No. 08-1371

In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner

v.

LEO P. MARTINEZ, ET AL.,
Respondents

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

BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONER

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February 4, 2010

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INTEREST OF THE *AMICUS*

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the 258 active Catholic Bishops in the United States, who preside over the 195 dioceses and archdioceses that span the entire country.[1] USCCB promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the Nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of religious education. Values of particular importance to USCCB are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The Bishops of the United States are firmly committed to upholding the dignity of each and every human person, no matter how vulnerable or marginalized. This includes, among many other things, the twin commitments *both* to assuring that all people (including those with a same-sex sexual orientation) enjoy the equal protection of the laws and freedom from unjust discrimination, *and* to the enduring, widely held proposition that extramarital sexual conduct (including same-sex sexual conduct) is harmful to the person and morally illicit.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief, in whole, and that no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

The Bishops are also deeply concerned that, increasingly and particularly in legal discourse, these two commitments are mis-described as mutually exclusive, so that affirming the latter is viewed as a renunciation of the former. This is usually accomplished by collapsing the distinction between the two, treating moral disapproval of same-sex sexual conduct as simply one species of unjust discrimination against persons with a same-sex sexual orientation. Such discrimination, in turn, is viewed as the moral equivalent of racism, a form of bigotry that the government has the strongest possible interest in eradicating from all sectors of society, overriding even the First Amendment rights of religious and other expressive associations. The decision below reflects this disturbing trend, both in condemning moral disapproval of same-sex sexual conduct as if it were sexual orientation discrimination, *see* Pet. App. 22a, and in concluding that the eradication of such discrimination, even from a religious expressive association, is a compelling government interest, *see* Pet. App. 61a-62a.

USCCB offers this brief *amicus curiae* in the event that this case calls upon the Court to assess the contours and strength of the government's asserted interest in prohibiting discrimination based on sexual orientation. We hope to aid the Court's analysis by urging precision in both identifying the government interest to be evaluated and evaluating that interest once identified; and by highlighting the grave implications that an overbroad ruling may have for religious liberty and for a vibrantly free and diverse civil society.

SUMMARY OF THE ARGUMENT

This brief focuses on the nature of one of the government interests asserted in this case—the prohibition of discrimination based on "sexual orientation." *See* Pet. App. 88a; J.A. 294.

The definition of that interest in the law is often vague, and this case is no exception. This uncertainty creates both legal-doctrinal and practical risks, which are now highlighted and amplified because this Court may address that interest in this case. *Amicus* therefore urges special care in handling the matter: in *describing* the interest, *evaluating* the interest, and considering the *consequences* of overbreadth in either description or evaluation.

First, the Court should *describe* the interest with sensitivity to context of this particular case. CLS does not exclude other students based on the mere status of orientation, but instead based on certain conduct—unremitting engagement in or advocacy for extramarital sexual activity. Thus, the broadly stated interest in prohibiting sexual orientation discrimination has no application on these facts. Nor does it take account of the fact that the government's interest varies depending on the kind of entity against which the interest is asserted: CLS is not the government itself, nor a commercial employer, landlord, or lunch counter, but instead a private, religious association of students organized to express certain unpopular views within a public university environment. These features of CLS do not just refine, but diminish, whatever interest the government might have in excluding CLS.

Second, the Court should *evaluate* only the government interest that takes account of the key

facts about CLS described above. A government university has no legitimate interest at all—none—in excluding a group of its own students that has these characteristics. If the Court nonetheless addresses the broader interest in prohibiting sexual orientation discrimination, it should find that interest less than "compelling." That is an extremely narrow class of interests, comprising only those "of the highest order," which may authorize government to override freedoms of speech and religious exercise, and freedoms from discrimination based on religion, race, or sex. This Court has already implicitly rejected the claim that eliminating sexual orientation discrimination belongs in this elite class, so it should either declare the same thing explicitly or, better still, not take up this broader question at all.

