No. 06-15956

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

MARY KAY KANE, ET AL.,
Appellees.

Appeal from Judgment of the United States District Court
Northern District of California
Hon. Jeffrey S. White

REPLY BRIEF

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INTRODUCTION

Appellant Christian Legal Society Chapter at Hastings College of the Law ("CLS") has a constitutional right to require officers and voting members to agree with its religious beliefs and viewpoints. *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000); *Hurley v. Irish-American Gay Lesbian & Bisexual Group,* 515 U.S. 557 (1995). CLS's meetings and activities are open to any student who wishes to attend. The students who *lead the group* and who *select the leaders*, however, must agree with CLS's Statement of Faith. To be an officially recognized student organization, Hastings College of the Law ("Hastings") claims that CLS must "allow *all* students to become members and officers." Hastings Brief ("HB") at 31 (emphasis in original). This not only "directly and immediately" impacts CLS's associational rights, but also those of every other student organization on campus. *Dale,* 530 U.S. at 659.

The two circuit courts that have examined this issue have both ruled in favor of the expressive associational rights of student organizations. The Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), held that Southern Illinois University ("SIU") violated the expressive association rights of a CLS

chapter when it applied the school's antidiscrimination policy to force the group to open its leadership and voting membership to persons that reject the group's religious beliefs. Likewise, the Second Circuit in *Hsu v. Roslyn Union Free School District No. 3,* 85 F.3d 839 (2d Cir. 1996), held that "when a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so." *Id.* at 872-73 (decided under the Equal Access Act); *see also id.* at 856-57 (calling the Equal Access Act "an analog" to the First Amendment). "[A]bsent a strong reason to do so," this Court "will not create a direct conflict with other circuits." *United States v. Alexander,* 287 F.3d 811, 820 (9th Cir. 2002), *quoting United States v. Chavez-Vernaza,* 844 F.2d 1368, 1374 (9th Cir. 1987). Because Hastings and Outlaw have provided no such reason, the court below should be reversed.

ARGUMENT

I. The Supreme Court's Decisions in *Dale* and *Hurley* Require Strict Scrutiny to Protect the Right of a Religious Expressive Association to Select Leaders and Voting Members Who Agree with Its Religious Viewpoints.

A. Hastings' interpretation of its Policy as one of "no association" renders the Policy unconstitutional.

Hastings is caught in a constitutional conundrum. Because Hastings deems the selection of officers and members on the basis of religion by religious groups to be "discrimination," the Nondiscrimination Policy is viewpoint discriminatory and fatally underinclusive. Secular groups may require officers and members, for example, to oppose war or adhere to a vegetarian diet, but religious groups are barred from requiring officers and members to adhere to Quaker pacifist religious beliefs or a kosher diet. Hastings and its *amici* offer no satisfactory response to these hypotheticals, proposed in CLS's opening brief, that demonstrate the Policy violates the Free Speech Clause's prohibition on viewpoint discrimination and the Free Exercise Clause's prohibition on government officials permitting

conduct done for secular reasons but prohibiting the same conduct done for religious reasons.

Desperately seeking to avoid this conundrum, Hastings insists the Nondiscrimination Policy is a "no association" policy: the Policy requires "*all* student groups to allow *all* students to become members and officers." HB at 31 (emphasis in original). No matter how opposed a particular student is to a particular organization's beliefs and viewpoints, the student must be permitted to lead the organization and to elect the organization's leaders. Just as the Los Angeles International Airport ("LAX") unconstitutionally banned "all First Amendment activities" to "create a virtual 'First Amendment Free Zone,'" *Board of Airport Comm'rs v. Jews for Jesus,* 482 U.S. 569, 570, 574 (1987), Hastings creates an "Association Free Zone," where members of Hastings Democratic Caucus must allow Republicans to run their club, ER at 341, and Christian student groups must offer leadership positions to atheists. HB at 31.

But just as it was "obvious that . . . no conceivable governmental interest would justify [LAX's] absolute prohibition of speech," it is obvious that Hastings' ban on expressive association offends the First

Amendment. *Jews for Jesus,* 482 U.S. at 575. That Hastings adopts such an extreme position demonstrates the constitutional straits in which it finds itself: either it claims to prohibit *all* groups from exercising their associational right to select leaders who agree with their organizational viewpoints, *or* the Policy prohibits only *religious* groups from exercising their First Amendment right to select leaders who agree with their religious viewpoints while allowing nonreligious groups to require leaders to affirm their secular viewpoints.

The reasonable solution to Hastings' dilemma is to permit CLS to choose leaders that agree with its religious viewpoints, a familiar result under Title VII of the Civil Rights Act of 1964 and other federal and state antidiscrimination provisions that generally exempt religious leadership decisions.[1] 42 U.S.C. § 2000e-1(a) (2007); Cal. Gov. Code § 12926(d) (2007).

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[1] Even the Association of American Law Schools ("AALS"), to which Hastings belongs, provides a religious exemption. AALS Bylaw 6-3(a) and Executive Committee Regulation 6-3.1 prohibit schools from discriminating on the basis of sexual orientation with respect to faculty and students, but AALS states these provisions "*should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school.*" Association of American Law Schools Executive Committee, *Interpretive Principles to*

B. Hastings' application of the Nondiscrimination Policy to CLS significantly burdens its expressive association rights

1. *O'Brien* is inapplicable in cases where a nondiscrimination rule is applied to interfere with an association's expression.

Hastings urges this Court to abandon the strict scrutiny standard applied to expressive associations by the Supreme Court in *Dale,* 530 U.S. at 659, and *Hurley,* 515 U.S. at 572-73, for the lesser *O'Brien* standard that applies to conduct. The Supreme Court in *Dale,* however, declared "*O'Brien* is inapplicable" in cases where expressive associational rights are "directly and immediately affect[ed]." *Dale,* 530 U.S. at 659. *See also Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("Where pure expression is involved, antidiscrimination law steers into the territory of the First Amendment.") (internal quotations and citations omitted).

Instead, when government attempts to use a nondiscrimination policy to regulate an association, the Supreme Court first determines

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Guide Religiously-Affiliated Member Schools as They Implement Bylaw 6-3 (a) and Executive Committee Regulation 6-3.1, Association of American Law Schools Handbook (Aug. 5, 1993), *available at* http://www.aals.org/about_handbook_sgp_rel.php.

whether the policy's application "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale,* 530 U.S. at 648. In *Dale,* for example, the Court observed that public accommodation laws "do not, as a general matter, violate the First or Fourteenth Amendments," *id* at 658, but nonetheless applied *strict scrutiny* because the law impaired the ability of the Scouts "to express those views, and only those views, that it intends to express." *Id.* at 648.

