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 OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the United States Constitution permit a state to relegate a religious group to second-class status because that group requires its officers and voting members to profess, and live in accordance with, the religion's core religious beliefs?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED

Page

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA[1]

Agudath Israel of America ("Agudath Israel") is an 87-year-old Orthodox Jewish organization, with constituents and constituent religious bodies – including a national network of some 40 Agudath Israel-affiliated synagogues – across the United States. In its capacity as an advocate on behalf of the approximately 700 Orthodox Jewish day schools across the country, Agudath Israel is a member of the Council for American Private Education, a coalition of national organizations and state affiliates serving private elementary and secondary schools.

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part; and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members or its counsel made such a monetary contribution.

Agudath Israel regularly intervenes at all levels of government – federal, state and local; legislative, administrative and judicial (including through the submission of or participation in *amicus curiae* briefs in this Court) – to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any government action that, inadvertently or otherwise, might restrict the ability of Orthodox Jews to practice our religion freely, or to participate fully and equally in the public life of our country.

In this case, the courts below ruled that a state entity, Hastings College of the Law ("Hastings"), may treat a religious group, the Christian Legal Society ("CLS"), as a second-class group, ineligible to participate equally in public life, because that religious group restricts its voting

membership and leadership to individuals who both profess and live in accordance with its core religious beliefs. The state entity deems these restrictions a violation of its prohibition against religious discrimination.

Agudath Israel respectfully submits this *amicus curiae* brief in support of the Christian Legal Society, because the decisions below point a judicial dagger at the heart of the Orthodox Jewish community in the United States. As we explain below, based upon millennia-old Jewish laws and traditions, Orthodox Jewish institutions, especially our schools and synagogues, regularly differentiate between Jews and non-Jews, and between men and women, in ways that would be deemed "discrimination" on the basis of religion and sex if the panoply of federal, state and local anti-

discrimination laws were applicable to these institutions.

The lower court decisions here raise concern that by applying these laws to Orthodox Jewish schools and synagogues, federal, state or local governments could relegate Orthodox Jews and our institutions to second-class status, ineligible to participate equally in society. Such a result cannot be reconciled with our nation's foundational concept of religious freedom as embodied in the Free Exercise Clause, and runs afoul, as well, of expressive association rights and the Equal Protection Clause.

There are over 700 Orthodox Jewish primary and secondary schools in the United States, with over 200,000 students. Each school devotes roughly half or more of the school hours to religious studies, and the rest to secular studies. Every one of these schools restricts admission to Jewish children.

The vast majority -- well over 95% -- restrict admission to only boys or only girls. Many of the co-ed schools separate boys and girls for all classes, and nearly all the rest separate boys and girls for at least some classes (e.g., religious studies in middle school or high school). Thus, based upon millennia of Jewish law and tradition, virtually every Orthodox Jewish school in the United States differentiates between Jews and non-Jews, and between boys and girls, in ways that would violate Hastings' anti-discrimination policy.

Also based upon millennia of Jewish law and tradition, every Orthodox synagogue requires men and women to sit separately during prayer services. Orthodox synagogues also limit membership to Jews. These practices, too, would violate Hastings' anti-discrimination policy.

We recognize that these policies and practices may be out of sync with the contemporary zeitgeist, at least at Hastings. Today, however, none of this "discrimination" by Orthodox Jewish schools and synagogues violates any anti-discrimination law, because, in keeping with the Free Exercise Clause, those laws have been deliberately crafted not to challenge these policies and practices of religious institutions.

