organization, out of which CLS formed, operated as a Registered Student Organization (RSO) for over a decade.<sup>72</sup> However, in 2004, CLS's application was denied.<sup>73</sup> Hastings told CLS that the organization's policy that required voting members and leaders to sign a Statement of Faith<sup>74</sup> failed to comply with the school's non-discrimination policy.<sup>75</sup> As a result, CLS was denied the benefits

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citizen"); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. L. REV. 795, 859 n.211 (1993) (arguing that providing funding to religious student groups is equivalent to the financial subsidy of providing access to school facilities).

68. *Rosenberger*, 515 U.S. at 833–34 (distinguishing *Widmar v. Vincent*, 454 U.S. 263 (1981), and noting that "viewpoint-based restrictions are [not] proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"). It is important to note that *Rosenberger* addressed student speech—not the government's ability to control its own expression. *Compare id.* at 834, with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262–63 (1988) (finding that a student newspaper published by the district, with district funds, involved the government's right to control the content of its own expression).

69. 130 S. Ct. 2971, 2978 (2010).

70. *Id.* at 2979–80 (detailing CLS's exclusion of students based on religion and sexual orientation). At Hastings, student groups apply to become registered student organizations (RSO), a status that provides certain benefits, including receiving financial assistance from student activity fees, communicating through Hastings' weekly newsletter, advertising on school bulletin boards, participating in an annual RSO fair, and using Hastings' name and logo. *Id.*

71. *Id.* at 2979. If a group wishes to use the school's name or logo, the group must sign a license agreement. *Id.*

72. *Id.* at 2980.

73. *Id.*

74. *Id.* The Statement of Faith affirms fundamental Christian doctrines. *Id.* at 3001. Such beliefs include the idea that the Bible is God's word and that "acts of sexual conduct outside of God's design for marriage between one man and one woman" are a sin. *Id.*

75. *Id.* at 2979–80. The school's policy states that "[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or

of a RSO, including a financial subsidy and an effective means of communicating with the larger student body.<sup>76</sup>

*1. Defining the Limited Public Forum Mission in Martinez*

CLS filed suit against Hastings, challenging the constitutionality of an “all-access” non-discrimination policy restriction on student groups.<sup>77</sup> The Supreme Court evaluated the legitimacy of an “all-access” non-discrimination policy applied to student groups by analyzing how the restriction serves the purposes of Hastings’ limited forum.<sup>78</sup> Hastings argued that its limited forum was defined not only by its educational mission, but also by an effort to create “opportunities to pursue academic and social interests outside of the classroom [to] further . . . develo[p] leadership skills.”<sup>79</sup> Hastings advocated that RSOs are a means to achieving this mission<sup>80</sup> and that their policy “ensure[d] that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students.”<sup>81</sup> The Supreme Court ruled in favor of Hastings,

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sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.” *Id.* at 2979.

76. *See supra* note 70 (explaining the benefits of a student organization). Hastings argued that denial of these benefits was simply “dangling the carrot of subsidy, not wielding the stick of prohibition.” *Martinez*, 130 S. Ct. at 2975. The issue of funding and benefits in this factual scenario, under the Spending Clause, is outside the scope of this Note. For more information, see Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7–8 (1988) (explaining that the unconstitutional conditions doctrine precludes the government from coercing the subject into waiving a constitutional right); Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 919 (2009) (arguing that portraying student group recognition as a subsidy undervalues their expressive interests); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (arguing that “the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether”).

77. *Martinez*, 130 S. Ct. at 2981.

78. *Id.* at 2978–79 (characterizing the school’s interest as promotion of education and leadership development).

79. *Id.*

80. *Id.* Hastings argued that the “all-access” policy (1) ensures that opportunities are available to everyone; (2) helps police the policy without requiring the school to determine an RSO’s reason for determination; (3) encourages tolerance, cooperation, and student learning; and (4) conveys the school’s compliance with state-law non-discrimination policies. Hastings registers around 60 RSOs a year to further their legal educational mission and bring together “individuals with diverse backgrounds and beliefs” to better “encourage tolerance, cooperation, and learning among students.” *Id.* at 2990.

81. *Id.* at 2989; *see Prospective Students, Learn About Our Students*, UCLA SCHOOL OF LAW, <http://www.law.ucla.edu/prospective-students/learn-about-our-students/Pages/default.aspx> (last visited Feb. 8, 2013). In 2008, the Supreme Court held that a non-discrimination policy was reasonable in light of the school’s interest in “developing good citizenship, [promoting] harmonious relationships . . . [and] developing a regard for law and order.” *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649 (9th Cir. 2008), *overruled on other grounds by* *L.A. Cty. v. Humphries*, 131 S. Ct. 447 (2010), *as recognized in* *Stone v. Advance Am., Cash Advance Cntrs. Inc.*, 08-

holding that an “all-access” non-discrimination policy is viewpoint neutral and a valid restriction within a limited forum.<sup>82</sup>

2. “All-Access” Approval: The True Holding of *Martinez*

After the Supreme Court’s decision in *Martinez*, many expressed deep concerns about the future of First Amendment rights in the university setting.<sup>83</sup> *Martinez*’s holding, however, is quite narrow:<sup>84</sup> a non-discrimination policy, which is neutral and generally applicable, mandating that student groups accept all eligible students as voting members is constitutional.<sup>85</sup> The Supreme Court in *Martinez* held that an “all-comers policy” could legitimately promote Hastings’ educational mission.<sup>86</sup> The Court, however, reiterated that a university may not engage in viewpoint discrimination.<sup>87</sup> The majority concluded that, “so long as a public university does not contravene constitutional limits, its choice to advance state-law goals [of non-discrimination] through the school’s educational endeavors stands on firm footing.”<sup>88</sup>

Therefore, *Martinez* does not address the constitutionality of a *selective* non-discrimination policy that prohibits discrimination based on certain categories within a limited forum.<sup>89</sup> Instead, the case only addresses an

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CV-1549-AJB WMC, 2011 WL 5377638 (S.D. Cal. Nov. 7, 2011); see *infra* note 117 (discussing *Truth v. Kent*).