Again, in *Hurley,* 515 U.S. at 572-73, the Court noted that a state public accommodations law "does not, on its face, target speech," but nonetheless applied strict scrutiny because the law forced an organization "to alter the expressive content of their parade." The Court held that a homosexual group could be "refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court observed that "[o]n its face, the Minnesota Act does not aim at the suppression of speech," but nonetheless proceeded to apply strict scrutiny to analyze the effect of the Act on the Jaycees' expression. *Id.*

at 623. The Court held that the right of association could only be overcome by "*regulations adopted to serve compelling state interests.*" *Id.* (emphasis added). *See also Board of Dir. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (noting "on its face the Unruh Act . . . makes no distinctions on the basis of the organization's viewpoint," but examining effect of Act on Club's expression and applying strict scrutiny). The Court expressly noted that teaching and activities "intended to develop good morals, reverence, . . . and a desire for self-improvement," such as those of CLS, are expressive. *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring).

In each case, the fact that the laws in question were nondiscrimination rules was not determinative for the Supreme Court. The Court, while observing that these rules do not *necessarily* target expression, nonetheless applied strict scrutiny in each case because the *application* of the laws was likely to affect an association's expression.

Rumsfeld v. Forum for Academic and Institutional Rights, __ U.S. __, 126 S. Ct. 1297 (2006) ("*FAIR*"), supports this same analysis. Despite concluding that the Solomon Amendment did not on its face regulate law schools' speech, *id.* at 1307-08, the Court nevertheless

examined whether the "law schools' ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them." *Id.* at 1312.

The Court specifically distinguished a case like this one where a nondiscrimination policy is used to interfere with the leadership and membership decisions of an expressive association:

> To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. *Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in* Dale, *the Solomon Amendment does not force a law school "to accept members it does not desire."*

Id. at 1312, *quoting Dale,* 530 U.S. at 648 (emphasis added).

As *FAIR* explains, this is a case of "outsiders . . . becom[ing] members of [CLS's] . . . expressive association." *Id.* CLS takes no issue with "interacting" with students who disagree with its religious beliefs. All students are welcome to attend and participate in the group's meetings and activities, including prayer. ER at 344. CLS's concern is

opening its leadership and voting membership to students who disagree with its religious beliefs. This "directly and immediately affects associational rights." *Dale,* 530 U.S. at 659. *See also Walker,* 453 F.3d at 863 ("We have no difficulty concluding that SIU's application of its nondiscrimination policies in this way burdens CLS's ability to express its ideas.").

2. Hastings' application of the Policy to CLS directly and immediately affects its expression.

Despite a host of factual concessions, Hastings and its *amici* remarkably claim CLS's expressive association rights are not burdened. Hastings concedes that CLS is an expressive association. HB at 48. Hastings concedes that CLS gladly welcomes all students, including homosexual students and non-Christian students, to attend and participate in its meetings and activities, including prayer. HB at 10-11; ER at 347, 452. Hastings concedes that only CLS leaders lead the group's Bible studies. HB at 10-11 & n.11; ER at 347. Hastings concedes that CLS officers speak for the group. HB at 11. Hastings concedes that requiring its members and officers to sign the Statement of Faith is CLS's sole "procedure for ensuring that its members or

officers are not gay[2] or non-Christian or engaging in conduct it views as inconsistent with that Statement." HB at 11; ER 457-458. Hastings concedes that only a handful of students have signed the Statement of Faith to qualify as voting members or leaders of CLS. HB at 10; ER at 346. Hastings concedes that in 2004 CLS "officers' decision to adopt the new bylaws and affiliate with CLS-National caused a number of HCF members to cease attending and one officer to resign." HB at 9; ER at 346, 528-529.

Additionally, under CLS's constitution, only voting members are eligible to elect and remove leaders, stand for leadership positions themselves, or amend the group's constitution. ER at 344, 395-399, 541-543. To be a voting member, a student must affirm his or her commitment to the group's foundational principles by signing CLS's Statement of Faith. ER at 344, 395-399, 541-543. Voting members also represent the group at the Student Organizations Fair, where

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[2] CLS does not exclude anyone from leadership or voting membership because of their sexual orientation or religious background. Students are only denied these positions if they do not share the group's religious *beliefs* or engage in *conduct* inconsistent with those beliefs. *See* discussion *infra* Part I.B.3.b.

recognized student organizations recruit new members from the first year class. ER at 339, 569-570.

Thus, the students who *lead the group* and *elect the leaders* must be able to affirm CLS's Statement of Faith, including the belief that extramarital sexual conduct is immoral. ER at 344, 395-399, 541-543. The viewpoint that sexual conduct is proper only within the bounds of a marriage relationship is one of numerous traditional Christian viewpoints that CLS holds and expresses. ER at 334; *see also Walker*, 453 F.3d at 863 ("One of its beliefs is that sexual conduct outside of a traditional marriage is immoral."). Officers are called upon to "exemplify the highest standards of morality as set forth in Scripture." ER at 396.

To gain recognition from Hastings, however, CLS must not simply allow anyone to attend or participate in its meetings; CLS must actually affirm in writing its willingness to give control of the group to persons who disagree with its religious beliefs. It must agree that it will allow persons who disagree with its core religious values to teach its Bible studies, to elect and remove its officers, to amend its constitution, to act as its representatives to the campus community, to invite guest

speakers, and to recruit new members at the Student Organizations Fair. ER at 344, 395-399, 541-543.

As a group with only a few members, CLS is required by Hastings to accept as a condition of recognition the real possibility that it will be taken over by those who disagree with its Statement of Faith. ER at 349. Only a handful of students who oppose any of CLS's religious views—including but certainly not limited to its views on sexual conduct—could elect a slate of officers who deny the divinity of Jesus Christ, reject the Bible as divinely inspired, or depart from CLS's traditional Christian viewpoints on any of a number of current social issues.[3] *See Hsu,* 85 F.3d at 861; *cf.* Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 Harv. L. Rev. 2882, 2885 n.20 (June 2005)

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[3] Hastings and Outlaw place great emphasis on the fact that homosexual students participated in previous Christian fellowships but then insist that no homosexual students wish to become voting members or leaders of CLS at present or in the future. Obviously, they cannot support such a claim, and the past directly contradicts it. ER at 342-343; *see also* Outlaw's Brief ("OB") at 1-2 ("Outlaw intervened in this action to protect the interests of its members and of other lesbian, gay, and bisexual students who wish to have an equal opportunity to become members of any registered student organization").

