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I. INTRODUCTION

"[E]galitarianism has become one of the most commanding drives in U.S. higher education, a nearly ubiquitous pressure on every segment of and activity in academe."[1] As egalitarian programs in higher education have become more prevalent, constitutional challenges to those programs have likewise increased.[2] Recently, Hastings Law School adopted a nondiscrimination policy that denied registered status to any student club that refused to adopt an all-comers policy, meaning that clubs could not restrict membership on *any* basis.[3] As a result, the university denied recognized status to a Christian club that required its members to espouse Christian beliefs.[4] The club challenged the policy in *Christian Legal Society v. Martinez* but lost.[5] The Supreme Court, for prudential reasons, declined to address the constitutionality of a policy that would deny registered status only to groups that discriminated on *particular* bases.[6]

In *Alpha Delta Chi-Delta Chapter v. Reed*, the Ninth Circuit addressed the very question that the Supreme Court left unanswered in *Christian Legal Society*.[7] The Ninth Circuit analyzed the constitutionality of San Diego State University's nondiscrimination

1. GEORGE KELLER, HIGHER EDUCATION AND THE NEW SOCIETY 84 (2008).

2. *See* Frank A. Schmidtlein & Robert O. Berdahl, *Autonomy and Accountability*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 83 (Philip G. Atbach et al. eds., 2011) (noting that "[r]ecourse to the courts to settle disputes has increased greatly during the past four decades," due in part to affirmative action in admissions); *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

3. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971 (2010).

4. *Id*. at 2980.

5. *Id*.

6. *Id*. at 2984 n.10.

7. 648 F.3d 790, 795 (9th Cir. 2011).

policy, which allows student groups to discriminate on any basis except for prohibited criteria—race, religion, sex, sexual orientation, and others.[8] Two Christian SDSU clubs sued, arguing that the policy violated their First Amendment rights of speech, expressive association, and free exercise of religion.[9] The Ninth Circuit rejected these claims, relying on its own precedent and on *Christian Legal Society*.[10]

The Ninth Circuit's reliance on *Christian Legal Society* was misplaced because the Supreme Court strongly distinguished a policy like the one at SDSU, which prohibits only some forms of discrimination. In addition, the Ninth Circuit failed to reconcile its decision with the Supreme Court's opinion in *Rosenberger v. Rector and Visitors of the University of Virginia*[11] and erred by holding that SDSU's policy was viewpoint-neutral.

II. FACTS AND PROCEDURAL HISTORY

SDSU operates a student organization program in which clubs can apply for recognized status,[12] a designation that provides various university benefits, including funding, rights to use the university's logo and name, use of university rooms and office space, and publicity in school publications at no cost.[13] The plaintiffs in the case were a Christian sorority, Alpha Delta Chi, and a Christian fraternity, Alpha Gamma Omega.[14] The plaintiffs applied for recognized status, but the university denied the applications because of the clubs' requirement that members profess Christian beliefs.[15] That requirement, according to university administrators, violated the school's nondiscrimination policy, which reads:

> 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,

8. *Id*. at 796.
9. *Id*.
10. *Id*. at 803.
11. 515 U.S. 819 (1995).
12. *Alpha Delta Chi-Delta*, 648 F.3d at 796.
13. *Id*.
14. *Id*. at 795.
15. *Id*. at 796.

> color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law.[16]

Thus, unlike officially recognized clubs, the plaintiffs had to pay to use university buildings for events and meetings.[17] Additionally, although the plaintiffs could distribute flyers and try to recruit members, they had to stay in areas open to anyone, "such as the 'free speech steps' of the student union and the wall next to the university bookstore."[18]

There was strong evidence that this policy was not applied uniformly to all organizations at SDSU.[19] Although the university denied plaintiffs' applications because of their religious requirement, the university had granted recognized status to other religious student groups that had similar requirements, including a group called the Catholic Newman Center.[20] Furthermore, the school officially recognized some nonreligious student groups that discriminated in contravention of the policy, including the African Student Drama Association.[21]

The plaintiffs brought a suit in federal court,[22] arguing that the university's nondiscrimination policy violated their rights of free speech, freedom of expressive association, free exercise of religion, and equal protection under the law.[23] On cross-motions for summary judgment, the district court denied the plaintiffs' motion and granted the defendants' motion on all counts.[24] The plaintiffs then appealed to the Ninth Circuit.[25]

III. SIGNIFICANT LEGAL BACKGROUND: FREE SPEECH & EXPRESSIVE ASSOCIATION

Because the Ninth Circuit centered most of its analysis on the plaintiffs' free speech and freedom of expressive association claims,

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 803–04.
20. *Id.* at 803.
21. *Id.* at 804.
22. *Id.* at 790.
23. *Id.* at 804.
24. *Id.* at 796.
25. *Id.*

this section will discuss the contours of those legal doctrines, focusing on cases with facts based in a university setting. This analysis tracks the evolution of these two doctrines leading up to *Christian Legal Society*.

