

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 PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

**BRIEF *AMICI CURIAE* OF COMMISSIONED II
LOVE, CORNERSTONE AT BOISE STATE
UNIVERSITY, and KAPPA UPSILON CHI,**
in support of the *Petitioners.*

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INTEREST OF *AMICI CURIAE*¹

Amici are all Christian student organizations that have faced opposition due to their Christian-only composition.

Commissioned II Love Outreach Ministries (“C2L”) is a Christian student organization with Chapters on three of America’s historically Black universities. C2L seeks to provide Christian fellowship to those who have already embraced Christianity and to preach the Gospel to other students. C2L has faced opposition on two of those campuses and was forced to file a lawsuit against Savannah State University after having its Recognized Student Organization status revoked for engaging in evangelism and other distinctively Christian activities. *Commissioned II Love v. Yarborough*, No. 07-036 (S.D. Ga. 2007). Savannah State settled the lawsuit and restored C2L’s recognized status. Unfortunately, C2L has been pushed to the brink of litigation on several other occasions before university administrators relented from other unconstitutional policies.

Cornerstone at Boise State University is a religious student organization that seeks to provide spiritual resources for students’ hearts and minds,

¹ The parties have consented to the filing of this Brief. Copies of the letters of consent from Counsel for the Petitioner and Respondent-Intervenor accompany this Brief. The letter of consent from Counsel for the Respondent has been lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

supplying Christian educational materials to students, faculty, and other Christian student groups at Boise State and organizing Bible studies and other events to encourage students to develop a Biblical worldview. Cornerstone strives to be biblically based in all it does, theologically sound and morally pure. In 2007 several Cornerstone members and other students challenged the complete exclusion of religious student groups from student activity fee funding from Boise State, which exclusion was based upon an Idaho constitutional requirement. *Cordova v. Laliberte*, 08-543 (D. Id. 2008). BSU decided to remove this viewpoint discriminatory restriction and make other changes to comply with this Court's *Board of Regents v. Southworth*, 529 U.S. 217 (2000) decision, but while doing so derecognized Cornerstone and threatened derecognition of other religious student groups because of their faith and conduct standards for their leaders. After five months of derecognition, Boise State ultimately exempted them from this requirement and restored Cornerstone's status.

Kappa Upsilon Chi ("KYX"), is a national Christian fraternity that exists to bring Christian males together on college campuses to experience biblical Christian accountability within the confines of a brotherhood, and to share the message of Jesus Christ with other students. KYX currently operates on fifteen campuses across seven states. KYX requires that its members be Christian men that hold to traditional beliefs and teachings found within the Bible. Several universities, including the University of New Mexico, the University of Central Florida, and the University of Florida, have refused to recognize KYX as a registered student

organization because KYX's religious-based membership requirements do not comply with the respective university's non-discrimination clause. KYX's religious goals, purpose and message would be compromised if the group was forced to abide by a non-discrimination clause that requires KYX to admit members regardless of religious belief or sexual orientation.

SUMMARY OF THE ARGUMENT

This case can be decided in a straight forward manner. The Respondents (hereinafter "Hastings") have given the Petitioner (hereinafter "CLS") an ultimatum: Allow us to tell you who you must accept as members and officers or lose 15 benefits. Because Hastings could not impose its membership mandate directly, it may not do so indirectly. Thus, this Court should hold that Hastings' ultimatum violates the unconstitutional conditions doctrine and should reverse the judgment of the Ninth Circuit.

However, in the face of the unconstitutional conditions doctrine, Hastings nonetheless insists it can enforce its ultimatum. In aid of this erroneous position, Hastings, Respondent-Intervenor, Hastings Outlaw, and their *amici* at the Ninth Circuit, invoke numerous sources that—taken out-of-context—may appear at first blush to be persuasive. This Brief will explain why these sources do not, in fact, salvage Hastings' position.

ARGUMENT

I. HASTINGS' POLICY VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BECAUSE IT USES INDIRECT COERCION.

Hastings;, Hastings Outlaw; and their *amici* below make this case out to be more complicated than it is.

As CLS has asserted, Hastings' Policy places unconstitutional conditions on the receipt of benefits. (Petr.'s Br. 54-55.) Indeed, Hastings insists that CLS must accept as voting members Hastings students whose views are diametrically opposed to its own or lose 15 benefits. *See Christian Legal Society v. Kane*, No. 04-04484, 2006 U.S. Dist. LEXIS 27347, at *5-6 (N.D. Cal. Apr. 17, 2006) (listing 13 enumerated benefits (a-m) and describing 2 others). Under this Court's unconstitutional conditions jurisprudence, Hastings cannot impose this requirement.