(describing how members of the College Republicans at the University of Nebraska hijacked the Young Democrats' election process).

Forcing CLS to open its leadership and voting membership to students who disagree with its religious beliefs "directly and immediately affects associational rights," and is therefore subject to strict scrutiny. *Dale,* 530 U.S. at 659. In an identical case, the Seventh Circuit had "no difficulty concluding that SIU's application of its nondiscrimination policies in this way burdens CLS's ability to express its ideas." *Walker,* 453 F.3d at 863. The Court applied strict scrutiny to require the university to grant CLS official recognition. *Id.* at 861.

Significantly, CLS is *not* arguing that Hastings cannot prohibit *any* student group from discriminating on the basis of religion. The College can undoubtedly tell *non-religious* groups, for example, the Hastings Outdoor Club or the Hastings Soccer Club, not to consider religion in selecting leaders and members. Such a prohibition has no effect whatsoever on *non-religious* groups' expression. But in the case of a religious group, like CLS, the government's denial of its right to select leaders and members on the basis of its religious beliefs undoubtedly affects its expression. As Justice Brennan explained,

"[d]etermining that certain activities are in furtherance of an organization's religious mission, and that *only those committed to that mission should conduct them*, is thus a means by which a religious community defines itself." *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).

In addition to the significant burden imposed on CLS's expression by application of the Policy, there are the "practical realities" of being denied recognition, which Hastings and its *amici* downplay. *Healy v. James*, 408 U.S. 169, 183 (1972). CLS is the only unrecognized student organization at Hastings. ER at 348. CLS may meet on campus only informally. ER at 339. It cannot meet as an officially recognized student organization. ER at 339. Informal meetings are not a constitutionally adequate substitute for recognition. *Widmar v. Vincent,* 454 U.S. 263, 288 (1981) (White, J., dissenting) (requiring official recognition of the religious group despite the fact that group could have continued to meet a block away from campus); *Board of Educ. v. Mergens*, 496 U.S. 226, 247 (1990) (requiring official recognition for the Christian club despite school officials' protests that

group could meet informally); *see also Prince v. Jacoby,* 303 F.3d 1074, 1082, 1086 (9th Cir. 2002) (same).

CLS is frozen out of virtually every channel of communication offered by Hastings to its student organizations, including *all* effective channels. It is prohibited from recruiting first year students at the Student Organizations Fair. ER at 339. *Healy*, 408 U.S. at 181 ("If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communication with these students."); *Mergens*, 496 U.S. at 247 (statutory equal access included access to student fair). It cannot advertise its meetings and activities through the student government's mass emails, the law school mail system, or the web events calendar. ER at 339, 348. It has been removed from the College's official lists of student organizations, including the College website, admission publications, and orientation packets. ER at 339.

CLS is denied eligibility for student activity fee funding and travel funds. ER at 338, 345-346. *Rosenberger v. Rector of the Univ. of Va.,* 515 U.S. 819, 837 (1995) (holding that denial of student activity fee funding to a religious student organization violated the group's free

speech rights); *Prince,* 303 F.3d at 1086 (holding that denial of funds to religious student organization violated statutory right of equal access). Indeed, $250.00 was promised by Hastings and subsequently revoked. ER at 344-345, 413.

Lack of recognition is itself a burden. The Supreme Court in *Healy,* 408 U.S. at 182-83, held that the denial of the "administrative seal of official college respectability" burdened SDS's associational rights. And in *Gay Alliance of Students v. Matthews,* 544 F.2d 162, 165 (4th Cir. 1976), the Fourth Circuit rejected Virginia Commonwealth University's "argument that the members of GAS have suffered no infringement of their associational rights because all that has been withheld is VCU's official seal of approval."

Hastings audaciously insists that it need not restore to CLS the host of benefits it has taken away, but rather demands that CLS be grateful for what it did not take away—informal meetings, chalkboards, and bulletin boards.[4] As already discussed, Supreme Court precedent

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[4] Hastings denied CLS access to chalkboards at the beginning of the Fall 2006 semester, and the informal access to meeting space and bulletin boards are only that which is available to any off-campus organization, such as a local community group or business. ER at 339, 348, 369-370.

requires restitution, not gratitude. Moreover, Hastings insists it "could properly exclude a student organization from *all of the benefits* that flow from participation in this limited public forum within the law school." ER at 642 (emphasis added). Only this litigation constrains Hastings from a complete denial of access.

3. The Supreme Court requires judicial deference to a group's identification of its message and its determination of what would impair that message.

Hastings urges three claims, all contrary to *Dale* and *Hurley:* (1) CLS has no message concerning sexuality; (2) forcing CLS to open its leadership and voting membership to students who reject its religious beliefs would not affect its expression; and (3) this Court should substitute Hastings' own judgment regarding CLS's message and what would impair that message for that of CLS. *See, e.g.,* HB at 54-55.

a. *Dale* and *Hurley* require deference to CLS's understanding of the harm to its message.

The Supreme Court in *Dale* directed federal courts to both "give deference to an association's assertions regarding the nature of its expression," and "give deference to an association's view of what would impair its expression." 530 U.S. at 653. The Court rejected New

Jersey's attempt to force the Scouts to open leadership to homosexual persons even though the Scouts did not explicitly proclaim a message of disapproval of homosexuality. *Cf. Dale v. Boy Scouts of America,* 734 A.2d 1196, 1203, 1234-35, 1240 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (examples of Scouts' lack of overt message on homosexuality).

"[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley,* 515 U.S. at 569. "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection." *Dale,* 530 U.S. at 656. "If the Boy Scouts wish[] Scout leaders to avoid questions of sexuality and teach only by example," concluded the Court, "this fact does not negate the sincerity of its belief ." *Id.* at 655.

b. CLS has a more explicit message on sexuality than the Scouts in *Dale* and chooses its leaders based on belief and conduct not status.

The National CLS Board adopted a resolution in March 2004 reaffirming CLS's adherence to traditional Christian viewpoints regarding "Biblical standards for sexual morality." ER at 334. CLS declares that "unrepentant participation in or advocacy of a sexually

immoral lifestyle is inconsistent with an affirmation of the Statement of Faith." ER at 334. Members that participate in or advocate extramarital sexual conduct may be denied continued membership. ER at 248-249, 334.

As CLS has consistently explained, its leadership and voting membership policies are based on belief and conduct, not status. In its initial demand letter to Hastings, CLS explained:

> CLS interprets its Statement of Faith to require that officers and members adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to serve as a CLS chapter officer or member. A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from serving as an officer or member.