82. *Martinez*, 130 S. Ct. at 2995.

83. See, e.g., Thro & Russo, *supra* note 18, at 474 (citing Editorial, *The Supreme Court’s “Subsidies”*, WALL ST. J., July 1, 2010, at A18) (noting that schools often, under the guise of non-discrimination policies, suppress unpopular groups and views).

84. *Martinez*, 130 S. Ct. at 2995 (Stevens, J., concurring).

85. *Id.* at 2978 (majority opinion).

86. *Id.* at 2995.

87. *Id.* at 2991 (stating that viewpoint-neutral barriers do not prohibit the group’s access to other available avenues through which it may exercise its First Amendment rights, thus lessening the burden created by any viewpoint-neutral restrictions).

88. *Id.* at 2990–91. This Note does not argue, or address whether *Martinez* was correctly decided. However, many commentators have argued that *Martinez*’s holding fundamentally contradicts other First Amendment jurisprudence found in *Healy* and *Widmar*. See e.g., Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 535–37 (2011) (arguing that “the Court was closer to getting it right the first time” when it considered “student’s associational rights” in *Healy*).

89. *Martinez*, 130 S. Ct. at 3002 (Alito, J., dissenting). It was left to determine on remand whether the all-access non-discrimination policy, which was determined to be constitutional if applied to all student groups, was in fact applied in a neutral fashion. *Id.* at 2995 (majority opinion). CLS tried to argue that under Hastings’ policy, a political group could “insist that its leaders support its purposes and beliefs . . . but a religious group cannot.” *Id.* at 2982. However, the Court did not address this issue and stated that “CLS’s assertion runs headlong into the stipulation of facts it jointly submitted.” *Id.*

all-access, all-comers policy.<sup>90</sup> The Court underscored that Hastings' policy "is justified without reference to the content [or viewpoint] of the regulated speech."<sup>91</sup> Acknowledging that viewpoint neutrality is the "sticking point" in limited forum analysis, the majority highlighted that it is "hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."<sup>92</sup> In contrast to other limited public forum cases like *Healy*, *Widmar*, and *Rosenberger*, Hastings' all-comers policy did not draw a distinction between groups, and was, therefore, "textbook viewpoint neutral."<sup>93</sup>

The dissent in *Martinez* focused on the discrepancies between Hastings' all-access policy and the actual language of Hastings' non-discrimination policy as applied when it denied CLS's registration.<sup>94</sup> Looking beyond the facial neutrality and authenticity issue of the all-access policy, Chief Justice John Roberts and Justices Samuel Alito, Antonin Scalia and Clarence Thomas questioned Hastings' motivation in establishing such a non-discrimination policy.<sup>95</sup> The dissenters criticized the majority for ignoring evidence that Hastings policy was not viewpoint neutral and, as a result, gave public universities a weapon to suppress unpopular speech.<sup>96</sup>

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90. See *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795 (9th Cir. 2011) (citing *Martinez*, 130 S.Ct. at 2982, 2984) (acknowledging that the *Martinez* court declined to extend its holding to narrower non-discrimination policies, such as those that prohibited membership requirements on the basis of race, gender, religion, and sexual orientation), *cert. denied*, 132 S. Ct. 1743 (2012).

91. *Martinez*, 130 S. Ct. at 2994 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

92. *Id.* at 2993.

93. *Id.*

94. *Id.* at 3001 (Alito, J., dissenting) ("Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began.").

95. *Id.* at 3004. The dissent noted that, until the all-comers policy was unveiled, Hastings registered numerous student organizations that restricted membership and leadership to individuals who agreed with the group message. *Id.* For example, since student groups were required to submit a copy of their bylaws, Hastings knew that the Hastings Democratic Caucus required that its members respect the organization's objective. Similarly, Silenced Right limited voting membership to students who advocated a pro-life message, and La Raza limited voting membership to students of Hispanic background.

96. *Id.* at 3001; see Adam Liptak, *Club that Discriminates Loses Appeal*, N.Y. TIMES, June 29, 2010, at A18 (suggesting that the majority left open the possibility that CLS could eventually prove that Hastings' policy was "a pretext for antireligious animus"); see also CLS Brief, *supra* note 9, at 17 ("If *Martinez* is correct, however, all that the campus officials in *Healy* needed to do to keep the SDS off campus was to adopt a uniform policy restricting all campus student groups' freedom of expressive association. Under *Martinez*—quite contrary to *Healy*—a state university apparently may restrict speech and association and does have power to 'burden' or 'abridge' the 'associational right' of student groups 'to associate to further their personal beliefs.' All that is required is that a university impose 'neutral,' across-the-board restrictions on all groups' expressive association.").