As a result, Orthodox Jewish schools and synagogues are fully able – within constitutional limits imposed by the Establishment Clause – to take advantage of governmental programs and services available to similar non-sectarian institutions, and thereby provide vital services to children, the elderly and the needy in their communities. For example, Orthodox Jewish schools are eligible to participate in federally-funded

programs to provide hot, nutritious breakfasts and lunches for children from low-income families. Orthodox Jewish schools are also eligible to participate in various state-funded programs, which include (depending upon the state) transportation for students to and from school, textbooks for secular studies classes, special education support, after-school programs, and a host of others. Orthodox Jewish institutions also participate in federal- or state-funded programs to provide hot, nutritious meals for low-income senior citizens, and often rent public-owned facilities.[2]

The decisions below suggest that all this could be ended if a state entity were to declare that

[2] Not far from this Court, in Montgomery County, Maryland, the Melvin J. Berman Hebrew Academy in Rockville rents the former Peary High School from the County; the Torah School of Greater Washington and the Yeshiva of Greater Washington, Girls Division, in Silver Spring jointly rent the former Montgomery Hills Junior High School from the County; and at least three synagogues in Wheaton -- Chabad of Silver Spring, Kemp Mill Synagogue and Silver Spring Jewish Center -- have rented the E. Brooke Lee Middle School for High Holiday Services.

a religious organization which discriminates on the basis of religion is a second-class group, ineligible to participate in any state-supported program.

This is not merely a hypothetical fear. One respected jurist has already posited that the case law of this Court suggests that "there is a constitutional requirement that religious meetings conducted on public school property 'be open to the public,'" and thus a religious organization which restricts its membership to those who espouse the religion may therefore be denied access to the school property. *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 492 F.3d 89, 121-22 (2d Cir. 2007) (Leval, J., concurring).[3]

[3] The decisions below do not necessarily permit governments to exclude religious organizations from all programs simply because they discriminate on the basis of religion. For example, there could be distinctions between programs which primarily support an organization and programs which primarily support individuals. Nonetheless, the proper response to the decisions below is that differentiation on the basis of religion by a religious organization is constitutionally protected, and may not be used by any government to restrict that religious group's

No Orthodox Jew could be a voting member of CLS, and no child of CLS members could attend an Orthodox Jewish school. There is nothing improper or invidious about this. To the contrary, this is inherent in the constitutionally protected free exercise of the religious beliefs of Orthodox Jews and CLS members.

SUMMARY OF ARGUMENT

The district court and the Ninth Circuit have things backwards. Hastings promulgates a policy as to what is, in Hastings' view, non-discrimination. Yet, in so doing, Hastings effectively discriminates against adherents to mainstream religions.

This nation was founded on principles of both pluralism *and* religious freedom, as expressed in our Constitution. Curtailing access to public

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participation in public life.

programs or arenas on the basis of a group's religious viewpoint is impermissible viewpoint discrimination in violation of the First Amendment. The decision of the Court of Appeals for the Ninth Circuit should be reversed.

ARGUMENT

The regulation at issue in this case is not viewpoint neutral. Rather, it specifically stigmatizes as illegitimate the viewpoints of mainstream religious organizations.

As we have previously argued to this Court, in the aftermath of *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Free Exercise clause offers little if any comfort to any religious body whose faith demands that it engage in conduct deemed to be unlawful religious discrimination under generally applicable provisions

of secular law if a state may sanction the religious body for practicing its faith. *See Boy Scouts of Am. v. Dale* (No. 99-699), Brief of Agudath Israel of America as Amicus Curiae in Support of the Petition, Nov. 26, 1999).

In this case, the district court held that the regulation at issue regulates conduct not speech. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane,* No. C 04-04484, 2006 WL 997217 at *5-*8 (N.D. Cal. May 19, 2006) ("*Kane*"). In the alternative, the district court found the regulation valid as a speech-regulation because the court determined that it is viewpoint neutral, that is, the regulation does not express preference for certain viewpoints over others. *See id.* at *10-*14. The district court erred in both respects.