ER at 404.

Hastings thus took issue with CLS's qualifications for officers and voting members even though they were based on belief and conduct rather than status. In response to interrogatories, Hastings explained that CLS's policy barring a person from leadership or voting membership "who engages in homosexual *conduct* or adheres to a

viewpoint that homosexual conduct is not sinful . . . violate[s] the 'sexual orientation' provision of the Policy on Nondiscrimination." ER at 260 (emphasis added).

Hastings and Outlaw are simply wrong that CLS seeks to maintain a blanket exclusion of all gay, lesbian, and non-Christian students. HB at 50-52.[5] Students may be denied leadership or voting membership because they do not share the group's religious beliefs as demonstrated by actively engaging in conduct inconsistent with those beliefs, not because they have a particular sexual orientation or religious background.

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[5] CLS welcomes attendance at its meetings and activities by all students regardless of their religious viewpoints on any issue, including extramarital sexual conduct. CLS does not believe that the viewpoints of persons attending its activities affect its expression. CLS believes that the viewpoints of leaders and voting members not only affect its message, they direct and control it. Hastings is simply wrong when it characterizes as a "concession" CLS's counsel's statement that participation in its activities by a homosexual person did not affect its message. HB at 6-7 & n.7, 55. CLS's position has been consistent: participation would not affect the message; voting membership and leadership by persons who disagree with CLS's religious viewpoints would affect its message. Nor did CLS state to the contrary in its brief as Hastings claims. HB at 7 n.7. A straightforward reading of CLS's Brief at page 31 reflects the same distinction between participation and voting membership/leadership.

In this sense, what CLS does is different from the Boy Scouts' policy in *Dale*. Unlike the Scouts, "CLS's membership policies are . . . based on belief and behavior rather than status."[6] *Walker,* 453 F.3d at 860. While the Scouts exclude members "solely on the basis of their sexual orientation," CLS does not. *Dale,* 530 U.S. at 650. Like the parade organizers in *Hurley,* CLS "does not wish to exclude . . . members because of their sexual orientations." 530 U.S. at 653. CLS simply requires its officers and voting members to affirm its beliefs regarding extramarital sexual conduct and act in accordance with those beliefs. ER at 334.

CLS has expressed this same position for the past fifteen years whenever a public university has tried to de-recognize a chapter due to its leadership and membership criteria. *Cf. Dale,* 530 U.S. at 652 ("The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation."). *See, e.g., Walker,* 453

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[6] For this reason, the Scouts are excluded from Connecticut's state employee charitable campaign, *Boy Scouts of America v. Wyman,* 335 F.3d 80, 85 (2d Cir. 2003), but CLS is not. Directory of Charitable Organizations, Connecticut State Employees' Campaign for Charitable Giving (2006), *available at* http://www.csec.ct.gov/directory/neighbor.asp.

F.3d 853 (CLS at Southern Illinois University); Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (Fall 1994) (CLS at University of Illinois); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 668-72 (Spring 1996) (CLS at University of Minnesota); Elizabeth Conlisk, *University Revises Guidelines for Student Groups*, The Ohio State University News and Information (Oct. 1, 2004), *available at* http://www.osu.edu/news/lvl2_news_story.php?id=927 (CLS at Ohio State University).

c. Accepting as leaders and voting members persons who reject CLS's religious beliefs would affect its expression.

The CLS chapter founded at Hastings six months after the National CLS Board resolution reflects the CLS student leaders' desire to affirm this traditional Christian viewpoint. ER at 343, 382-387, 395-399. Hastings and Outlaw place heavy reliance on the existence of earlier Christian groups. As Hastings admits, however, the CLS

chapter first formally affiliated with National CLS in Summer 2004. HB at 7. Previous Christian fellowships were not officially affiliated with National CLS. ER at 237, 250. Their prior practices are irrelevant to the constitutional right of the official CLS affiliate, established in 2004, to select its officers and voting members in accordance with CLS's religious viewpoint.[7]

Critically, Hastings itself acknowledges the significance of the CLS chapter's decision to affiliate formally with CLS when it writes: "*The officers' decision to adopt the new bylaws and affiliate with CLS-National caused a number of HCF members to cease attending and one officer to resign.*" HB at 9 (emphasis added). In other words, whatever the relationship between the CLS chapter and previous Christian groups at Hastings, the decision to formally affiliate with National CLS constituted a change in the group's expressive identity significant enough to cause some students to stop attending and one officer to resign. ER at 346.

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[7] Counsel readily acknowledges that its October 2004 demand letter erroneously stated that there was a prior CLS affiliate at Hastings. ER at 404. That erroneous statement was corrected early in the proceedings below and should not be perpetuated at this stage of the proceedings. *Compare* HB at 5 n.5, *with* ER at 237, 250.

Indeed, with that sentence, Hastings captures precisely why CLS has a constitutional right to select its officers and voting members in accordance with its religious viewpoints. Leaders affect the message of an expressive association. The choices made by leaders on behalf of an expressive association determine which students are likely to choose to associate with the group and how the group is viewed by other students. *Choice of leaders matters because leaders' choices matter.*

Thus, the facts belie Hastings' claim that prohibiting a group from selecting only leaders who share its beliefs does not affect CLS's expressive message. CLS's leaders made a single decision that directly affected the group's message as perceived by its leaders, students who attended its meetings, and the general student body.

To gain recognition, CLS must allow persons who reject its core religious viewpoints to teach its Bible studies, to elect and remove its officers, to amend its constitution, to act as its representatives to the campus community, to invite guest speakers, and to recruit new members at the Student Organizations Fair. ER at 344, 395-99, 541-43. As the Seventh Circuit found, "enforcement of its antidiscrimination policy upon penalty of derecognition can only be understood as intended

to induce CLS to alter its membership standards . . . in order to maintain recognition." *Walker,* 453 F.3d at 863.

Finally, despite common sense and its own acknowledgment that a leader and some attendees quit when CLS formally affiliated in 2004, Hastings coolly asserts that CLS has provided "no evidence" that the "Policy has had the slightest adverse effect on CLS's . . . message." HB at 49. Obviously, CLS's decision to forgo recognition rather than accept leaders and voting members who reject its religious viewpoints necessarily meant no further evidence was developed. CLS, however, need not comply with the Policy in order to challenge its unconstitutionality. The Scouts were not compelled to retain Mr. Dale as scoutmaster to demonstrate the burden the antidiscrimination law imposed on their expressive association rights. *Dale,* 530 U.S. at 653-54.