*D. The Seventh Circuit Addresses What Martinez Did Not*

The Supreme Court's limited holding in *Martinez* left unanswered questions about the constitutionality of a selective non-discrimination policy that relates to a university's mission. However, in 2006, four years before the Supreme Court decided *Martinez*, the Seventh Circuit in *Christian Legal Society v. Walker* addressed and invalidated a selective non-discrimination policy that prohibited a Christian student organization from restricting its membership.<sup>97</sup>

In *Walker*, Christian Legal Society (CLS) brought an action against Southern Illinois University's School of Law (SIU) for denying it RSO-recognition on account of the organization's Statement of Faith, which required voting members and officers to abide by specific moral principles.<sup>98</sup> The university rejected CLS's application, arguing that it violated state non-discrimination laws as well as the school's nondiscrimination policy.<sup>99</sup> The university also argued that CLS's sexual abstinence requirement, which was part of the Statement of Faith, violated the school's non-discrimination policy.<sup>100</sup> Because of the school's rejection, CLS was stripped of the benefits reserved for officially recognized student groups.<sup>101</sup>

CLS sought a preliminary injunction, alleging that the university violated its First Amendment and due process rights.<sup>102</sup> The district court held that CLS "had not suffered irreparable harm," and therefore CLS failed to show potentially successful First Amendment claims.<sup>103</sup> The Seventh Circuit disagreed, reasoning that CLS demonstrated a likelihood that the university unconstitutionally infringed its right of expressive association and freedom of speech by denying the group RSO-status.<sup>104</sup> Acknowledging that the government can override the right of expressive association only in areas that

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97. 453 F.3d 853, 863 (7th Cir. 2006).

98. *Walker*, 453 F.3d at 857–58. CLS's Statement of Faith reads: "CLS welcomes anyone to its meetings, but voting members and officers of the organization must subscribe to the statement of faith, meaning, among other things, that they must not engage in or approve of fornication, adultery, or homosexual conduct; or, having done so, must repent of that conduct." *Id.* at 858. A person's past sexual conduct or homosexual inclinations did not preclude eligibility for membership or candidacy for an officer position. *Id.* at 859.

99. *Id.* at 858.

100. *Id.*

101. *Id.* at 857–58 (noting that some of these benefits included access to the law school List-Serve and bulletin boards, representation on the school's website, support of an official faculty advisor, recognition as a student organization, ability to reserve conference rooms, and funding from student fees).

102. *Id.* at 857.

103. *Id.* at 858–59.

104. *Id.* at 859–60. The court also found that it was unclear whether CLS violated any SIU policy, which was SIU's justification for revoking CLS's status as registered student organization. *Id.* At 861 (finding a clear interference with an organization where the "regulation . . . forces the group to accept members it does not desire"). Freedom to associate "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

serve a compelling state interest, the Seventh Circuit concluded that the university's actions failed to reach the mark.<sup>105</sup> The Seventh Circuit held that the university had no compelling interest in requiring CLS to accept members whose conduct violated their Statement of Faith beyond "eradicating or neutralizing particular beliefs contained in [CLS'] creed."<sup>106</sup>

## II. *ALPHA DELTA*: THE NINTH CIRCUIT TACKLES SELECTIVE NON-DISCRIMINATION POLICIES

Recently, the Ninth Circuit, in *Alpha Delta Chi-Delta Chapter v. Reed* addressed the constitutionality of a policy very similar to the policy in *Walker*. However, despite their factual similarities, the two circuits' holdings conflict.<sup>107</sup>

In *Alpha Delta*, a Christian sorority and fraternity brought suit alleging that San Diego State University violated the organizations' First Amendment rights when the university rejected their application for official registration as student organizations.<sup>108</sup> Like other state universities, San Diego State is a limited public forum, defined by its educational mission and forum rules.<sup>109</sup> San Diego State's Student Handbook declares that the educational mission includes a commitment to diversity and encourages students to promote "ideals of respect, equality, diversity and freedom from harassment."<sup>110</sup> San Diego State's rejection of Alpha Delta's application was not an isolated occurrence.<sup>111</sup> In fact, the university repeatedly denied the organization's application to become an RSO.<sup>112</sup>

105. *Walker*, 453 F.3d at 863.

106. *Id.* (finding that the point of the policy was to force the group to modify its message).

107. 648 F.3d 790, 805 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012) (concluding that the non-discrimination policy was "viewpoint neutral and reasonable"); *Walker*, 453 F.3d at 858 (holding that there is a "reasonable likelihood" that the policy would be unconstitutional).

108. *Alpha Delta*, 648 F.3d at 795–96. The requirements for membership in the sorority, Alpha Delta Chi, include acceptance of Jesus Christ, church attendance, and participation in Christian service. *Id.* at 795. The fraternity, Alpha Gamma Omega, requires members to accept Jesus Christ, and requires officers to sign a statement that reads:

I hereby publicly confess my belief in the Lord Jesus Christ as God and only Savior and give witness to the regenerating power of the Holy Spirit in my life. I will make it a purpose of my life to continue in fellowship with God through prayer and reading of the Holy Scriptures.

*Id.*

109. *See id.* at 798 (identifying university programs that limit membership to certain groups and require university approval as "hallmark[s] of a limited public forum" (internal citations omitted)).

110. *Id.* at 798–99.

111. *Id.* at 795.

112. *Id.* at 796. San Diego had approximately 115 RSOs. *Id.* Recognition benefits include university funding, use of university name and logo, use of university facilities, publicity, and participation in school events. *Id.* at 795–96.