Finally, the Court should consider the practical *consequences* of an overbroad ruling on these issues. If this Court treats (or allows Hastings to continue to treat) CLS's moral and religious opposition to extramarital sexual conduct as "discrimination," CLS and very many others of like mind will be stigmatized as bigots and correspondingly marginalized and punished by government. The government's strong thumb on the scale will at once distort, stifle, and enflame our national conversation on these important questions. It will also trigger a host of religious freedom conflicts, of uncertain legal outcome, but of certainly large social cost. But if the Court also declares "compelling" the interest in suppressing one side of this moral debate over conduct—cloaked under the rubric of suppressing "discrimination"—then the outcome of the religious freedom conflicts will become virtually certain, as religious claimants will almost always lose.

ARGUMENT

I. The Court Should Describe with Precision and Care the Government Interest Relating to Sexual Orientation in This Case.

Lower courts have recently addressed the government's constitutional interest in prohibiting "sexual orientation discrimination," but few if any have described precisely what they mean by the term. *See, e.g., N. Coast Women's Care Med. Grp.* v. *San Diego Cy. Super. Ct.,* 44 Cal.4th 1145, 1158, 189 P.3d 959, 968 (Cal. 2008) (holding that the state has a compelling interest in prohibiting sexual orientation discrimination in access to medical treatment, but without explaining what "orientation" means or whether it includes conduct). *See also Varnum* v. *Brien,* 763 N.W.2d 862, 896 (Iowa 2009) (holding that a legislative classification based on sexual orientation must be examined under a "heightened level of scrutiny," but without explaining what "orientation" means or whether it includes conduct); *Kerrigan* v. *Comm'r of Pub. Health*, 289 Conn. 135, 174, 957 A.2d 407, 431-32 (Conn. 2008) (concluding that sexual orientation is a "quasi-suspect" classification under the state equal protection guarantee, but without explaining what "orientation" means or whether it includes conduct).

In accordance with this disturbing trend, the trial court opinion in this case, which was summarily affirmed by the Ninth Circuit, gave short shrift to two important fact-specific, contextual considerations urged by CLS, and went on to declare Hastings' ill-defined interest "compelling." Pet. App. 61a. *See Cutter* v. *Wilkinson,* 544 U.S. 709, 723 (2005)

("'[c]ontext matters' in the application of th[e compelling interest] standard") (quoting *Grutter* v. *Bollinger,* 539 U.S. 306, 327 (2003)). *Gonzales* v. *O Centro Espírita Beneficente União Do Vegetal,* 546 U.S. 418 (2006) ("[T]he strict scrutiny test … contemplate[s] an inquiry more focused than the Government's categorical approach.").

First, the trial court dismissed in a footnote CLS's insistence that it does not discriminate based on sexual orientation, because its membership policies do not exclude persons based on same-sex orientation, but instead any person of any orientation who unrepentantly engages in or advocates for extramarital sexual conduct. *See* Pet. App. 22a. Second, the court took insufficient account of the religious and expressive character of the organization against which the interest is asserted. *See* Pet. App. 59a-62a.

Amicus respectfully submits that, before evaluating whether Hastings' asserted interest in this case is "compelling," this Court should first describe the interest with much greater care than did the court below. The Court should conclude that the interest to be evaluated on these facts is *not* the interest in prohibiting discrimination based on sexual orientation (*i.e.,* disadvantaging a person or group, regardless of their conduct or advocacy), but in suppressing controversial, moral disapproval of both extramarital sexual conduct and advocacy for that conduct. In addition, that more precise interest should not be described as if it applied with equal force in all societal contexts, but instead with reference to the particular kind of entity to which it is applied here—a religious, expressive association of students operating within a government university

environment.

In other words, the Court should not ask, as did the trial court below, "How strong is the government's interest in prohibiting sexual orientation discrimination?"—an oversimplified question that blurs many important distinctions. Instead, the Court should ask, "How strong is the interest of a government university in prohibiting moral and religious opposition to extramarital sexual conduct within a voluntary, religious association of students organized around the expression of that and other controversial views?" *See O Centro Espírita,* 546 U.S. at 431 (when applying strict scrutiny, the Court has "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.").

A. The Court Should Distinguish the General Asserted Interest in Prohibiting Sexual Orientation Discrimination from the Particular Interest That Is Actually at Issue on These Facts—Curtailing Moral or Religious Criticism of Extramarital Sexual Conduct.