4. *Wyman* cannot be used to escape the burden imposed on CLS's expressive association.

Hastings' reliance on *Wyman,* 335 F.3d 80, is misguided. The underlying premise of *Wyman*—that an indirect burden on associational rights is permissible—runs contrary to well-established Supreme Court

precedent. In *Dale*, the Court explained that interference with the right of expressive association may "take many forms," including so-called "indirect interference." 530 U.S. at 640; *see also Roberts,* 468 U.S. at 622 ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms."). "It is clear from previous decisions that associational rights are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference, and that these rights can be abridged even by government actions that do not directly restrict individuals' ability to associate freely." *Lyng v. International Union,* 485 U.S. 360, 367 n.5 (1988) (internal citations and quotations omitted).

In *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), for example, the Court held that for Alabama to require the NAACP to disclose its membership lists was an unconstitutional burden on association and applied strict scrutiny even though the state had "*taken no direct action . . . to restrict the right of members to associate freely.*" *Id.* at 461 (emphasis added); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982) (same). Likewise, in *Healy,* 408 U.S. 169, the Court held that the denial of official college

recognition violated SDS's associational rights and applied strict scrutiny even though the "*administration ha[d] taken no direct action to restrict the rights of petitioners to associate freely*." *Id.* at 183 (emphasis added).

Referring to these cases, the Supreme Court in *FAIR,* 126 S. Ct. at 1312, explained that "[a]lthough these laws did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message."

The Supreme Court has specifically held that "to impose penalties or withhold benefits from individuals" because of their exercise of associational rights violates the right of expressive association. *Roberts,* 468 U.S. at 622; *see also Clingman v. Beaver,* 544 U.S. 581, 586-87 (2005) (observing that it "impose[s] severe burdens on associational rights . . . to disqualify the [Libertarian Party] from public benefits or privileges"); *FAIR,* 126 S. Ct. at 1312 (observing that the "freedom of expressive association protects" against laws that "impose penalties or withhold benefits based on membership in a disfavored group").

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), for example, the Supreme Court held that a university could *not* deny persons the benefit of employment because of their association with "'subversive' organizations." *Id.* at 595. The Court expressly rejected the premise "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Id.* at 605. *See also United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit") (internal citations and quotations omitted).

It cannot be that Hastings is barred from denying someone a professorship (a position directly identified with the College) based on the person's exercise of the right of association, but may deny recognition to a student organization (groups whose sponsorship is specifically disclaimed by the College) because of the exercise of the same right of association. *Dale* and *Hurley* clearly establish that Hastings cannot directly force CLS to accept officers or voting members that disagree with the group's religious beliefs. Hastings cannot

accomplish the same result by simply conditioning recognition on agreement to the Policy. "This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Accordingly, *Wyman* provides no escape from the burden on CLS's expressive association.

Moreover, as explained in the opening brief, *Wyman* is distinguishable on a number of grounds. *First, Wyman* improperly conflates forum analysis and expressive association. The right of expressive association is not contingent on the nature of the forum. *See Walker*, 453 F.3d at 861-64.

Second, the purpose of charitable campaigns is to "*lessen[]* the amount of expressive activity," *Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 805 (1985) (emphasis in original), whereas Hastings' forum is designed to promote student expression. ER at 347; *Widmar,* 454 U.S at 272 n.10 ("It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas."); *Rosenberger,* 515 U.S. at 834 (purpose of University's forum was to "encourage a diversity of views from private speakers"); *Board of Regents of Univ. of*

Wisc. Sys. v. Southworth, 529 U.S. 217, 299 (2000) (purpose of University's student activity fee forum was "facilitating the free and open exchange of ideas by, and among, its students").

Third, Wyman rested on the dubious proposition that state employees donating their own money by their own free choice to charities is a "government subsidy." 335 F3d at 91-92. There are no government subsidies involved in this case. The funds at issue—student activity fees—are paid by students and administered by students. ER at 338. As the Supreme Court held in *Rosenberger,* "the University does not itself speak or subsidize transmittal of a message it favors" through a student activity fee.[8] 515 U.S. at 834. *See also Southworth,* 529 U.S. at 229 (holding that student activity fee "does not raise the issue of the government's right, or, to be more specific, the

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[8] *Amicus* Americans United argues that *Rosenberger* is distinguishable from this case because here student organizations are simply handed money to divert to whatever use they want. Americans United Brief ("AU") at 19-20. This is contrary to common sense and the record. No one would establish a system of simply giving students money to use any way they desire. Moreover, student groups must submit budgets to student government specifically enumerating what items they are seeking funding for, and funds are then paid out to groups on a reimbursement basis after they submit receipts documenting their purchases. ER at 338, 375-377. There is no place in the process where funds could be diverted to other uses.

state-controlled University's right, to use its own funds to advance a particular message").

Ultimately though, *Wyman* wrongly ignores consistent Supreme Court precedent holding that indirect burdens on expressive association trigger strict scrutiny. Besides the court below, all other federal courts have ignored *Wyman* in holding that access to a school or university forum cannot be conditioned on a group forfeiting its right to require that leaders and members share the group's beliefs and viewpoints. The Seventh Circuit in *Walker*, including the dissent, disregarded *Wyman* altogether, despite the case being argued in briefing. The *Wyman* court noted *Hsu* and gave no indication its decision affected the right of religious student groups to select their leaders. 335 F.3d at 89 n.3. *See also Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (conditioning after-school use of school facilities on agreement to nondiscrimination policy subject to strict scrutiny); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ.*, 443 F. Supp. 2d 374 (E.D.N.Y. 2006) (conditioning recognition of Jewish fraternity on agreement to university nondiscrimination policy subject to strict scrutiny).

II. Hastings' Denial of Recognition Violates CLS's Freedom of Speech.

A. Hastings' prohibition on religious leadership and membership criteria is not neutral as to religious groups.

CLS is the only student organization denied recognition by Hastings. The sole basis for denial is Hastings' insistence that CLS agree to allow as leaders and voting members persons who do not agree with its religious viewpoints. In response to interrogatories, Hastings admitted that its denial was based on CLS's policies barring a person from leadership or voting membership who "adheres to a *viewpoint* that homosexual conduct is not sinful." ER at 260 (emphasis added). Hastings' exclusion of CLS has always been directed at its viewpoint.