The university denied the applications because of the group's membership and officer requirements, which required a belief in Christianity.<sup>113</sup> San Diego State alleged that requiring affirmation of religious belief for membership and leadership in a student group violated its non-discrimination policy.<sup>114</sup> After the university denied the group official recognition, the plaintiffs challenged San Diego State's non-discrimination policy under the First and Fourteenth Amendments.<sup>115</sup> The district court granted summary judgment for San Diego State, and the Ninth Circuit affirmed.<sup>116</sup>

Looking to its limited public forum jurisprudence,<sup>117</sup> the Ninth Circuit accepted the limited forum's purpose as defined by the student handbook's program guidelines.<sup>118</sup> San Diego State's Student Handbook declares that the educational mission includes:

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113. *Id.* at 796.

114. *Id.* The full policy states:

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.

*Id.*

This policy mirrors the California State University Non-Discrimination Regulation, which states:

No campus shall recognize any fraternity, sorority, living group, honor society, or other student organization, which discriminates on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability.

The prohibition on membership policies that discriminate on the basis of gender does not apply to social fraternities or sororities or to other university living groups.

5 Cal. Code Regs. tit. 5, § 41500 (2012).

115. *Alpha Delta*, 648 F.3d at 796. Even without official recognition, student groups may recruit new members by handing out flyers and posting signs in areas open to all groups. *Id.* But, plaintiffs must pay for access to university rooms for meetings and events, which officially recognized groups may use for free. *Id.*

116. *Id.* at 795–96.

117. *Id.* at 798–99. In *Alpha Delta*, the court's discussion of the forum's "purpose" relied on the court's analysis and decision in *Truth v. Kent School District*, 542 F.3d 634 (9th Cir.2008). In *Truth*, the Court looked to the program's own constitution to determine if the non-discrimination policy was reasonable with respect to the forum's purpose. *Truth*, 542 F.3d at 649. The Kent School District's constitution listed developing good citizenship, promoting harmonious relationships, facilitating student and faculty expression, and encouraging students to obey, honor, and sustain state and local laws and school rules as the foundational principles guiding its purpose. *Id.* The court in *Truth* interpreted the non-discrimination policy as advancing these broad statements and the "school's basic pedagogical goals," instilling "shared values of a civilized social order" . . . includ[ing] instilling the value of non-discrimination." *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)). The court in *Truth* therefore concluded that the non-discrimination policy was a reasonable limitation in light of the purpose of the student organization forum. *Id.*

118. *Alpha Delta*, 648 F.3d at 798–99.

positive commitment toward diversity. . . . We encourage every student organization to make a conscious effort to undertake recruitment efforts to ensure diversity within the group's membership and to take steps to reach populations currently underrepresented. . . . No organization will direct recruitment . . . toward any one group (i.e. racial, ethnic, gender, etc.) of potential members. . . . We . . . challenge you to express yourself in a manner that promotes and maintains the ideals of respect, equality, diversity, and freedom from harassment.<sup>119</sup>

The court concluded from the mission statement that the essential purpose of the forum was to promote diversity; therefore, the Court found that requiring RSOs to comply with a non-discrimination policy was reasonable.<sup>120</sup>

On the issue of viewpoint neutrality, the Ninth Circuit held that the policy did not violate the Constitution's Free Exercise or Equal Protection Clauses because the policy, as written, is a "rule of general application" that does not specifically target or burden religious groups.<sup>121</sup> As a matter of school policy and practice, however, student groups apparently *may* limit membership to those who agree with the club's purpose, ideology, or mission.<sup>122</sup> Therefore, the Ninth Circuit remanded the case for a determination of whether San Diego State had applied the policy evenly to all student groups.<sup>123</sup> Alpha Delta subsequently submitted a petition for *certiorari* to the Supreme Court asking the Court to clarify whether the Free Speech and Free Exercise Clauses prevent state universities from discriminating against religiously affiliated student organizations based on the religious nature of their association and speech.<sup>124</sup> The Court denied the petition.<sup>125</sup>

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119. *Id.*

120. *Id.* at 799.

121. *Id.* at 804.

122. *Id.* at 803–04 (pointing to other instances of inconsistency in applying the non-discrimination policy); *see also* CLS Brief, *supra* note 9, at 7–8 (noting that the Lebanese Club limits membership to students willing to work toward an independent Lebanon, the Immigration Rights Coalition requires members to share their beliefs regarding immigrant rights, and the Voices of Planned Parenthood limits membership to those committed to reproductive freedom). There is little distinction between permitting students to require agreement with the particular ideology, belief, or philosophy, and forbidding groups from requiring affirmation of religious belief. *See infra* notes 149–53 and accompanying text.

123. *Alpha Delta*, 648 F.3d at 804.

124. Petition for Writ of Certiorari, *Alpha Delta*, 123 S. Ct. 1743 (No. 11-744). Although the Supreme Court declined to grant certiorari in this case, this Note argues that the issue is still ripe for Supreme Court review.

125. *Alpha Delta*, 132 S. Ct. 1743 (2012) (denying certiorari).