CLS has argued that, whatever interest the government may have in eradicating sexual orientation discrimination, that interest was not implicated in this case, because CLS's membership policies do not actually discriminate based on sexual orientation. Pet. Br. 5, 10, 39. Instead, CLS is opposed to "*all* acts of sexual conduct *outside* of God's design for *marriage* between one man and one

woman, which acts include fornication, adultery, and homosexual conduct," and so CLS excludes from membership anyone who engages in "unrepentant participation in or advocacy of" those acts. J.A. 146 (emphasis added).

The trial court dismissed this argument in a footnote as a "distinction without a difference," citing Justice O'Connor's single-vote concurrence in *Lawrence* v. *Texas,* 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). Pet. App. 22a. This Court should reject that assertion and conclude instead that the government's interest in eradicating sexual orientation discrimination is distinct from and does not include the government's interest in eradicating moral or religious opposition either to extramarital sexual conduct, or to advocacy for such conduct.

This is so for two reasons. First, the reasoning of the *Lawrence* concurrence does not support the trial court's conclusion on these facts and actually undermines it. Justice O'Connor concluded that the Texas law violated the Equal Protection Clause because it prohibited sodomy *only* between people of the same sex and not *also* between people of the opposite sex. *Lawrence,* 539 U.S. at 581. Here, CLS's policy does not make the same distinction, excluding those who unrepentantly engage in or support "*all* acts of sexual conduct outside of … marriage," J.A. 146 (emphasis added), including fornication and adultery—not just homosexual conduct.

Second, to the extent that the *Lawrence* concurrence suggests that moral condemnation specifically of same-sex sexual *conduct* is no different under the Constitution from moral condemnation of *persons* who merely have the *inclination* to such

conduct, this Court should decline to adopt the reasoning of that opinion. Although same-sex sexual conduct may indeed be "closely correlated with being homosexual," *Lawrence,* 539 U.S. at 583, the correlation is by no means absolute, and what separates the two is critical—the exercise of morally responsible human will.

Whether in the context of human sexuality or otherwise, merely having an inclination to conduct is blameless; freely engaging in conduct, however, *is* subject to moral evaluation, as is advocacy for that conduct. Thus, moral condemnation of a person or group for their mere *inclination* is deeply problematic, but moral condemnation of *conduct*, or of advocacy for that conduct, is not. So if it really were the case that, under the law at issue in *Lawrence,* merely "*being* homosexual carrie[d] the presumption of being a criminal," *Lawrence,* 539 U.S. at 584, and that the law really did "brand[] all homosexuals as criminals," *id.* at 581, then there would indeed be a serious concern. But the law did no such thing, punishing only conduct—not being, but doing. This Court should reject any analysis that would blur or collapse the distinction between the two.

The Court should maintain this venerable distinction in part because it pervades the Anglo-American legal tradition, extending far beyond discussions of sexuality. Thus, in general, although the government may punish all manner of conduct, the Constitution forbids government from punishing a status, belief, or inclination. *See, e.g., United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-07 (2007) (noting that, at common law, mere attempt to commit an unlawful act was not a crime absent "some open deed"); *Church of the Lukumi Babalu Aye* v. *City of*

Hialeah, 508 U.S. 520, 533 (1993) (explaining that "a law targeting religious beliefs as such is never permissible," but a law targeting religious practices may be justified upon the satisfaction of strict scrutiny); *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (holding that criminal punishment for "being" a drug addict, without the behavior of taking drugs, violates the Eighth Amendment); *Doe* v. *City of Lafayette*, 377 F.3d 757, 765 (7th Cir. 2004) ("the government cannot regulate mere thought, unaccompanied by conduct") (citing *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 67-68 (1973)). *See also Employment Div.* v. *Smith,* 494 U.S. 872, 877 (1990) (contrasting strong protection against government regulation based on religious status or belief with rational basis protection that generally applies to religious conduct).

More relevantly, the distinction between status or various mental states (such as belief, intent, or inclination) on the one hand, and overt acts (such as conduct or advocacy) on the other, plays an especially prominent role in antidiscrimination law. It is precisely the imposition of a disadvantage on the basis of a status (which is never culpable) rather than conduct (which may be) that most commonly elicits the pejorative legal label of "discrimination" from courts. *See, e.g., Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (noting that "[d]istinctions between citizens solely because of their ancestry" is "odious to a free people whose institutions are founded upon the doctrine of equality") (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)); *United States* v. *Virginia*, 518 U.S. 515, 532 (1996) (a law or government policy that denies women equal opportunity "simply because they are women" is

incompatible with the guarantee of equal protection).