Hastings maintains its denial of recognition is neutral because all groups must agree not to require their leaders and voting members to share the religious viewpoints of the group. Of course, this is an easy promise for nonreligious groups. But to claim that such a condition is neutral when applied to a religious group is formalism that ignores reality and Supreme Court precedent in *Widmar,* 454 U.S. 263, *Rosenberger,* 515 U.S. 819, and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

In *Widmar,* 454 U.S. at 265, the university conditioned use of school facilities on student groups refraining from "religious worship or religious teaching." Nonreligious student groups could easily comply with this condition and use university facilities; however, the religious group could not. The university, therefore, withdrew the religious group's previously granted access to meeting space.

Even though the condition applied to all university groups, the Supreme Court ruled that it was not content neutral and applied strict scrutiny in holding that the condition violated the religious group's expressive association and freedom of speech. *Id.* at 269-70. Like the university in *Widmar,* Hastings applies to all groups a condition that matters only to religious groups. A prohibition on religious criteria for officer selection is no more neutral than a prohibition on religious instruction or worship.

Similarly, in *Rosenberger*, 515 U.S. at 830-31, the university argued its policy was viewpoint neutral because it was not denying funding to a particular religious perspective but denying all student organizations funding for religious content. The Supreme Court disagreed:

> It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Id. at 831-32. Thus, Hastings' assurance that the condition is neutral because neither religious groups nor atheistic groups may use religious criteria for selecting officers misses the point. HB at 29-30.

Finally, in *Lamb's Chapel,* 508 U.S. at 393, school officials argued they were not discriminating against a church that sought access to show a religious film because all community groups were banned from speaking on religious subject matter. The Supreme Court again dismissed the argument that this was neutral:

> That all religions and all uses for religious purposes are treated alike . . . , however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

Id.

Indeed, if Hastings prevails, equal access for most religious groups would cease because a government could simply condition access to school facilities on the simple requirement that religious groups, along

with all other community groups, affirm that they do not "discriminate" on the basis of religion. *Hsu,* 85 F.3d at 872-73 (holding that conditioning recognition of religious group on agreement to religion nondiscrimination policy was a denial of "equal access").

By recognizing student organizations, Hastings does not sponsor their messages or viewpoints. The Supreme Court has repeatedly held that recognition of student organizations does not render a university responsible for the organizations' speech. The Court in *Widmar* held that "an open forum in a public university does not confer any imprimatur of state approval on" student organizations. 454 U.S. at 274. *See also id.* at 272 n.10 ("[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there."). In *Rosenberger,* the Court held that even in funding student organizations, "the University itself does not speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." 515 U.S. at 834. Indeed, the Court's holding that recognition is not sponsorship is necessary to avoid Establishment Clause problems. *Widmar,* 454 U.S. at 274; *Rosenberger,* 515 U.S. at 841-42.

Significantly, Hastings specifically disclaims responsibility for student organizations. ER at 372, 378 ("Hastings does not sponsor student organizations and therefore does not accept liability for activities of student organizations."); ER at 377 ("Registration is subject to the condition and provision that Hastings College of the Law and the University of California neither sponsor nor endorse any such organization."); ER at 378 (requiring student organizations to "inform members and those doing business with the organization that it is not College-sponsored and that the College assumes no responsibility for its activities"). *Amicus* Regents of the University of California likewise disclaims sponsorship of student groups' speech. The Regents of the University of California, *University Policies Applying to Campus Activities, Organizations, and Students* § 70.70 (Jul. 28, 2004), attached as Exhibit A to Regents' Brief (requiring student group to "avoid any . . . implication that it is sponsored, endorsed or favored by the University"). Accordingly, recognition does not impute to Hastings responsibility for the leadership and membership decisions of student organizations.[9]

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[9] Thus, Hastings' and Outlaw's implication that recognizing CLS would violate state laws that preclude the College from discriminating on the basis of religion and sexual orientation is simply incorrect. HB

B. Hastings' Policy is viewpoint discriminatory as applied to CLS because other groups may select officers that share their viewpoints.

Hastings seeks to distinguish *Walker* on the basis that the Seventh Circuit only found viewpoint discrimination in that case because "other student groups discriminate[d] in their membership requirements on grounds that are prohibited by the policy." HB at 32 n.20, *quoting Walker,* 453 F.3d at 866. But this case is no different. Hastings claims the Nondiscrimination Policy requires "*all* student groups to allow *all* students to become members and officers." HB at 31 (emphasis in original).

Nonetheless, Hastings, like SIU, recognizes student organizations that require officers and members to agree with their organizations' purposes. Hastings recognizes Outlaw despite its constitution's provision that officers may be removed for "working against the spirit of the organization's goals and objectives." ER at 325. The Hastings Chapter of The Association of Trial Lawyers of America is recognized even though it requires members to "adhere to the objectives of the

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at 57 & n.37; OB at 15 n.9. Moreover, none of these state laws prohibit a religious organization, like CLS, from taking religious beliefs into account.

Student Chapter as well as the mission of ATLA." ER at 301. Hastings Democratic Caucus is recognized, yet students may only be members "so long as they do not exhibit a consistent disregard and lack of respect for the objectives of the organization." ER at 296. These groups require their members and officers to adhere to specific viewpoints (*e.g.* positive views of homosexual conduct, trial attorneys, and Democratic political objectives), yet they are recognized by the College.

Hastings contends that these statements by student organizations requiring members and officers to be committed to their organization's ideals are "informational only." HB at 4. Of course the statements are "informational." They inform students interested in joining the group that they are required to agree with its mission and purposes. There is no reason to think student groups mean anything other than what they say. Nor is there anything unusual about a student organization wanting its members and officers to support its cause.

While Hastings argues these groups agreed to the Policy, they would no doubt be surprised to learn the Policy requires them to offer the privileges of voting membership and leadership to students opposed

to the groups' viewpoints, beliefs, and objectives. The language of the Policy says no such thing.

Regardless of how Hastings interprets its Policy, Hastings is caught in a web of viewpoint discrimination. As applied, the Policy allows secular groups to select officers holding certain beliefs for secular reasons but prohibits religious groups from selecting officers holding the same beliefs for religious reasons. An Orthodox Jewish group is forbidden from requiring officers and members to abstain from eating pork on religious grounds, but a vegetarian club can require its officers and members to refrain from eating meat. A Quaker fellowship is prohibited from requiring officers and members to be pacifists for religious reasons, but an anti-war group can require officers and members to oppose war for political reasons. If, however, as Hastings claims, no group can require its officers or voting members to agree with the group's core beliefs, then Hastings violates the expressive association rights of *every* student group. *See* discussion *supra* Part I.A. Violating the constitutional rights of every student organization does not make the Policy constitutional.

C. The rights of students who may object to CLS receiving funds are protected not by exclusion of CLS but by a genuinely viewpoint neutral disbursement of funds.