### III. HOW SELECTIVE NON-DISCRIMINATION POLICIES ARE BROADLY UNCONSTITUTIONAL

Although *Martinez* finds “all-access” policies constitutionally permissible,<sup>126</sup> the *Alpha Delta* decision strikes far beyond *Martinez*’s holding.<sup>127</sup> By applying a low standard of review to a selective non-discrimination policy that prohibits an organization from restricting membership on the “basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition,” the Ninth Circuit essentially permitted viewpoint-based discrimination.<sup>128</sup> The court’s “hear no evil, see no evil, speak no evil” approach failed to inquire beyond the facial validity of the school’s affirmative defense.<sup>129</sup> By accepting San Diego State’s articulation of its interest in promoting a non-discrimination policy, the Ninth Circuit overlooked significant constitutional questions.<sup>130</sup>

#### A. A Lack of Scrutiny: The Questions Raised by Alpha Delta

The important factual development for First Amendment cases within a limited forum lies in the determination of a policy’s viewpoint neutrality and reasonability,<sup>131</sup> not only “as written” but also “as applied.”<sup>132</sup> The Ninth Circuit noted that San Diego State’s policy “as written” did not focus on religious beliefs or contain restrictions that targeted religious organizations.<sup>133</sup> However, whether a policy targets or imposes unique requirements is a factual

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126. See Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2993 (2010); WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION at 516–20 (3d ed. 1995) (arguing that there is no obligation for a university to create a limited public forum recognizing, supporting, or funding student groups, but if that choice is made, all student groups must be treated the same).

127. See text accompanying *supra* notes 84–85.

128. *Alpha Delta*, 648 F.3d at 797. Looking to *Martinez*, the Ninth Circuit in *Alpha Delta* found no material distinctions between Hastings’ and San Diego State’s RSO programs. *Id.* In addressing the purposes of the limited forum, the court concluded that San Diego State’s non-discrimination policy was reasonable to promote diversity because the RSOs still had access to the school’s resources and could recruit members. *Id.* at 798–99.

129. *Id.* at 803–04.

130. See *id.* at 805–06 (Ripple, J., concurring) (noting that “it is still an open question at the national level”). The Ninth Circuit did not address how the university defines “diversity,” or, more importantly, why the same non-discrimination rules do not apply to other “ideological” organizations. These factual questions should be developed before declaring the non-discrimination policy viewpoint neutral, both as written and as applied.

131. See *Martinez*, 130 S. Ct. at 2988 (beginning its analysis with the non-discrimination policy’s reasonableness in view of the forum’s purpose).

132. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 883 (1995) (remanding to determine whether the facially neutral program was in fact neutral in application); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006) (finding that, although a policy was facially neutral, there was strong evidence that the policy was not neutral as applied).

133. *Alpha Delta*, 648 F.3d at 804 (stating any burden to be “incidental”).

question, not a legal determination.<sup>134</sup> It is evident that San Diego State students can limit membership based on adherence to the group's mission.<sup>135</sup> Yet, student groups motivated by an ideology or religious purpose may not limit their membership or leadership.<sup>136</sup> The question of whether any burden created by the policy's application falls on religious groups is also a factual question that the courts should not dismiss lightly.<sup>137</sup>

Examining the school's non-discrimination policy "as applied" requires, first, determining how San Diego State understands its purpose and, second, questioning how the policy fits this purpose.<sup>138</sup> Ironically, within the past two decades, select universities, including the University of California at Los Angeles (UCLA), have argued that their non-discrimination policies should be subsumed by an interest in promoting student-body diversity.<sup>139</sup> One such argument was central in *Grutter v. Bollinger*, a case in which the University of Michigan Law School, when sued over admissions policies that granted preferences to under-represented minorities,<sup>140</sup> asked the Court to recognize that "in the context of higher education [there is] a compelling state interest in student body diversity."<sup>141</sup> Similarly, in *Regents of the University of California v. Bakke*, the Court applied a similar rationale when the University was sued over its admissions policies, which considered race and gender in the

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134. *Id.* at 803.

135. CLS Brief, *supra* note 9, at 7 (distinguishing *Alpha Delta* from *Martinez*).

136. *Alpha Delta*, 648 F.3d at 796; *see also* CLS Brief, *supra* note 9, at 8 (arguing that this is the exception to the general rule that student groups may limit membership and leadership to students who agree with the group's ideology or purpose "as a whole").

137. *See Alpha Delta*, 648 F.3d at 804 (stating that the plaintiffs may have mischaracterized the evidence). The Ninth Circuit accepted San Diego State's assertion that they did not intend to suppress religious speech and association. *Id.* Even in *Martinez*, the Court remanded to determine how the facially viewpoint neutral policy was actually applied, noting that CLS had a strong argument because even under the lowest level of scrutiny, it was clear that CLS alone was singled out. *See* Charles J. Russo & William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker As an Illustration*, 33 J.C. & U.L. 361, 368–69 (2007).

138. *See supra* notes 35–40 and accompanying text (explaining that a limited forum is an area that is narrowly tailored for use by certain groups dedicated solely to select subjects).

139. *See Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003) (rejecting the notion that only remedying past discrimination can provide a permissible justification for a race-based admissions policy); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (acknowledging the University's argument that its admission policy takes race into account in order to achieve its stated mission of a diverse student body).

140. *Grutter*, 539 U.S. at 316–18 (proving an explanation by the director of the law school's admissions process that there was no target percentage to achieve sufficient representation by the "underrepresented"). Petitioner, Barbara Grutter, was a white Michigan resident seeking admission to the Law School. *Id.* at 316–17. Grutter sued the University of Michigan Law School for allegedly discriminating against her based on race because of the University's policy to attain a certain number of minority groups. *Id.*

141. *Id.* at 328.

admission process.<sup>142</sup> Furthermore, the university alleged that the close relationship between its educational mission and the compelling state interest in institutional diversity should take precedence over the forum's non-discrimination rules.<sup>143</sup> The university's law school even submitted an amicus brief arguing that "diversity serves a special function in education, to prepare students for life in a pluralistic society" and that in "legal education, built upon dialogue, debate, and the clash of conflicting opinion, diversity makes a unique contribution to the education of all students, majority and minority alike."<sup>144</sup> The Supreme Court held in favor of the universities in both *Grutter* and *Bakke*, recognizing the corollary between the educational mission and the universities' interest in ensuring diversity within the student body.<sup>145</sup>