A. Free Speech

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[26] The Supreme Court has interpreted the First Amendment to mean that "government may not regulate speech based on its substantive content or the message it conveys."[27] Viewpoint discrimination, where the government targets "particular views taken by speakers on a subject," is an "egregious form of content discrimination."[28]

Although the First Amendment protects the speech of students and faculty on campuses of public universities,[29] the right is analyzed differently from speech in public forums, such as public parks and streets.[30] Student-club programs at universities are treated by courts as limited public forums.[31] Under the limited forum doctrine, in which the government provides a forum "that is limited to use by certain groups or dedicated solely to the discussion of certain subjects," the government can impose reasonable speech restrictions that are viewpoint-neutral.[32] In a limited forum, the government is not obligated to "allow persons to engage in every type of speech."[33] For example, a government may reserve a forum for use by particular speakers or for discussing certain topics so as to confine the forum "to the limited and legitimate purposes for which it was created."[34]

26. U.S. CONST. amend. I.

27. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995).

28. *Id*. at 829.

29. Widmar v. Vincent, 454 U.S. 263, 268–69 (1981); Healy v. James, 408 U.S. 169, 180 (1972) ("[W]e note that state colleges and universities are not enclaves immune from the sweep of the First Amendment.").

30. *Widmar*, 454 U.S. at 267 n.5; *see also* Christian Legal Soc'y Chapter of The Univ. of Cal. v. Martinez, 130 S. Ct. 2971 (2010).

31. *Christian Legal Soc'y*, 130 S. Ct. at 2984 n.12.

32. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 470 (2009) (citations omitted).

33. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

34. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

Judicial review under the limited public forum doctrine consists of two inquiries: (1) whether the regulation is "'reasonable in light of the purpose served by the forum,'" and (2) whether the regulation discriminates on a viewpoint basis.[35] For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Supreme Court held that the university violated student publishers' free speech rights by withholding on the basis of the publishers' religious views funding that was available to all other student publishers.[36]

B. Freedom of Expressive Association

The right to associate "for the purpose of engaging in those activities protected by the First Amendment" is protected by the Constitution.[37] This associational right is fundamental to the exercise of other First Amendment rights because those rights "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."[38] One way to violate this right is to "impose penalties or withhold benefits from individuals because of their membership in a disfavored group."[39] Similarly, the right is infringed when the government "forces [a] group to accept members it does not desire."[40] "Freedom of association therefore plainly presupposes a freedom not to associate."[41]

Where a regulation infringes on the right of association, a court will uphold the regulation only if it serves "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[42] Thus, in *Roberts v. Jaycees*, the Supreme Court held that although a men-only organization's expressive association rights had been infringed by a state's requirement that it allow women, the state's interest in eliminating gender discrimination was a compelling

35. *Christian Legal Soc'y*, 130 S. Ct. at 2988 (quoting *Rosenberger*, 515 U.S. at 829).
36. *Rosenberger*, 515 U.S. at 822–23.
37. Roberts v. Jaycees, 468 U.S. 609, 618 (1984).
38. *Id.* at 622.
39. *Id.*
40. *Id.* at 623.
41. *Id.*
42. *Id.*

interest that justified the infringement.[43] By contrast, the Supreme Court held in *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group* that parade organizers' right of expressive association was violated by the application of a state law that required the organizers to include a group in the parade with which the parade organizers disagreed.[44]

C. Combining These Rights: Christian Legal Society

In 2010, the Supreme Court decided *Christian Legal Society*, wherein the Court introduced a new method for analysis of the two above rights.[45] Because of the similarity between *Christian Legal Society* and *Alpha Delta*, a brief discussion of the case is included here.

1. Facts of Christian Legal Society

Like San Diego State University, the Hastings College of Law operates a student-organization program in which students can apply for recognized status.[46] Hastings has in place an "all-comers" nondiscrimination policy which requires student groups to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[47] Hastings denied recognized status to a religious student group, the Christian Legal Society, because the group allowed membership only to those who shared its Christian beliefs.[48]

43. *Id.*

44. 515 U.S. 557, 581 (1995); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (holding that the Boy Scouts' right of expressive association was violated by a state law that would have required the group to admit "an avowed homosexual and gay rights activist" in contravention of its values).

45. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2985 (2010) (noting that it "makes little sense to treat CLS's speech and association claims as discrete").

46. *Id.* at 2979.

47. *Id.*

48. *Id.* at 2980. Their beliefs are included in a Statement of Faith, which reads:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> • One God, eternally existent in three persons, Father, Son and Holy Spirit.
>
> • God the Father Almighty, Maker of heaven and earth.
>
> • The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.

2. Legal analysis in Christian Legal Society

The Court held that the all-comers policy at Hastings was constitutional.[49] Noting that the plaintiffs brought claims both for freedom of speech and freedom of association, the Court reasoned that the claims would best be analyzed together under the limited public forum doctrine.[50] The Court reasoned that the all-comers policy was reasonable in light of the purposes of the forum and that the regulation was viewpoint neutral because it drew "no distinction between groups based on their message or perspective."[51] Responding to the plaintiffs' criticisms of the restrictions, the Court reasoned that it had "repeatedly stressed that a State's restriction on access to a limited public forum 'need not be the most reasonable or the only reasonable limitation.'"[52] Relying on this reasoning, the Court upheld the constitutionality of the all-comers policy.[53]

IV. THE COURT'S DECISION

Like the Supreme Court in *Christian Legal Society*, the Ninth Circuit upheld San Diego State University's nondiscrimination policy in *Alpha Delta*.[54] The most important elements of the Ninth Circuit's legal analysis are discussed below.

A. Christian Legal Society *Does Not Control, But It Helps*

The court determined that the holding of *Christian Legal Society* was not controlling because the Supreme Court explicitly declined to address the constitutionality of a nondiscrimination policy that would apply only against certain groups,[55] as does SDSU's. For

• The presence and power of the Holy Spirit in the work of regeneration.

• The Bible as the inspired Word of God.

Id. n.3 (quoting App. 226).

49. *Id*. at 2995.

50. *Id*. at 2985.

51. *Id*. at 2993.

52. *Id*. at 2991 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 808 (1985)).

53. *Id*. at 2995.

54. Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 805 (9th Cir. 2011).

55. *Christian Legal Soc'y*, 130 S. Ct. at 2984 ("This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."); *Alpha Delta Chi-Delta Chapter* 648 F.3d at 795. The

example, SDSU's nondiscrimination policy prohibits discrimination "on certain specified bases, for example, race, gender, religion, and sexual orientation," but allows discrimination on any other basis.[56] Thus, the Supreme Court explicitly declined to rule on the constitutionality of a policy like the one at SDSU. Instead, the Court upheld only Hastings' all-comers policy, which prohibited student groups from restricting membership on *any* basis. Despite the significant differences in the policies at issue in *Alpha Delta* and *Christian Legal Society*, the Ninth Circuit concluded that as a matter of constitutional principles, SDSU's policy was not materially different from the all-comers policy in *Christian Legal Society*.[57] Relying upon this conclusion, the court held that SDSU's policy was constitutional.

B. No Violation of Expressive Association and Free Speech Rights

The Ninth Circuit, citing *Christian Legal Society*, also held that SDSU's student organization program created a limited public forum.[58] The Ninth Circuit analyzed both the expressive association and free speech rights together under the limited public forum doctrine, as did the Supreme Court in *Christian Legal Society*.[59] Similarly, the Ninth Circuit limited its analysis to whether the nondiscrimination policy was reasonable in light of the purposes of the forum and whether the policy was viewpoint neutral.[60]

1. Reasonable in light of the purposes of the forum

In its reasonableness analysis, the Ninth Circuit first examined SDSU's Student Organizations Handbook to determine the purpose of the school-sponsored clubs.[61] Finding several "references to diversity and nondiscrimination," the court concluded that one of the purposes of the student clubs was to "promote diversity and

concurrence agrees that CLS does not control. *Alpha Delta Chi-Delta*, 648 F3d at 805 (Ripple, J., concurring).

56. *Alpha Delta Chi-Delta*, 648 F.3d at 795 (majority opinion).

57. *Id*. at 805.

58. *Id*. at 797.

59. *Id*. at 798.

60. *Id*.