Hastings argues that if CLS prevails in this case, students will be forced to fund groups with which they disagree. HB at 35 n.23. The Supreme Court squarely addressed this issue in *Southworth,* 529 U.S. 217. There, students challenged the use of their student activity fees to fund student groups with views and purposes they found "offensive to their personal beliefs." *Id.* at 227. The Court rejected the challenge, holding that so long as the university allocates funds in a viewpoint neutral manner it "is in general sufficient to protect the rights of the objecting students." *Id.* at 230; *see also Rounds v. Oregon State Bd. of Higher Educ.,* 166 F.3d 1032 (9th Cir. 1999) (same).

Here, the allocation of student activity fees is viewpoint neutral *only* if CLS is included. Outlaw can receive funding to advocate for gay rights and require officers to support this purpose. ER at 325. Students Raising Consciousness may receive funding to educate the campus about the struggles facing homosexual communities and require its members to support this objective. ER at 278. But CLS cannot receive funding to form a group to affirm its religious viewpoint

regarding homosexual conduct. "[P]refer[ring] some viewpoints to others" is the essence of viewpoint discrimination. *Southworth,* 529 U.S. at 233. Ultimately, the exclusion of CLS's viewpoint means CLS's officers and voting members are forced to pay for a forum from which they are excluded. *Id.* at 229 ("students may insist upon certain safeguards with respect to the expressive activities which they are required to support").

D. It is unreasonable for Hastings to prohibit religious groups from selecting leaders and voting members on the basis of religion.

"The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Rosenberger*, 515 U.S. at 829, *quoting Cornelius,* 473 U.S. at 806. To satisfy the reasonableness requirement "requires more of a showing than does the traditional rational basis test; *i.e.*, it is not the same as establishing that the regulation is rationally related to a legitimate governmental objective, as might be the case for the typical exercise of the government's police power." *Tucker v. California Dept. of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996). Hastings must point to "evidence that

the restriction reasonably fulfills a legitimate need." *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 967 (9th Cir. 2002).

Hastings stipulated in the court below that the purpose of its registration system for student organizations is "to promote a diversity of viewpoints . . . including viewpoints on religion and human sexuality." ER at 337. Hastings insists that student organizations are free to promote whatever viewpoints they wish. HB at 22, 33-34. Hastings, however, will not allow a religious group to require that its voting members and leaders share its religious viewpoints. Such a prohibition is unreasonable. *Association of Faith-Based Orgs. v. Bablitch,* 454 F. Supp. 2d 812, 816-18 (W.D. Wis. 2006) (holding it was unreasonable to exclude religious charities from state employee charitable campaign due to their religious hiring policies).

Hastings' mantra-like invocation of the language of *Healy,* 408 U.S. at 188-89, and *Widmar,* 454 U.S. at 277, regarding "reasonable campus rules" cannot save the College. Those cases were discussing *constitutionally valid* time, place, manner, regulations, *Healy,* 408 U.S. at 192-94; *Widmar,* 454 U.S. at 277, not rules directly and immediately affecting associational rights, as the Policy does in this case. *Pi*

Lambda Phi Fraternity v. University of Pittsburgh, 229 F.3d 435, 445 (3d Cir. 2000) (holding that a "reasonable campus rule" is only "where a university acts out of *non-ideological* motives to directly restrict a group's *non-expressive* activity") (emphasis added). *Healy*, 408 U.S. at 184, itself said universities have a "heavy burden" to justify the denial of recognition.

III. Hastings' Application of the Policy to CLS Burdens Its Free Exercise of Religion.

The Nondiscrimination Policy targets religion whether the Policy is viewed under Hastings' claimed interpretation or as actually written. If taken as written, the Nondiscrimination Policy is substantially underinclusive and, therefore, suffers from the same lack of general applicability. For example, it prohibits an Orthodox Jewish group from requiring members and officers to adhere to a kosher diet for religious reasons, but permits a vegetarian club to tell its members and officers they must not eat meat. Hastings pursues its interest of prohibiting discrimination "only against conduct motivated by religious belief." *Church of the Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1993). "The proffered objectives are not pursued with respect to

analogous non-religious conduct," and this "suffices to establish the invalidity of the [Policy]." *Id.* at 546.

Hastings claims the Policy requires "*all* student groups to allow *all* students to become members and officers." HB at 31 (emphasis in original). Yet Hastings has granted exemptions to numerous student organizations allowing them to require that leaders and/or members support their organization's objectives. *See* discussion *supra* Part II.B. These exemptions render the Policy *not* generally applicable. *Rader v. Johnston,* 924 F. Supp. 1540, 1551-53 (D. Neb. 1996) (university's granting of exceptions from on-campus residency rule rendered rule not generally applicable); *Blackhawk v. Pennsylvania,* 381 F.3d 202, 209-10 (3d Cir. 2004) (Alito. J.) (exemptions from fee requirement caused Game Code to "fail[] the general applicability requirement").

This is true whether the exemptions are given by policy or by practice. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (because "the Borough ha[d] *tacitly or expressly granted exemptions* from [sign] ordinance's unyielding language for various secular and religious . . . purposes," the ordinance was not generally applicable) (emphasis added). Hastings exempts, at least by practice,

numerous student organizations from the Nondiscrimination Policy, such as Silenced Right and the Vietnamese American Law Society. ER at 282, 285. These groups may select officers and members who will support their organization's objectives. To provide exemptions for nonreligious groups while refusing exemptions for religious groups is religious discrimination triggering strict scrutiny under *Employment Div. v. Smith,* 494 U.S. 872, 884 (1990).

Smith, 494 U.S. at 882, also expressly preserved the application of strict scrutiny for "a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." Given that CLS has established more than a "fair probability" that Hastings has violated its expressive association and free speech rights, the application of the Nondiscrimination Policy to CLS also constitutes a hybrid rights violation requiring strict scrutiny under *Smith*. *Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir. 1999).

IV. Hastings Lacks a Compelling Interest in Prohibiting Religious Groups from Selecting Religious Leaders and Voting Members.

A. The alleged "educational purpose" of recognizing student organizations does not provide a compelling interest for excluding CLS.

Hastings and its *amici* claim that the registration system for student organizations is for "educational purposes" and, therefore, Hastings has an interest in excluding groups that do not promote that purpose. The Supreme Court in *Mergens,* 496 U.S. at 244-45, squarely rejected the idea that "[a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal."