For universities that actively "manage" diversity, important questions must be asked: How does the university define "diversity"? Why do non-discrimination rules apply differently to certain ideological organizations?<sup>146</sup> With such a pervasive interest in promoting diversity within the student body, it is essential to question how diversity is defined.<sup>147</sup> Only the facts will disclose if the forum has been constructed in a manner designed to target certain viewpoints and privilege others.<sup>148</sup>

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142. *Bakke*, 438 U.S. at 311–12. Respondent, Allan Bakke, a white male, sued the University of California, Davis Medical School after being rejected multiple times, claiming that it was due to a racial and ethnic quota policy. *Id.* at 276–78.

143. *Id.* at 313.

144. Brief for the Law School Admission Council as Amicus Curiae Supporting Petitioner at 54, *Bakke*, 438 U.S. 265 (No. 76-811); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (suggesting that to adequately prepare students to live in a pluralist society, a ratio reflecting the proportion within the relevant school district is necessary); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (explaining that a law school that only admits African Americans creates inequality because it excludes substantial portions of racial groups that, when brought together in the same classroom, generate an exchange of ideas and further enhance the learning of the law).

145. *Grutter*, 539 U.S. at 327–28 (holding that the use of race in the admissions process forms a compelling state interest because of the educational benefits stemming from a diverse student body); see also *Bakke*, 438 U.S. at 311–12 (holding that attaining a diverse student body is constitutionally permissible for an institution of higher education).

146. For example: Democrats, Republicans, Vegans, and Meat-Lovers. See *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 805 (9th Cir. 2011) (Ripple, J., concurring) (noting that Vegan students can restrict members to Vegans and still receive official recognition), *cert. denied*, 132 S. Ct. 1743 (2012).

147. See Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 112 (2002) (explaining that the school's definition of diversity is essential because diversity is a factor in a court's narrow tailoring analysis). For example, *Martinez* rested on the premise that a university must not only adopt a true "all-comers" policy, but also apply that policy uniformly. *Martinez*, 130 S. Ct. at 2994–95.

148. The forum's message raises important questions that require additional facts. If, for instance, the message conveyed by the university's official action is that some religious viewpoints are inconsistent with diversity and civil rights, that message raises Establishment Clause issues. See *supra* Part I.B.2 (discussing how equal treatment of student groups does not

What is clear from the concurring opinion in *Alpha Delta* is that the selective non-discrimination policy is plainly not viewpoint neutral.<sup>149</sup> The explicit language used in selective non-discrimination policies dictates specifically which groups are not permitted to draw distinctions.<sup>150</sup> Religiously affiliated organizations, in particular, face unique challenges in exercising their freedom of speech, freedom of religion, and freedom of expressive association within the university's non-discrimination requirements.<sup>151</sup> Vegans are permitted to require their leadership to adhere to particular norms and conduct of a vegan lifestyle, but a Jewish organization would be forbidden from requiring belief in the Jewish faith in order to officially lead the association.<sup>152</sup> The rationale for not wanting a Republican to lead a Democratic student organization, or even become a voting member, is the same rationale that applies to religious organizations—when the membership or leadership does not adhere to the group's stated mission and expressive message, the message is compromised,

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violate the Establishment Clause generally, and that within a limited forum any regulations imposed on student groups must be content neutral); *see also* Andrew D. Brown, *Do As I Say, Not As I Do: The Myth of Neutrality in Nondiscrimination Policies at Public Universities*, 91 N.C. L. REV. 280, 304 (2012) (arguing that the failure to apply appropriate judicial scrutiny to the constitutional validity of the restrictive measures disproportionately burdens religious groups and is unacceptable given the rights at stake); Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 553, 566 (2011) (arguing that restrictions on the right of expressive association should be able to survive a strict scrutiny test and that a lower standard actually favors government restriction, which is inappropriate in the context of protecting expressive student association); Kara R. Moheban, Case Comment, *Establishment Clause Does Not Compel University to Deny Funding to Religious Student Publications—Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510 (1995), 30 SUFFOLK U. L. REV. 237, 242 (1996) (stating that the Establishment Clause does not require a complete separation of church and state; instead, the state must use neutral criteria and policies when providing benefits to recipients).

149. *Alpha Delta*, 648 F.3d at 805 (Ripple, J., concurring) (arguing that *Alpha Delta* is not controlled by *Martinez*, as the school's non-discrimination policy is not an "all-comers" policy, but rather prohibits discrimination of specified groups).

150. *See supra* text accompanying note 144. Such policies not only impact religious organizations, but also affects groups formed around certain cultures or ethnic backgrounds. The policies dilute the organization's unique cultural identity, which ultimately fosters diversity for the university campus.

151. *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006) (discussing a university policy that provides for equal treatment without regard to sexual orientation, but noting that homosexual conduct conflicts with some religious organizations' beliefs). *See generally* Kathleen A. Brady, *Religious Groups Autonomy: Further Reflections About What Is at Stake*, 22 J.L. & RELIGION 153 (2006) (defending the autonomy of religious organizations and groups because they are a source of alternative ideas for our society and our laws).