61. *Id*. at 798–99.

nondiscrimination."[62] Thus, the court reasoned that requiring student clubs to adhere to the university's nondiscrimination policy was reasonable.[63] The Ninth Circuit also found it significant that the plaintiffs, like those in *Christian Legal Society*, had alternative means for communication—including social media, email, and websites—that would compensate for denying them the communicative means given to recognized clubs.[64]

2. Viewpoint neutrality

After concluding that the nondiscrimination policy was reasonable, the court next analyzed viewpoint neutrality. The plaintiffs in *Alpha Delta* argued that the nondiscrimination policy discriminated based on viewpoint, and in the alternative, that the policy was discriminatorily applied to them.[65] The court disagreed, reasoning that "a restriction that 'serves purposes unrelated to the content of expression' and only incidentally burdens some speakers, messages, or viewpoints, 'is deemed neutral.'"[66] The court saw no evidence that the university adopted the nondiscrimination policy "for the *purpose* of suppressing Plaintiffs' viewpoint, or indeed of restricting any sort of expression at all."[67] The court further reasoned that the university's policy "does not 'target speech or discriminate on the basis of its content,' but instead serves to remove access barriers imposed against groups that have historically been excluded."[68] Relying on *Truth v. Kent School District*, a case in which the Ninth Circuit upheld the constitutionality of a similar nondiscrimination policy of a high school,[69] the court concluded that SDSU's nondiscrimination policy was viewpoint- and content-neutral.[70]

62. *Id*. at 799.

63. *Id*.

64. *Id*.

65. *Id*. at 800.

66. *Id*. (quoting Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2994 (2010).

67. *Id*. at 801.

68. *Id*. (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572 (1995)).

69. 542 F.3d 634 (9th Cir. 2008), *overruled on other grounds by* Los Angeles Cnty. v. Humphries, 131 S.Ct. 447 (2010).

70. *Alpha Delta Chi-Delta*, 648 F.3d at 803.

However, in its as-applied analysis of the statute, the court reasoned that a viewpoint neutral statute can still be unconstitutional if it is not uniformly applied.[71] Noting that the university allowed recognition to other student groups whose practices appeared to violate the university's nondiscrimination policy, the court reversed in part the district court's grant of summary judgment.[72]

C. Equal Protection and Free Exercise Claims

Although this Note does not analyze these claims, it is worth observing here that the court briefly addressed the plaintiffs' Equal Protection and Free Exercise claims and held that the plaintiffs had raised an issue of material fact regarding the discriminatory application of the nondiscrimination policy.[73]

D. The Concurrence

Judge Ripple concurred in the judgment for the sole reason that he felt that the Ninth Circuit's holding in *Truth v. Kent* commanded such a result.[74] However, he expressed his personal disagreement with the result and argued that SDSU's policy "marginalize[s] in the life of the institution those activities, practices and discourses that are religiously based."[75] Judge Ripple suggested that "at some later point, this case [would] be an appropriate case for further Supreme Court review."[76] Judge Ripple lamented the inability of students within protected categories to participate in student organizations, to "band together for mutual support and discourse."[77] "Homosexual students," for example, "who have suffered discrimination or ostracism, may not both limit their membership to homosexuals and enjoy the benefits of official recognition."[78]

71. *Id*.
72. *Id*. at 804.
73. *Id*.
74. *Id*. at 805 (Ripple, J., concurring).
75. *Id*. at 806.
76. *Id*. at 805.
77. *Id*.
78. *Id*.

V. ANALYSIS

A. The Ninth Circuit's Reliance on Christian Legal Society

1. The policies are not materially the same

The Ninth Circuit's attempt to grapple with *Christian Legal Society* is one of the most striking characteristics of *Alpha Delta*. On the one hand, the Ninth Circuit correctly acknowledged that its decision was not controlled by *Christian Legal Society* because the Supreme Court reserved for another day the precise question that the Ninth Circuit was asked to address: the constitutionality of a policy that allows discrimination except on certain prohibited bases.[79] But on the other hand, the Ninth Circuit claimed that *Christian Legal Society* supported its holding, concluding that, as a matter of constitutional principles, SDSU's nondiscrimination policy is "not materially different from the content-neutral all-comers policy approved in *Christian Legal Society*" and that SDSU's policy must therefore be upheld.[80]

The Ninth Circuit's reliance on *Christian Legal Society* was misplaced because the Supreme Court unmistakably and repeatedly distinguished the type of policy at issue in *Alpha Delta*—wherein a nondiscrimination policy applies only against a few groups—from the policy analyzed in *Christian Legal Society*, which applies to *all* groups. Although the Supreme Court declined for prudential reasons to rule on the constitutionality of a clubs policy like SDSU's,[81] the reasoning in the Supreme Court's opinion suggests that—contrary to the Ninth Circuit's assertion—such a policy is, constitutionally speaking, materially different.