Similarly, federal statutes provide the strongest protection from employment discrimination based on pure status, such as race, color, national origin, and sex. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. But for those categories that may encompass both status and conduct—such as religion and disability—the protection is highly circumscribed precisely to the extent it includes conduct. *See* 42 U.S.C. § 2000e(j) (limiting protection for employee's "religious observance and practice" to requirement that employer provide "reasonable accommodation" that does not impose "undue hardship" on employer); 42 U.S.C. § 12112(b)(5) (limiting protection for employee's "physical or mental limitations" or "impairments" to requirement that employer provide "reasonable accommodation" that does not impose "undue hardship" on employer); 42 U.S.C. § 12111(8) (excluding from protection against disability discrimination those employees who cannot perform essential job functions). *See also Trans World Airlines* v. *Hardison*, 432 U.S. 63, 84 (1977) (further weakening protection for "religious observance and practice" by finding "undue hardship" on employer to be anything "more than a *de minimis* cost").

The Court should maintain the distinction here as well, by refusing to treat CLS's opposition to same-sex (and other extramarital) sexual conduct and corresponding advocacy as if it were sexual orientation discrimination. The Court should conclude instead that Hastings' asserted interest in prohibiting such discrimination is not implicated on these facts and so fails to justify the exclusion of CLS.

B. The Court Should Not Describe the Government Interest as if It Applied With Equal Force in All Sectors of Society, but Instead by Reference to the Particular Religious Expressive Entity Against Which the Interest Is Asserted.

Another important consideration in defining an interest that the government asserts as "compelling" is the character of the particular entity against which the interest is asserted. *See O Centro Espírita,* 546 U.S. at 430-31 (strict scrutiny "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant" against whom the interest is asserted).

Although the trial court cited *Boy Scouts of America* v. *Dale,* 530 U.S. 640 (2000), and other cases recognizing that the government's interest in prohibiting discrimination is more "attenuated" when applied to private expressive associations, Pet. App. 61a, the court appeared to disregard that CLS is such an association, that it is a religious one, and that, in this case, it is operating on a government university campus. *Id.* 60a-61a.

This Court should take account of all of these factors when examining the government's interest in this case. *See Roberts* v. *United States Jaycees,* 468 U.S. 609, 620 (1984) (freedom of association analysis "unavoidably entails a careful assessment of where th[e association's] objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments").

For example, the government's interest in avoiding discrimination *for the government's own part* is often different from (and usually stronger than) its interest in prohibiting the same discrimination within *private* entities. This is illustrated most dramatically with respect to religion: the government has no interest at all in making distinctions based on religion or engaging in advocacy for religious beliefs, but has a compelling interest in protecting the freedom of private religious entities to do both. *See Capitol Square Review and Adv. Bd.* v. *Pinette,* 515 U.S. 753, 655-56 (1995) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (quoting *Bd. of Educ. of Westside Comm'y Schs.* v. *Mergens,* 496 U.S. 226, 250 (1990) (O'Connor, J., concurring)).[2]

Among private entities, there are further distinctions that affect the strength of any antidiscrimination interest the government may have, including distinctions between commercial

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[2] While all government interests vary in strength depending on the type of entity against which they are applied, they do not all vary in the same way. For example, there is no constitutional provision that specifically protects the freedom of private actors to make race-based distinctions, as there is for private religion-based distinctions in the form of the Free Exercise Clause. Indeed, the opposite is true for race in light of the Thirteenth Amendment which, uniquely among constitutional provisions, proscribes private conduct. *See* U.S. CONST. amend. XIII. This additional axis of contextual variation represents still another reason why the Court should not address whether the asserted general interest in prohibiting sexual orientation discrimination is "compelling." *See infra* Section II.

associations and expressive or intimate ones. *See Roberts,* 468 U.S. at 620 ("[A]n association … such as a large business enterprise … seems remote from the concerns giving rise to this constitutional protection."). *See also id.* at 636 (O'Connor, J., concurring) ("Lawyering to advance social goals may be speech, *NAACP* v. *Button,* 371 U.S. 415, 429-30 (1963), but ordinary commercial law practice is not, *see Hishon* v. *King & Spalding,* 467 U.S. 69 (1984).").