The test is clear:

For at least a quarter-century [now, "for at least fifty-three years"], this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his

interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Significantly, as the above quotation shows, the unconstitutional conditions doctrine applies to both the freedom of speech and the freedom of association. Thus, whether this Court views this case to be about speech or expressive association or both, Hastings’ policy fails because it forces CLS to send a message it does not want to send, forces it to associate with persons it does not wish to associate with, or both.

Hastings tacitly admits this when, for example, it writes

[Boy Scouts of America v.] Dale[, 530 U.S. 640 (2000)] recognized that government action may unconstitutionally burden associational freedom when it constitutes an “intrusion into the internal structure or affairs of an association,” such as a “regulation that forces the group to

accept members it does not desire.”
 This case, in contrast, does not involve
 any such *direct* legal compulsion.

(Resp’t Br. in Opp’n to Pet. For Writ of Cert.
 (hereinafter “Resp’t Br. in Opp’n”) 26 (emphasis
 added) (citations omitted).)

Thus, Hastings is relying upon the distinction
 between direct and indirect coercion. This reliance
 is clear, but it is also curious, since this tacit
 admission is fatal. In fact, the whole point of the
 unconstitutional conditions doctrine is, as noted
 above, that government cannot do indirectly what it
 cannot do directly. This black letter proposition was
 reiterated by this court as recently as 2006 in
Rumsfeld v. FAIR, 547 U.S. 47, 59-60 (2006).

II. HASTINGS ERRONEOUSLY INVOKES *RUMSFELD V. FAIR* TO MASK ITS IMPOSITION OF AN UNCONSTITUTIONAL CONDITION.

Thus, when Hastings quotes this Court’s
FAIR opinion as supporting its position, it ignores
 the context from which the quote is wrenched.
 Hastings claims that CLS

had a choice: if it wished to participate
 in Hastings’ forum, thereby gaining
 access to eligibility for funding and
 certain law school resources, it could
 agree to comply with the law school’s
 nondiscrimination policy. If not, it
 could continue to meet on campus and
 to exclude whichever students it chose.

(Resp't Br. in Opp'n 27.)

Hastings then cites *FAIR* and quotes it as follows: “The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds.” (*Id.* at 27 (quoting *FAIR*, 547 U.S. at 58).)

Hastings fails to realize (or at least fails to alert this Court) that this statement comes after this Court had already declared that

[u]nder . . . the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

FAIR, 547 U.S. at 58.

This Court then explained that Congress could directly impose the access because

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies, “ and “[t]o provide and

maintain a Navy.” Art. I, § 8, cls. 1, 12-13. Congress’ power in this area “is broad and sweeping,” [*United States v. O’Brien*, 391 U.S. [367,] 377, and there is no dispute in this case that it includes the authority to require campus access for military recruiters.

Id. (first two alterations original). This Court put even a finer point on it: “judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies.” *Id.* (citations omitted).

Because Congress could have *directly* legislated access to college campuses under the Article I, § 8 clauses, it was permissible for Congress to legislate access *indirectly* through the Spending Clause. *Id.* *In that context*, this Court wrote the language that Hastings quoted: “The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds.” *FAIR*, 547 U.S. at 58.

In the instant case, Hastings would have this Court jump to the same downstream conclusion by ignoring all of the upstream prerequisites—prerequisites that are missing in this case. Congress *can* compel campus access directly; Hastings *cannot* compel CLS to accept members or officers directly. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“[A] corollary of the right to associate is the right not to associate.”)

Against this clear teaching, Hastings, Hastings Outlaw, and their *amici* level additional inapposite quotations and a parade of horrors.

This Brief will examine each in turn, noting the errors in each one.

III. HASTINGS ATTEMPTS TO—BUT CANNOT—AVOID THE APPLICATION OF *DALE* AND *HURLEY*.

First, Hastings writes that, in addition to not involving direct compulsion, *Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) are also inapplicable because neither involves access to public fora or to government subsidies. (Resp’t Br. in Opp’n 28.) Thus, Hastings asserts, *Dale* and *Hurley* “are entirely distinct from this Court’s public forum decisions” (*Id.*) This assertion is belied by two sources that Hastings, Hastings Outlaw, and their *amici* have relied on extensively here and at the Ninth Circuit, namely the Second Circuit’s decision in *Boy Scouts of American v. Wyman*, 335 F.3d 80 (2d Cir. 2003), and Professor Volokh’s law review article, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006). (See Resp’t Br. in Opp’n 23, 29, 34; Brief of Defendants-Appellees at 29-30, 33, 38-41, 44-45, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956); Brief of Defendants-Intervenors-Appellees Hastings Outlaw at 4, 20, 24-25, 31-38, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956); Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 5, 18, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).) Both *Wyman* and Professor Volokh are clear that *Dale* and *Hurley* are relevant to cases such as the instant one.