The conduct at issue here – CLS' exclusion from voting membership and leadership of

those who do not profess and practice the group's religious doctrines – is inseparably linked to CLS' religiously-inspired viewpoints. Admitting as full members students who do not share CLS' religious beliefs would undermine CLS' message, and would be fundamentally inconsistent with CLS' religious convictions. As such, the regulation in this case is unlike the viewpoint-neutral regulations this Court has upheld, and is instead akin to the viewpoint-discriminatory viewpoints which this Court has determined are unconstitutional. Compare *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding state statute prohibiting certain types of expression within 100 feet of entrance to polling place); *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding local ordinance prohibiting posting of signs on public property) with *Good News Club v. Milford Sch. Dist.*, 533 U.S. 98 (2001) (holding that

public school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that public university's denial of funds to student publication with a religious viewpoint was unconstitutional viewpoint discrimination); and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that school board's denial of access to public school's premises to church to show film from a religious viewpoint was impermissible viewpoint discrimination).

In enforcing its anti-discrimination regulation against CLS, Hastings was expressing its disapproval of CLS' religious convictions, and was effectively punishing CLS for acting upon its religious beliefs. CLS' religious beliefs may not be

popular or in vogue at Hastings, but the Free Exercise Clause means nothing if Hastings may therefore punish CLS.

Moreover, contrary to the lower courts' conclusions, this viewpoint-motivated regulation is not viewpoint neutral. This Court has stated that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). In this case, Hastings specifically targeted CLS *because* CLS' policy expresses an unpopular viewpoint -- one which Hastings deems discriminatory. Such expressive conduct is protected by the First Amendment.

The district court claims that "Hastings has not excluded CLS because it is a religious group

but rather because it refuses to comply with the prerequisites imposed on all student organizations." *Kane,* 2006 WL 997217 at *11. This is specious, and elevates the policy's facially-neutral form over its non-neutral substance. CLS' conduct expresses CLS' religious viewpoint -- a viewpoint that is at odds with the viewpoint of Hastings' administrators. By adopting the regulation at issue in this case, those administrators certainly knew that the impact of their policy would fall disproportionately, if not exclusively, on those who disagree with their viewpoint.

> [The] conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact. . . . To treat such restrictions as viewpoint-neutral seems simply to ignore reality.

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 56 (1986) (Brennan, J., dissenting) (quoting Stone, RESTRICTIONS OF SPEECH BECAUSE OF ITS CONTENT: THE PECULIAR CASE OF SUBJECT-MATTER RESTRICTIONS, 46 U.Chi.L.Rev. 81, 111-12 (1978)) (internal quotation marks omitted) (emphasis added).

For millennia, Jews have professed and lived by beliefs out of sync with, and often anathema to, those of society at large. Over three thousand years ago, the very first Jews, Abraham and Sarah, rejected the contemporary notion that statues of clay were gods to be worshipped. When a large part of the world in which we lived officially accepted Jesus as the messiah, we dissented; and when another large part of the world officially accepted Mohammed as a new prophet, we dissented again.

Jews also have millennia of experience with paying a high price for holding fast to our religious beliefs. Indeed, by the standards of the Twentieth Century, merely having our institutions relegated to second-class status might be considered relatively benign.

But this country has been exceptional from its inception. The Massachusetts Bay Colony was founded by Puritans who fled second-class status in England because their core religious beliefs conflicted with contemporary mores. Even before the First Amendment was ratified, in 1790, President George Washington wrote to the Orthodox Jewish congregation in Newport, Rhode Island:

> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy . . . . All possess alike liberty of conscience and immunities of citizenship. . . .

> . . . . May the children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.

George Washington, *Letter To Touro Synagogue* (1790).[4] And the First Amendment, of course, guarantees free exercise to people of all religions. This has given Orthodox Jews and our institutions opportunities and protection unprecedented in a non-Jewish society.

The courts below disregarded these foundational principles, and would permit a state to punish a religious group because it insists that its members and leaders must profess and adhere to the group's core religious beliefs. This suggests that Orthodox Jews and our institutions, and all other traditional faith-based communities and their

[4] Available at http://www.pbs.org/georgewashington/collection/other_hebrew_congregation.html.

institutions, may be relegated to second-class status wherever our beliefs and practices conflict with the contemporary zeitgeist. We implore this Court to reject this evisceration of the First Amendment.

CONCLUSION

Agudath Israel of America respectfully urges the Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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