152. *See, e.g.*, *Martinez*, 130 S. Ct. at 3010–11 (Alito, J., dissenting) ("An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination."); *Alpha Delta*, 648 F.3d at 805 (discussing the lack of restrictions on Vegan student organizations that limit membership).



the purpose of the association is thwarted, and the associational beliefs are internally challenged.<sup>153</sup>

It is important that selective non-discrimination policies clearly define which types of organizations can limit student membership. While groups with no expressive association have no right to discriminate, as there is no message to be compromised by the inclusion of individuals with certain beliefs, the same is not true for expressive associational groups, such as religiously affiliated organizations.<sup>154</sup> As Justice Alito highlighted in *Martinez*, “of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association.”<sup>155</sup> It is universally understood that, at a minimum, the Free Exercise Clause forbids the government from discriminating against religion or regulating conduct on the basis of its religious nature.<sup>156</sup> Singling out one category of expressive association for disfavored treatment is clear viewpoint discrimination, which unconstitutionally assaults students’ First Amendment freedoms of speech and association.<sup>157</sup>

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153. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that the group’s message would be severely thwarted by the Court forcing inclusion of a member who opposes the message’s underlying principle); *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 579 (1995) (holding that the government may not restrict speech merely to promote popular ideas or to discourage disfavored ideas).

154. *Martinez*, 130 S. Ct. at 3012 (Alito, J., dissenting); see also *Dale*, 530 U.S. at 660–61 (“[P]ublic or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.”); James Cleith Phillips, “*All of the Blood and Treasure*”: *The Founders on Christian Legal Society Chapter of the University of California, Hastings Coll. of the Law v. Martinez*, 30 MISS. C. L. REV. 15, 24 (2011) (arguing that the Founders would have had difficulty “understand[ing] how forcing religious intra-group diversity would not violate religious freedom and could be justified in the name of promoting diversity, especially when diversity could be achieved through the proliferation of diverse groups rather than the infiltration of groups by diverse members”).

155. *Martinez*, 130 S. Ct. at 3012 (Alito, J., dissenting) (quoting Brief for American Islamic Congress et al. as Amicus Curiae Supporting Petitioners, *Martinez*, 130 S. Ct. 2971 (No. 08-1371)).

156. See *Church of the Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

157. See *Martinez*, 130 S. Ct. at 3010 (Alito, J., dissenting) (noting that the majority did not “defend the constitutionality of the [school’s] Nondiscrimination Policy” because the policy explicitly disfavored religious groups); see also Ryan C. Visser, *Collision Course?: Christian Legal Society v. Kane Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies*, 30 HAMLINE L. REV. 449, 476–77 (2007) (arguing that even if the original purpose of the school’s non-discrimination policies sought to remedy discrimination and foster cooperation, equality, and debate, the antidiscrimination policy ultimately promoted the school’s goal of inclusion and tolerance through coercion in violation of the First Amendment).

*B. Scrutiny Applied: The Answers Provided by Walker*

Where the Ninth Circuit's analysis in *Alpha Delta* failed to apply close scrutiny to discover how selective non-discrimination policies related to the limited forum or comported with viewpoint neutrality,<sup>158</sup> the Seventh Circuit's analysis in *Walker* succeeded.<sup>159</sup>

In *Walker*, the Seventh Circuit reiterated that it "is a decidedly fatal objective" simply "to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with a message of their own."<sup>160</sup> Although SIU, like San Diego State in *Alpha Delta*, argued that de-recognition of a student organization did not contain a significant constitutional infringement, the Seventh Circuit adopted the Supreme Court's holding from *Healy*, which prohibited indirect interferences of constitutional freedoms, noting that such protections are vital in the context of schools.<sup>161</sup> Thus, the Seventh Circuit concluded that universities are prohibited from indirectly discriminating against religiously affiliated organizations through the denial of official organization recognition.<sup>162</sup>

The factual question remains: What was the basis for the targeted non-discrimination policy? The Seventh Circuit held that SIU enforcement of its non-discrimination policy "can only be understood as intended to induce CLS to alter its membership standards—not merely to allow attendance by nonmembers."<sup>163</sup> SIU failed to identify any interest in forcing open CLS membership beyond an apparent interest in "eradicating or neutralizing particular beliefs contained in [CLS's] creed."<sup>164</sup> The Ninth Circuit, on the other hand, did not reach this conclusion, in large part because the court did not ask the crucial factual questions. The court overlooked the difference in the actual language between an "all access" policy and the selectively discriminate one at issue in *Alpha Delta*.<sup>165</sup> It also provided great deference to the asserted didactic interests advocated by Hastings, and failed to access those interests in light of cases such as *Widmar* or *Rosenberger*, which

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158. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 797–98 (9th Cir. Jan. 2011) (applying the "same analysis to both plaintiffs' free speech and expressive association claims"), *cert. denied*, 132 S. Ct. 1743 (2012).

159. *See supra* notes 98–106 (discussing *Walker*).

160. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006) (quoting *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 578–79 (1995)). In its rationale, the court highlighted that CLS's requirement for membership and officers is a "conduct" requirement—the policies do not exclude students on the basis of sexual orientation, but rather sexual conduct, including heterosexual conduct outside of marriage and all homosexual conduct. *Id.* at 860.

161. *Id.* at 864 (citing *Healy v. James*, 408 U.S. 169, 180–83 (1972)).

162. *Id.*

163. *Id.* at 863 (arguing that this coercion would impair CLS's expressive associational message).