While your *Amici* disagree with the ultimate conclusions of *Wyman* and Professor Volokh, their forthrightness about the applicability of *Dale* and *Hurley* is commendable.

Indeed, Hastings' assertion here seems incompatible with a portion of the opinion from *Wyman* that Hastings quoted in its Ninth Circuit brief:

While *Dale*'s recognition of the Boy Scouts' expressive-associational right to exclude a gay activist from a leadership position sets the stage for the issues in this case, it does not determine their resolution. *Dale* considered New Jersey's attempt to require the Boy Scouts to admit a person who, [this] Court found, would compromise the Boy Scouts' message. Not surprisingly, [this] Court held that such state compulsion "directly and immediately affects . . . associational rights that enjoy First Amendment protection" and imposes a "serious burden" on them. The effect of Connecticut's removal of the BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion.

Id. at 91 (citation omitted; ellipses original). (See Brief of Defendants-Appellees at 39, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).)

The reason that the *Wyman* court believed that *Dale* did not control had nothing to do with the fact that it was not a forum or subsidy case. Rather, the reason was that, like Hastings, the *Wyman* court bought into the false direct-indirect dichotomy, as demonstrated by this sentence that follows immediately after the end of Hastings' quotation of the case: "*Consequently, Dale does not, by itself, mandate a result in the current case.*" *Wyman*, 335 F.3d at 91. Not surprisingly, the *Wyman* court interacted with *Dale* and *Hurley* scores of times.

Similarly, Professor Volokh believes that the unconstitutional conditions doctrine does not preclude policies such as Hastings'. Volokh, *supra*, at 1944. However, he clearly explains that there is an argument to the contrary and that it is based upon *Dale*:

Here, then, is the simplest form of expressive groups' argument for equal access to various benefit programs: The programs—whether they provide access to property, to funding, or to tax exemptions - are public fora designated for the expression of a diversity of private views. *Boy Scouts v. Dale* recognizes that our discriminatory selection decisions are necessary for us to speak effectively, and are thus part of our Free Speech Clause rights. Under *Rosenberger v. Rector* [515 U.S. 819 (1995)], the government may not discriminate based on content within public fora, so long as the speech is within the

forum's purpose, and the government may not discriminate based on viewpoint at all in these fora (or even in nonpublic fora). Therefore, the government may not discriminate based on our exercise of our expressive association rights, either. *Boy Scouts* plus *Rosenberger* equals we win.

Volokh, *supra*, at 1929 (footnotes omitted).

Thus, two of Hastings' most relied upon sources stand four square against the proposition that *Dale* and *Hurley* are inapplicable here. Furthermore, the *Wyman* court is clear that *Dale* is relevant, though not controlling, precisely *because* this case "lies at the intersection of" the forum line of cases and the unconstitutional doctrine line of cases, *Wyman*, 335 F.3d at 92.

It is worth noting in passing that Professor Volokh's comments also highlight why Hastings is incorrect to claim that *Rosenberger* supports its position since it is doing nothing but enforcing reasonable restrictions, (Resp't Br. in Opp'n 28.) Quite to the contrary, Hastings is, at a minimum, "discriminat[ing] based on [CLS's] exercise of [its] expressive association." Volokh, *supra*, at 1929.

IV. HASTINGS AND ITS *AMICI* FURTHER MUDDY THE WATER THROUGH THEIR TREATMENT OF RACIAL AND GENDER DISCRIMINATION CASES.

However, further attention is required regarding Hastings' subsidy argument. Once Hastings dispatches *Dale* and *Hurly*, it blithely

claims that “[t]he decision below is entirely consistent with this Court’s government subsidy precedents.” (Resp’t Br. in Opp’n 28.) In support of the claim, Hastings cites several cases, including two from this Court—*Bob Jones v. University v. United States*, 461 U.S. 574 (1983) and *Grove City College v. Bell*, 465 U.S. 555 (1984)—purporting to stand for the proposition that government may enforce anti-discrimination restrictions as a condition for receipt of subsidies. Elsewhere, Hastings’ *amici* take this anti-discrimination argument and turn it into a parade of horrible. According to *amici* American Civil Liberties Union, *et al.*, should this Court rule in CLS’s favor, “any student organization that claimed an ideological opposition to including women, African Americans, gays and lesbians, or people with disabilities, for example, would be entitled to force a public university to grant it official recognition not withstanding university policies to the contrary.” Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 19, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956). Additionally, the American Civil Liberties Union cites several other cases—*Norwood v. Harrison*, 413 U.S. 455 (1973); and *Runyon v. McCrary*, 427 U.S. 160 (1976)—for the less-than-surprising proposition that discrimination in education is not a good thing. Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 10-11, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956). These cases involve racial discrimination in settings that are altogether different from the one involved in the instant case, yet the implication is that should this Court rule in CLS’s favor, all of this

Court's anti-racial discrimination protections would be removed.