And among private expressive associations, the government has still less of an interest in eliminating discrimination from within religious associations. *See Kedroff* v. *Saint Nicholas Cathedral,* 344 U.S. 94, 116 (1952) (reaffirming the freedom of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"). *See also Corp. of the Presiding Bishop* v. *Amos,* 483 US 327 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions….'") (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)). Indeed, the Constitution divests the government of *any* interest in reaching into certain relationships constituting religious life. *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 292-93 (2008) (stating that the "preservation … of the churches' moral and legal right to govern themselves in accord with their own

norms and in response to their own calling is our day's most pressing religious freedom challenge").[3]

Even among government entities, the government's interest in prohibiting discrimination within government itself may vary as a function of the capacity in which the government acts—as regulator, as provider of financial benefits, as employer, or most relevantly here, as the institutional venue for the exchange of ideas, such as a public university. Taking once again the example of religion, the government operates under different constraints depending on its function. *Compare Employment Div.* v. *Smith,* 494 U.S. 872 (1990) (application of general criminal law that incidentally burdens religious exercise does not trigger strict scrutiny under Free Exercise Clause), *with Sherbert* v. *Verner,* 374 U.S. 398 (1963) (discretionary denial of unemployment benefits that incidentally burdens religious exercise triggers strict scrutiny under Free

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[3] *See, e.g., N.L.R.B.* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979) (declining to construe federal labor relations statute to reach relationship between religious schools and their teachers based on risk of excessive entanglement); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (striking down law compelling attendance at public schools based on interference with freedom of parents to direct religious upbringing and education of their children); *Petruska* v. *Gannon University*, 462 F.3d 294 (3rd Cir. 2006) (declining to decide sex discrimination claim by religious university administrator based on "ministerial" status of employee); *Curay-Cramer* v. *Ursuline Academy*, 450 F.3d 130 (3d Cir. 2006) (declining to decide sex discrimination claim by religious school teacher that would entail resolution of religious-doctrinal questions of the relative severity of different moral offenses); *Bryce* v. *Episcopal Church in the Diocese of Colorado,* 289 F.3d 648 (10th Cir. 2002) (declining to decide sexual harassment claim involving religious-doctrinal dispute over homosexuality).

Exercise Clause), *and with Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (denial of funding of student publication at public university based on religious viewpoint triggers strict scrutiny under Free Speech Clause). *See also Fraternal Order of Police* v. *City of Newark,* 170 F.3d 359, 366 n.7 (3d Cir. 1999) (Alito, J.) (suggesting that intermediate scrutiny may apply to public employment decisions based on religion).

The trial court ignored all of the above variables, but this Court should not.

First, the Court should consider the particular governmental function and setting at issue. Hastings is not exercising the police power, or regulating its own employees or sponsored organizations, but instead is a public university challenged for its decision to deny activities funding and facilities access to a private student group. Regardless of how this government function is categorized as a matter of forum analysis,[4] one would expect a top-rated public law school like Hastings to be an environment marked by vigorous academic debate, including about controversial moral questions. *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.") (internal quotations and brackets omitted). In turn, one would expect Hastings to claim no interest in shielding its

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[4] *Amicus*, of course, agrees with the forum analysis set forth by CLS in its principal brief. *See* Pet. Br. 22-23, 52-53.

students, all presumably in their twenties and older, from moral debates they may find disturbing. *See also New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); *Cantwell* v. *Connecticut,* 310 U.S. 296, 310 (1940) (similar regarding religion).

Next, the Court should consider the character of the group whose access to this academic environment is being curtailed. CLS is a private, expressive, and religious association of Hastings students; it is not governmental, commercial, or secular, or a group of outsiders. That is, all factors based on the character of the entity against whom the government interest is asserted tend to "attenuate" the strength of that interest. Pet. App. 61a.