164. *Id.*

165. *Id.* at 797.

strictly scrutinized such interests in a university setting.<sup>166</sup> The *Alpha Delta* court failed to look beyond the conclusory statements regarding the nature of the non-discrimination policy. As such, it relinquished its duty to apply a higher level of scrutiny, one that is needed to ensure the constitutional validity of such a targeted policy.<sup>167</sup>

### C. Scrutiny and Clarity: The Importance of Supreme Court Review

Overall, the Seventh Circuit addressed the crucial questions that the Ninth Circuit abdicated: What is the message that San Diego State or SIU wants to convey with the non-discrimination policy?; What is the non-discrimination policy teaching about diversity?; and lastly, Why was the student group excluded? Although San Diego State in *Alpha Delta* defended itself by using a high level of generality, asserting interests of “respect, equality, diversity, and freedom”<sup>168</sup> as an affirmative defense, the court should not have been convinced by such a costumed justification.

*Martinez* held that a prohibition against *all* student groups employing any ideology, idea, or belief-oriented requirements for membership and leadership was constitutionally permissible.<sup>169</sup> However, the universities in *Alpha Delta* and *Walker* permitted restrictions for membership and leadership, but prohibited religious student groups from requiring leadership to agree with the groups’ faith philosophy.<sup>170</sup> These actions are plain viewpoint discrimination and irreconcilable with First Amendment protections and jurisprudence.<sup>171</sup>

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166. See *supra* Part I.B.; *supra* note 148 and accompanying text.

167. See *Alpha Delta Chi Delta v. Reed*, 648 F.3d 790, 798–99 (9th Cir. 2011) (citing *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649 (9th Cir. 2008), *overruled on other grounds by Los Angeles Cty. v. Humphries*, 131 S. Ct. 447 (2010) *as recognized in Stone v. Advance Am. Cash Advance Cntrs., Inc.*, 08-CV-1549-AJB WMC, 2011 WL 5377638 (S.D. Cal. Nov. 7, 2011)), *cert. denied*, 132 S. Ct. 1743 (2012). The Court applied a level of scrutiny normally used to evaluate a non-discrimination policy at a high school, which is arguably different than the level required for actions undertaken by a university. See *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3rd Cir. 2008) (finding a difference in First Amendment protections in a public university versus at a public elementary school or high school); see also *Brown*, *supra* note 148, at 302–03 (“Generally, courts give more deference to the asserted pedagogical interests of elementary and secondary schools because of the far greater degree of paternalistic posture over students who are dependent on adult provision and protection and whose attendance is mandatory.”).

168. *Alpha Delta*, 648 F.3d at 799.

169. *Christian Legal Soc’y of the Univ. of Ca. v. Martinez*, 130 S. Ct. 2971, 2977 (2010).

170. Compare *id.* at 2978, with *Alpha Delta*, 648 F.3d at 800–01 (noting that the university’s non-discrimination policy burdens some groups but not others), and *Walker*, 453 F.3d at 863 (concluding that the university’s policy burdens CLS’s ability to express its viewpoint because accepting members who do not share its ideas impede the group’s ability to espouse its values).

171. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29, 834–35 (1995) (holding that the university’s policy, predicated only on restricting speech, was unconstitutional).

*Martinez* does not support such a conclusion.<sup>172</sup> Instead, *Martinez* addressed an “all-access” policy, not a policy that permits a state university to recognize some student groups’ ability to limit membership and deny that same ability to religiously affiliated student groups.<sup>173</sup> Such viewpoint discrimination is inherent in the selective non-discrimination policies employed in *Alpha Delta* and, as such, the university’s action violates important First Amendment freedoms.<sup>174</sup>

#### IV. CONCLUSION

Like the Establishment Clause, religious disentanglement, or diversity initiatives, non-discrimination is an affirmative defense. In a case in which a plaintiff makes a prima facie claim that a right of the forum has been violated, the state must respond with an affirmative defense demonstrating the legitimacy of the restriction.<sup>175</sup> In *Walker*, the state could neither articulate nor demonstrate the legality of its purpose.<sup>176</sup> More recently, in *Alpha Delta*, the Ninth Circuit did not even require the state to present an affirmative defense. In applying equal protection, non-discrimination, or an initiative for diversity within a limited forum, courts should require universities to articulate their purpose, the meaning of the term “diversity,” and how the policy seeks to achieve the ends of the created limited forum.

The Ninth Circuit failed to question what the term “diversity” meant and what implicit message was contained within the exclusion rules. These questions constitute a crucial step in evaluating any non-discrimination affirmative defense in limited forum cases. Given the split among the circuits on this issue, it is vital for the Supreme Court to determine whether such selective non-discrimination is permissible in a limited forum and the level of scrutiny such questions require—preserving First Amendment freedoms on university campuses depends on it.

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172. *Martinez*, 130 S. Ct. at 2993; see also Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Five Years*, 24 REGENT U. L. REV. 283, 299 (2011) (recognizing that under *Martinez*, state universities cannot condition forum access on expressive viewpoints).

173. *Martinez*, 130 S. Ct. at 2984.

174. *Alpha Delta*, 648 F.3d at 801; CLS Brief, *supra* note 9, at 222 (arguing that the Ninth Circuit missed the point, wrongly thinking that a “state university could engage in viewpoint discrimination as long as that was not its consciously intended purpose”).

175. See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (disagreeing with the university’s argument that it had a compelling state interest in the separation of church and state and in ensuring compliance with its obligations under the Establishment Clause); see also *Healy v. James*, 408 U.S. 169, 186–87 (1972) (noting that the “government has the burden” of proving the legitimacy of its restriction).

176. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006) (holding that SIU failed to identify any interest in forcing open CLS membership beyond an apparent interest in “eradicating or neutralizing particular beliefs contained in [CLS’s] creed”).