For example, the Court's reasoning in *Christian Legal Society* regarding the viewpoint neutrality of the all-comers policy makes clear that it was constitutionally significant that the policy applied to all clubs. The Court noted that although the viewpoint-neutrality factor of limited public forum analysis typically was a "sticking point" in the Court's earlier decisions, the Court reasoned that "we need not dwell on it" because "[i]t is, after all, hard to imagine a more

79. Christian Legal Soc'y Chapter of The Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2982–84 (2010); *Alpha Delta Chi-Delta*, 648 F.3d at 795.

80. *Alpha Delta Chi-Delta*, 648 F.3d at 803.

81. *Christian Legal Soc'y*, 130 S. Ct. at 2984 n.10.

viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[82] This reasoning suggests that the Court's analysis would have been different, or at least more difficult, had the nondiscrimination policy required only *some* groups to accept everyone.

Moreover, the Supreme Court's reasons for distinguishing prior cases also suggests that the policy addressed by the Ninth Circuit is materially different from the one addressed by the Supreme Court. For example, the Supreme Court distinguished *Healy v. James*, *Widmar v. Vincent*, and *Rosenberger*—cases "in which universities singled out organizations for disfavored treatment because of their points of view"—by reasoning that "Hastings' all-comers requirement draws no distinction between groups based on their message or perspective."[83] Moreover, in distinguishing a case that analyzed the constitutionality of a student-clubs policy that would allow students, by popular vote, to deny funding to a group, the *Christian Legal Society* Court noted that Hastings's "all-comers policy governs *all* [clubs]; Hastings does not pick and choose which organizations must comply with the policy on the basis of viewpoint."[84] After making these distinctions, the Court concluded that the all-comers policy in *Christian Legal Society* was "textbook viewpoint neutral."[85] Therefore, the "all-comers" nature of the Hastings policy was a strong distinguishing characteristic in *Christian Legal Society*, and thus was constitutionally significant to the Court. SDSU's policy cannot claim these saving principles because it singles out groups for disfavored treatment and does not govern all clubs.

One final element of *Christian Legal Society* shows that the Supreme Court likely viewed it as constitutionally significant that the nondiscrimination policy was applied to all student clubs. In its opinion, the Supreme Court elected not to analyze Hastings's as-written nondiscrimination policy, which is similar to SDSU's policy because it prohibits "discrimination on several enumerated bases, including religion and sexual orientation."[86] The dissent and

82. *Id*. at 2993.
83. *Id*.
84. *Id*. at 2994 n.25.
85. *Id*. at 2993.
86. *Id*. at 2982.

concurrence analyzed the as-written policy, and the plaintiff urged the Supreme Court to analyze the as-written policy.[87] Instead, the Supreme Court analyzed only the school's enforcement of the policy, in which all student groups were required to adopt an all-comers policy, or in other words, to "allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[88] The Court spent a significant portion of its opinion defending its choice to address the all-comers policy rather than the as-written policy.[89] If the two policies were materially the same, it would not have made sense for the Court to devote so much of its opinion to defending its decision to analyze one or the other. Moreover, the Supreme Court's choice to reserve for another day the question of the constitutionality of a selective nondiscrimination policy[90] is also strong evidence that the Supreme Court saw the policy as being constitutionally different, or at least different enough to raise constitutional or precedential issues. Thus, the Ninth Circuit erred in its confident assertion that SDSU's nondiscrimination policy was not materially different than Hastings's policy.

2. The Ninth Circuit's decision in Truth *was sufficient authority*

The Ninth Circuit's reliance on *Christian Legal Society* is also odd because it was unnecessary. The Ninth Circuit could have relied solely on its own precedent in reaching its result. In an earlier decision, *Truth v. Kent School District*, the Ninth Circuit upheld the constitutionality of a similar nondiscrimination policy adopted by a high school.[91] *Truth* would have provided sufficient foundation for the Ninth Circuit's decision, but the panel apparently wanted to buttress its reasoning with Supreme Court precedent in addition to Ninth Circuit precedent. Perhaps the Ninth Circuit, given the clear reasoning quoted above, viewed *Christian Legal Society* as raising some question as to the constitutional soundness of *Truth*, and

87. *Id*. at 3000–01 (Alito, J., dissenting); *id*. at 2995 (Stevens, J., concurring); *id*. at 2982 (majority opinion).