Finally, the Court should consider, as discussed above, *see supra* Section I.A., that the asserted general interest in prohibiting "sexual orientation discrimination" is not implicated on these facts, because CLS has not actually urged opposition to the sexual inclinations or status of any person or group, but instead to sexual conduct—and to all extramarital sexual conduct at that.

Putting it all together, the Court should describe as follows the government interest pertaining to sexual orientation in this case: it is the interest of a public university in prohibiting a private, religious, expressive association of students from organizing themselves within the academic community around the moral and religious criticism

of extramarital sexual conduct.

Only after identifying this interest with precision and care should the Court assess the strength of the interest.

II. Having Precisely Described the Government Interest Relating to Sexual Orientation in This Case, the Court Should Assess That Interest with Equal Care.

A. The Interest Actually Implicated on These Facts Is Not Even Legitimate.

In general, it is easy for the government to satisfy the requirement to have a "legitimate government interest." The government's asserted interest enjoys the presumption of rationality, which a plaintiff must rebut. *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 462-63 (1988). Interests that this Court has found illegitimate include "mere negative attitudes, or fear," *City of Cleburne* v. *Cleburne Living Ctr.,* 473 U.S. 432, 448 (1985), and "'a bare ... desire to harm a politically unpopular group.'" *Romer* v. *Evans,* 517 U.S. 620, 634 (1996) (quoting *United States Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973)). Though deferential, this minimum standard of rationality is "'not a toothless one.'" *Schweiker* v. *Wilson,* 450 U.S. 221, 234 (1981) (quoting *Mathews* v. *Lucas,* 427 U.S. 495, 510 (1976)).[5]

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[5] *Amicus* does not mean to suggest that rational basis scrutiny is appropriate in this case, under the Free Speech Clause or otherwise. In fact, it believes Hastings' action here should be subject to strict scrutiny. But it offers this analysis to underscore that Hastings' exclusion of CLS fails even the least exacting constitutional scrutiny. *See also* Pet. Br. 44-45.

Here, Hastings has asserted an interest in prohibiting "sexual orientation discrimination." If, by this, Hastings means differential treatment of persons based on their actual sexual orientation, rather than conduct in addition, then the interest is generally legitimate—but then it is also inapplicable on these facts. Because CLS does not actually discriminate based on status, and because Hastings excluded CLS anyway, then Hastings' asserted interest can only be understood as the interest in prohibiting conduct- and advocacy-based "discrimination"—that is, the interest in prohibiting a private, religious, expressive association from excluding students who are engaged in or committed to conduct that the association opposes as immoral.

No government actor—least of all a public university—has a legitimate interest in this. As discussed above, CLS has every feature that diminishes the government's interest in eliminating discrimination within it—CLS is private, expressive, and religious and operates within a government environment dedicated to the robust exchange of ideas. And whatever meager antidiscrimination interest may be left as against CLS after this winnowing process, CLS has not even offended. In this context, the only purpose served by still denying CLS funding and access is to interfere with the ability of a private group to organize around a set of shared moral and religious ideas. That is because Hastings either disfavors the particular set of ideas, or disfavors the ability of any private group to organize around any ideas. The government has no interest—no business—in either of these; they are illegitimate government purposes.

The first is illegitimate because no government

entity (least of all a public university) should punish people or groups (least of all religious ones) based on their viewpoints. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1992); *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment") (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

The second is illegitimate because no government entity (least of all a public university) should hamper the ability of the voluntary associations (least of all religious ones) that constitute our vibrant civil society—and form a bulwark against the overweening power of the state—to create and perpetuate themselves. *See Dale*, 530 U.S. at 653-61, and cases cited therein; *Roberts*, 468 U.S. at 619 (noting that such associations "foster diversity and act as critical buffers between the individual and the power of the State").

B. The Broader Asserted Interest in Prohibiting Sexual Orientation Discrimination Should Not Be Addressed in This Case, but if It Is, It Should Not Be Found Compelling.

For the two reasons discussed above, this Court should decline to evaluate Hastings' broader asserted interest in prohibiting sexual orientation discrimination: (1) that interest is not implicated on these facts, because CLS has not actually engaged in such discrimination; and (2) interests so broadly

framed ignore that the government's interest varies depending on the entities against which the interest is asserted.