All of these arguments are problematic. For example, the each of the race and gender discrimination cases appear to be either a parade of horrors, an attempt to tar CLS with the brush of racism, or the application of a legal principle at too high a level of abstraction.

First, *Bob Jones* is easily distinguishable. The issue in that case was whether educational institutions that discriminated on the basis of race (including prohibiting interracial dating and marriage among applicants) should be eligible to receive federal tax exemptions. The case turned on statutory construction with this Court explaining that tax exemptions originated in the law of charitable trusts. *Id.* at 585-92. Therefore, this Court concluded that schools that discriminated on the basis of race did not fall within the definition of a charity since charitable trust law always included the idea that the charity must not operate in violation of public policy. *Id.* Given the federal government's long standing public policy to end racial discrimination, this Court determined that tax exemption could be withheld. *Id.* However, this Court cautioned against making such determinations cavalierly:

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be

made only where there can be *no doubt* that the activity involved is contrary to a fundamental public policy.

Id. at 592 (emphasis added). Lest there be any confusion over the “no doubt” standard, this Court explained: “Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.” *Id.* at 593. There is no comparable firm national policy with regard to homosexuality.

Grove City College is just as easily distinguished. When this Court articulated the unconstitutional conditions doctrine in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), it noted that government may deny a “benefit for any number of reasons, [but] there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.” *Grove City* is simply a case in which no justice of this Court believed that any constitutionally protected interests were at stake. And that is easy to understand. *Grove City*’s argument smacked of the quintessential kitchen sink argument. As noted by the Third Circuit when the case was before it, *Grove City*’s supposed First Amendment interest was as follows:

“Since its founding, *Grove City College* has professed deeply held beliefs regarding the proper role of the individual, government and private education. For over a century, the

College has steadfastly maintained a strict independence from governmental funding, holding that the ideals embodied in its educational philosophy draw their essence from the practice of institutional self-sufficiency and autonomy. A similar philosophy guides the political and economic teaching of the College's faculty. Moreover, the College has continued its strong espousal of religious principles. Although it is not controlled or operated by any church, it retains its Christian conscience. It does not discriminate; it does maintain its programs to give equal opportunity to students, faculty and staff. The College has undertaken to do what is morally right without government compulsion."

Grove City College v. Bell, 687 F.2d 684 (3d Cir.)
(quoting Grove City's Brief).

What Grove City objected to was, in effect, having to report any information to the federal government—the relief it sought was an injunction that would allow its students to continue to receive federal financial aid while it could stop reporting to the government. This contextual setting makes it clear that Grove City's purported interest—despite its out-of-place reference to its "Christian conscience"—is tantamount to a claim that people and institutions ought to be free from all government reporting.

Under *those* circumstances government certainly may attach anti-discrimination strings to

funding. But those are not the circumstances of this case. CLS is not asserting a putative right to be free from reporting requirements; it is claiming a right to speak, assemble, exercise its religion, and indeed to continue to exist.

Norwood is even less applicable, as the opinion itself plainly states: “This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion or of the authority of a State to allow such schools.” 413 U.S. at 457-58. Its invocation by the American Civil Liberties Union is hard to understand. The crux of the case was that the textbook subsidy program at issue was Mississippi’s way of “induc[ing], encourage[ing] or promot[ing] private persons to accomplish what it is constitutionally forbidden to accomplish,” namely fighting desegregation. *Id.* at 731 (internal quotation marks and citation omitted). There is no *governmental* discrimination in the instant case and *Norwood* is simply not relevant here.

Similarly, *Runyon*’s context has been ignored. *Runyon* involved racially segregated private schools, but once again, this Court went to great lengths to be clear what the case was *not* about, and one is left wondering why *amici* have invoked it here:

It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a

private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied.

427 U.S. at 167-68. (footnotes omitted).

Furthermore, this Court added a footnote pointing out that “[n]othing in this record suggests that [either of the private schools] excludes applicants on religious grounds, and the Free Exercise Clause of the First Amendment is thus in no way here involved.” *Id.* at 168 n.6. Of course, the Free Exercise Clause is front and center in the instant case and that makes all the difference.