88. *Id*. at 2983 (majority opinion) (emphasis added) (citation omitted).

89. *Id*. at 2982–84.

90. *Id*. at 2984 n.10.

91. 542 F.3d 634, 639–40 (9th Cir. 2008), *overruled on other grounds by* Los Angeles Cnty. v. Humphries, 131 S. Ct. 447 (2010).

therefore the Ninth Circuit felt compelled to harmonize the decisions. If this explanation is accurate, however, the Ninth Circuit failed to adequately address the Supreme Court's strong reasoning suggesting that these policies are constitutionally different.

B. SDSU's Nondiscrimination Policy Is Not Viewpoint-Neutral

The Ninth Circuit erred in determining that SDSU's nondiscrimination policy was viewpoint neutral. The court failed to adequately consider the Supreme Court's opinion in *Rosenberger v. Rector & Visitors of the University of Virginia*, wherein the Supreme Court held that the university engaged in viewpoint discrimination by withholding, on the basis of student publishers' religious views, funding that was available to all other student publishers.[92] In *Rosenberger*, the University of Virginia allowed student groups to obtain reimbursements for the printing costs of various student publications.[93] The university denied a reimbursement request by a Christian student publication because of the university program's prohibition on any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[94] The Court reasoned that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[95]

Although the policy in *Rosenberger* was arguably viewpoint neutral, the Court held that it was not viewpoint neutral because "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[96] In doing so, the Court relied upon *Lamb's Chapel v. Center Moriches Union Free School District*, which held that a school district engaged in viewpoint discrimination by opening its facilities to the general public on wide-ranging issues and then denying that benefit to a group because of its religious views.[97] Quoting *Lamb's Chapel*, the Court reasoned: "[I]t discriminates on

92. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995).
93. *Id.* at 823–24.
94. *Id.* at 825 (quoting the school's policy).
95. *Id.* at 829.
96. *Id.* at 831.
97. *Id.* at 830.

the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[98]

Likewise, SDSU's program constitutes impermissible viewpoint discrimination. As in *Rosenberger*, SDSU provides various benefits to students, including the ability to discriminate in membership.[99] For example, the student-republican club can discriminate against non-republicans in its membership. Under the reasoning of *Rosenberger*, SDSU's policy is viewpoint discriminatory because the university allows student groups to discriminate in membership except where the university disagrees with "the specific motivating ideology or the opinion or perspective of the speaker."[100] Put another way, the university allows discrimination in membership so long as the university agrees with the group's discriminatory ideology or opinion. This is impermissible viewpoint discrimination under *Rosenberger*, and the Ninth Circuit failed to attempt to reconcile its reasoning with *Rosenberger*.

SDSU's policy is in some ways similar to the viewpoint-discriminatory ordinance in *R.A.V. v. St. Paul, Minn.*, which, according to Justice Scalia, allowed fighting words expressed by those in favor of racial, gender, and sexual-orientation equality, but punished fighting words expressed by those who disagreed with those aims.[101] Likewise, SDSU allows discriminatory membership practices by groups with whom the university agrees, but punishes discriminatory membership practices when exercised by those with whom the university disagrees. Justice Scalia reasoned in *R.A.V.* that the city has "no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[102] This reasoning applies to SDSU with equal force.

98. *Id.* (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993)).

99. Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795 (9th Cir. 2011).

100. *Rosenberger*, 515 U.S. at 829.

101. R.A.V. v. St. Paul, Minn., 505 U.S. 377, 391–92 (1992).

102. *Id.* at 392.

VI. CONCLUSION

The Ninth Circuit's opinion fails to adequately address *Rosenberger*, and the court erroneously held that SDSU's policy was viewpoint neutral. The court also erred in attempting to leverage *Christian Legal Society* as supporting authority because the Supreme Court strongly distinguished the type of policy at issue in *Alpha Delta*. This decision is a success for university administrators, since a contrary holding—that the Christian clubs' right of free speech was violated by the policy—would likely mean that the university could not enforce the nondiscrimination policy at all. However, the decision fails to adequately protect the constitutional freedoms of university students. Contrary to the Ninth Circuit's assertion, the Christian clubs in this case were not merely "incidentally burden[ed]"[103] by SDSU's policy; the clubs were purposely excluded from the forum by the policy. Judge Ripple rightly observed in his concurrence that the "net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based."[104]

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103. *Alpha Delta Chi-Delta*, 648 F.3d at 801.

104. *Id.* at 806 (Ripple, J., concurring).

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