Only "paramount interests" of "the highest order" qualify for the designation of "compelling." *See Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520, 546 (1993); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963). *See, e.g., Cutter* v. *Wilkinson,* 544 U.S. 709, 725 n.13 (2005) (prison security a compelling interest); *Nat'l Treasury Employees Union* v. *Von Raab,* 489 U.S. 656, 677 (1989) (avoiding disclosure of sensitive governmental information a compelling interest); *Skinner* v. *Ry. Labor Executives' Ass'n,* 489 U.S. 602, 633 (1989) (regulating railway safety a compelling interest); *United States* v. *Lee*, 455 U.S. 252, 260 (1982) (compulsory participation in the Social Security system a compelling interest).

The gravity of elevating a government interest to the status of "compelling" is illustrated by considering the facially repugnant governmental action that the interest may then justify: government preference among religious denominations, *see Larson* v. *Valente,* 456 U.S. 228, 246-47 (1982); government targeting of religious practices for special disfavor, *see Lukumi,* 508 U.S. at 533; government suppression of speech based on viewpoint, *see Regan*, 468 U.S. at 648-49; and government classification of citizens based on race, *see Johnson* v. *California*, 543 U.S. 499, 505-06 (2005).

A fortiori, interests deemed "compelling" may also justify government actions that trigger intermediate scrutiny, which may be satisfied by an interest deemed merely "important." *Craig* v. *Boren,* 429 U.S. 190 (1976) ("important" interest may justify

government classifications based on gender); *Caban* v. *Mohammed*, 441 U.S. 380 (1979) ("important" interest may justify government classifications based on illegitimacy).

Although this Court has not addressed the question squarely, its prior related decisions militate against the conclusion that the prohibition of sexual orientation discrimination is a compelling interest.

In *Boy Scouts of America* v. *Dale,* 530 U.S. 640 (2000), the asserted government interest was the elimination of sexual orientation discrimination. *Id.* at 647. Although the Court did not directly address whether that interest was "compelling," it reaffirmed that rights of expressive association may be overridden by a compelling interest, and then held that those rights were not overridden by the asserted interest in that case. *Id.* at 648. The fact that the interest in prohibiting sexual orientation discrimination did not override the Boy Scouts' expressive-associational rights would seem to imply that the interest was not "compelling."

One step farther removed, this Court has on two occasions declined to identify sexual orientation as a suspect classification of any kind, rejecting the laws on other bases instead. In *Romer* v. *Evans,* 517 U.S. 620 (1996), the Court found that the law at issue failed rational basis scrutiny because it was "born of animosity toward the class of persons affected." *Id.* at 634. In *Lawrence* v. *Texas,* 539 U.S. 558 (2003), the Court found not that the moral objection to the prohibited conduct was irrational, but that the conduct—whether done by same-sex or different-sex couples—fell within a zone of intimate association that the criminal law may not reach. *Id.* at 573-75.

The decisions of the political branches on related questions may also inform the Court's assessment. The federal Employment Non-Discrimination Act ("ENDA")—which would add "sexual orientation" to the list of nationally prohibited bases of employment discrimination under Title VII—has been proposed in some form or another in every Congress since 1975. *See* Speaker Nancy Pelosi, *Current Legislation: The Employment Non-Discrimination Act* (available at <http://www.speaker.gov/legislation?id=0121>) (last visited Feb. 3, 2010). In all that time, it has only passed the House once, over two years ago. *Id.* Most importantly here, even if ENDA were eventually to pass, it would not apply to private membership clubs or most religious employers—private expressive entities akin to CLS here. *Id.* The sexual orientation antidiscrimination laws that exist in approximately twenty states have similar exemptions. In other words, even where legislatures would prohibit sexual orientation discrimination, they do so in particular contexts rather than broadly, and avoid intrusion into religious or other expressive associations.[6]

In light of these considerations, the generalized government interest in prohibiting sexual orientation discrimination cannot fairly be called a "paramount interest" of "the highest order." *Sherbert; Lukumi.* This Court should not elevate this interest to the degree that it may justify the targeted regulation of religious exercise, viewpoint-based suppression of speech, race or sex discrimination, or any other government action that triggers strict or intermediate

[6] *Cf. Dale,* 530 U.S. at 657 n.3 (noting that the New Jersey Supreme Court was unusual in construing the state's public accommodation law to include the Boy Scouts).

scrutiny. This Court has declined to take this major step in the past, and particularly in light of the political branches' remarkable consistency in avoiding all-encompassing prohibitions on sexual orientation discrimination, the Court should continue to exercise restraint as well.[7] Thus, if the Court addresses the question at all, it should make explicit what was implicit in *Dale*—that the general interest in prohibiting sexual orientation discrimination does not rise to the level of "compelling."