In light of the inappositeness of the above racial and gender discrimination cases, this Court should not allow its analysis to be impacted by parades of horrible, putative slippery slopes, or spectres of racism, none of which are real. Hastings *has* imposed indirectly a condition that it could not impose directly. And no amount of camouflage can hide the fact.

V. **HASTINGS ATTEMPTS TO—BUT CANNOT—HIDE ITS UNCONSTITUTIONAL CONDITION BEHIND *LOCKE* AND *AMERICAN LIBRARY ASSOCIATION*.**

However, there are other red herrings in the arguments of Hastings, Hastings Outlaw and their *amici* as well.

For example, at the Ninth Circuit, *amicus* Americans United for Separation of Church and State argued that the situation in the instant case is like that in *Locke v. Davey*, 540 U.S. 712 (2004), and in *United States v. American Library Association*, 539 U.S. 194 (2003). See Brief of *Amicus Curiae* Americans United for Separation of Church and State at 13, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956.) It is certainly true, as Americans United argues, that the *Locke* majority opined that benefits available to “secular students [are] *not* part of the baseline against which burdens on religion are measured.” *Id.* at 13 (quoting *Locke*, 540 U.S. at 721 (internal quotation marks omitted)). It is also true, as Americans United argues, that the *American Library Association* plurality (as had other courts before it) opined that “[a] refusal to fund protected activity, without more, cannot be equated with imposition of a ‘penalty’ on that activity.” *Id.* (quoting *Am. Library Assoc.*, 539 U.S. at 212 (plurality) (internal quotation marks and citations omitted)). What is *not* true, is that these quotations have anything to do with what Hastings has done.

In *Locke*, the State of Washington did not want to change students’ behavior, speech, or

thoughts. It simply wanted to assist with funding of secular education. Here, Hastings *wants* to change students' behavior, their speech, or more likely, their thoughts. After all, it claims a compelling interest in eradicating discrimination. (Resp't Br. in Opp'n 30 n.13 (stating "that conclusion is not open to serious question.")) While the behavior/speech issue may be important for other parts of this Court's analysis of this case, it is not important here—Hastings cannot do *any* of these things directly, see *supra*, p. 8, so it has tried to do so indirectly through inducement (or punishment). This, of course, runs Hastings afoul of the unconstitutional conditions doctrine. The only mystery is why Hastings and its amicus Americans United cannot see that.

Nor is this case like *American Library Association*. The most important difference is that this Court refused to employ forum analysis in *American Library Association*. *Id.* at 205-06 (plurality); *id.* at 215 (Breyer, J., concurring). Here, however, the parties agree that a forum of some sort is at issue. (Resp't Br. in Opp'n 25; Petr.'s Br. 21.) Although this Court also noted briefly that the scholarship program in *Locke* was not a forum, 540 U.S. at 721 n.3, this Court emphasized the lack of forum analysis point much more strongly in *American Library Association*. The significance is this: In *American Library Association*, libraries could accept or reject the money. But even if a library altered its preferred course of action, to obtain the money, it would not have given up a constitutionally protected right. There is no constitutional right to provide unfiltered Internet access. *Am. Library Assoc.*, 539 U.S. at 211-12 (plurality). However, by the very nature of a forum,

any altered course of action will impact one or more constitutionally protected rights: free exercise of religion, freedom of speech, freedom of association. And that is what makes Hastings' policy unconstitutional.

VI. A SIMPLE ILLUSTRATION OF THE UNCONSTITUTIONALITY OF HASTINGS' POLICY.

Once the obfuscating false complexity is cleared away, this case becomes quite simple. Your *Amici* suggest that the unconstitutional nature of Hastings' policy's condition is not at all difficult to see. One method for bringing clarity to the situation is to recall the constitutional provision that was at issue in *Speiser v. Randall*, 357 U.S. 513, 516 (U.S. 1958). There, the California Constitution provided that

Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

. . . .

(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau,

commission or other public agency of this State.

Making appropriate substitutions for the facts of this case, Hastings' policy might be paraphrased as follows: "Notwithstanding any other rule of this University, no organization that refuses to abide by the Non-Discrimination Policy shall receive any of the 15 benefits to which it would otherwise be entitled." This Court has already given its opinion on such governmental arm twisting, and so this Brief ends where it began:

For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

CONCLUSION

For the foregoing reasons and for other reasons stated in CLS's Brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,
this 4th day of February, 2010,

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