III. Overstating the Scope or Strength of the Government Interest in Prohibiting Sexual Orientation Discrimination Would Have Serious Implications for Religious Liberty and Would Distort the Ongoing Moral Debate over Sexual Conduct in Civil Society.

In addition to all of the foregoing, there are important practical reasons for this Court to avoid either describing the government's constitutional interest in prohibiting "sexual orientation discrimination" to encompass prohibiting moral criticism of conduct, or declaring the interest in prohibiting "sexual orientation discrimination" (however defined) as compelling.

First, to collapse the distinction between the act and the actor—that is, to treat moral condemnation of a person's conduct as no different than the moral condemnation of the person—is to

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[7] *Cf. O Centro Espírita,* 546 U.S. at 433 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Lukumi,* 508 U.S. at 547) (some internal quotations omitted).

transform all debate about the morality of conduct into "discriminatory" personal attack. Instantly, the moral reasoner becomes the bigot. Conversation comes to a halt and name-calling begins. The conduct is effectively immunized from criticism, no matter how kindly or carefully formulated. This is problematic enough for interpersonal relationships and for public and private discourse within civil society. But add in the coercive power of the state, and result is simply disastrous.

In particular, if the "discrimination" consisting of the moral condemnation of conduct is penalized by law, then the government has weighed in on that disputed moral question in the strongest possible terms—not merely to adopt one side, but to rule the other side wholly out of bounds, subjecting it to coercive and financial sanctions. At a minimum, this would severely distort that ongoing moral debate and skew its results. Over time, might would make right. This is no role for government in a Nation that prizes its vibrant, free, and diverse civil society.

It would also give rise to a host of religious freedom conflicts. Many—though by no means all—of those with moral objections to same-sex sexual conduct are at least reinforced in their positions by religious belief. Once the government deems those beliefs bigoted, it may then unleash the full range of weapons that have proven so effective against racism in the latter half of the last century—civil rights laws directly forbidding the discrimination (in this case, moral opposition to conduct), paired with the targeted withdrawal of government benefits. Religious people and groups will resist, and First Amendment litigation will follow.

Indeed, this very case reflects this pattern, as the dispute all traces back to Hastings' decision to treat CLS's policy—which criticizes conduct rather than people—as "discrimination." Pet. App. 88a; J.A. 294. *See also* Marc D. Stern, *Same-Sex Marriage and the Churches,* in Douglas Laycock, Anthony Picarello, and Robin Wilson, Eds., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1-59 (Rowman & Littlefield 2008) (cataloguing religious freedom disputes that have already arisen under sexual orientation antidiscrimination laws, in order to anticipate analogous disputes that would arise in the event of the legal redefinition of marriage).

Second, to declare broadly—as the trial court and others seem inclined to do—that "[t]he eradication of sexual orientation discrimination is a compelling governmental interest," *Gay Rights Coalition* v. *Georgetown Univ.,* 536 A.2d 1, 38 (D.C. 1987), would be equally disastrous. *See* Pet. App. 61a-62a. In short, the government can do just about anything with a "compelling government interest"; it can tear through precious freedoms like a buzz-saw. Among (many) other things, it would essentially pre-determine the outcome of the religious freedom conflicts anticipated above—even where a religious plaintiff could convince a court to apply strict scrutiny, the plaintiff would still likely lose.

This Court should therefore hand out the "compelling" designation very sparingly indeed, and the interest in prohibiting "sexual orientation discrimination" simply does not qualify for elevation to this exalted state. This is true even if the interest is defined in a more precise and context-sensitive way, but it is especially true if the interest is described loosely or wholly without definition—as,

regrettably, seems more common recently. *Amicus* respectfully requests that the Court not follow that trend.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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February 4, 2010

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