Hastings stipulated that the purpose of its registration system is "to promote a diversity of viewpoints . . . including viewpoints on religion and human sexuality." ER at 337. This is consistent with the Supreme Court's holding that universities recognize student organizations "for the sole purpose of facilitating the free and open exchange of ideas by, and among, [their] students." *Southworth,* 529 U.S. at 229. Accordingly, in recognizing student organizations,

Hastings is *not* promoting its own educational message, but "encourag[ing] a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; *see also Keyishian*, 385 U.S. at 603 ("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.").

To be sure, fostering such a debate has "educational value," but the purpose is not to promote Hastings' educational agenda or message. "The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors." *Southworth*, 529 U.S. at 229.

The way Hastings promotes diversity and tolerance in such an environment is not to require "*all* student groups to allow *all* students to become members and officers." HB at 31. "[S]tate regulation of . . . membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard." *Roberts*, 468 U.S. at 635-36 (O'Connor, J., concurring). Rather, ensuring that students may

start their own clubs to promote their unique viewpoint is the means to encourage diversity.

B. Hastings' interest in nondiscrimination is not advanced by prohibiting CLS from selecting officers and members that share its religious beliefs.

No doubt Hastings has a general interest in prohibiting invidious discrimination. But contrary to the claims of *amici* ACLU that interest is not implicated in this case. "[D]etermining whether discrimination is invidious in a particular case depends on an understanding of the context that informs and characterizes that discrimination." *Hsu,* 85 F.3d at 869. Part of that understanding is *who* is doing the "discriminating."

There is a marked difference, for example, between the Hastings Soccer Club selecting leaders and members on the basis of religious belief and a religious group, like CLS, doing the same. The Hastings Soccer Club would be discriminating only out of animus, since religion has no relevance to its purpose or mission. Religious groups have a religious mission and desire officers and members who will support that mission. This is no different than the Soccer Club requiring its

members to have particular athletic abilities, which no one would suggest is invidious discrimination.

Federal and state anti-discrimination laws reflect this distinction. Title VII, 42 U.S.C. § 2000e-1(a), which forbids covered employers from discriminating on the basis of religion, explicitly permits religious organizations to take religion into account. California's Fair Employment and Housing Act, Cal. Gov. Code § 12926(d), exempts religious employers from the ban on employment discrimination entirely. The Unruh Act, Cal. Civ. Code § 51 (2007), is interpreted by the California Attorney General to exempt religious schools. 81 Cal. Op. Att'y Gen. 189 (1998). And a California Court of Appeals in *Hart v. Cult Awareness Network*, 16 Cal. Rptr. 2d 705 (Cal. App. 1993), refused to hold that the Unruh Act could be applied to religious organizations to prevent them from discriminating on the basis of religion. *Id.* at 711.

This Court also recognizes the "'ministerial exception' to Title VII . . . carved out from the statute based on the commands of the Free Exercise and Establishment Clauses of the First Amendment." *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 790 (9th Cir. 2005). The exception relieves religious employers from Title VII entirely. This

Court interprets the exception to apply equally to state nondiscrimination laws. *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999).

These exemptions are not grudgingly given, as Hastings and the ACLU seem to think. Rather they are recognition of the right of "religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991). *See also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) ("[t]he right to organize voluntary religious associations to assist in the expression and dissemination of . . . religious doctrine"). Indeed, the exemptions are constitutionally required to accommodate the religious exercise and expression of religious organizations.[10] *Amos*, 483 U.S. at 338 ("here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion"); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d

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[10] Contrary to claims of *amicus* Americans United, AU at 20-29, religious exemptions do not violate the Establishment Clause. *See, e.g., Amos,* 483 U.S. at 334-35; *Cutter v. Wilkinson,* 544 U.S. 709, 724-25 (2005). For this very reason, neither of the Appellees raised this argument in this Court or the court below. *United States v. Jackson,* 974 F.2d 104, 106 (9th Cir. 1992) ("Ordinarily, we will not address on appeal arguments not raised below.").

618, 625 (6th Cir. 2000) ("The exemptions reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention."); *Little*, 929 F.2d at 951 ("with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly").

C. Protecting CLS's expressive association will not trigger access for extremists or jeopardize antidiscrimination laws.

Hastings and its *amici* insist that if Hastings recognizes CLS, it will be forced to abrogate its Nondiscrimination Policy entirely, and the College will thereby lose the power to combat discrimination. This parade of horribles is nothing new. Government officials typically argue that recognition for a religious group will trigger access for extremist groups. Courts have uniformly rejected this argument. *See, e.g., Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514, 528 n.9 (3d Cir. 2004) (Alito, J.) ("there is no merit to Stafford's contention that if it distributes the literature of the Good News Club, it will have to distribute the literature of virulent racist groups"); *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501,

1516 n.5 (8th Cir. 1994) (rejecting dissent's claim that letting in religious group would open the door to hate groups).

Hastings' and the ACLU's claim that, if CLS prevails, the nation's antidiscrimination laws would be placed in serious jeopardy is desperate hyperbole. Numerous federal and state laws (like Title VII) protect the right of religious organizations to use religious criteria to select leaders and simultaneously protect against invidious discrimination. After *Dale* and *Hurley,* New Jersey's and Massachusetts' antidiscrimination laws continue to provide their citizens a vigorous defense against invidious discrimination. Invidious discrimination can be eliminated without the overzealous eradication of the First Amendment's protection of expressive association, speech, and religion.

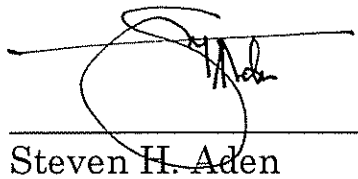
CONCLUSION

CLS respectfully requests that this Court reverse the district court's denial of its motion for summary judgment, its motion to alter or amend judgment, and the costs taxed against it; reverse the grant of summary judgment to Hastings and Hastings Outlaw; and enter an order directing the court below to grant CLS's motion for summary

judgment and motion to alter or amend judgment, with costs taxed to Appellees.

Dated: February 1, 2007.

Center for Law & Religious Freedom



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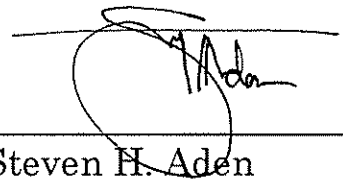
CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Appellant furnishes the following in compliance with F.R.A.P. 32(a)(7):

I hereby certify that, subject to the accompanying Unopposed Renewed Motion for Additional Words for Reply Brief, this brief conforms to the rules contained in F.R.A.P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 10,445 words.

Dated: February 1, 2007.

Center for Law & Religious Freedom



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PROOF OF SERVICE

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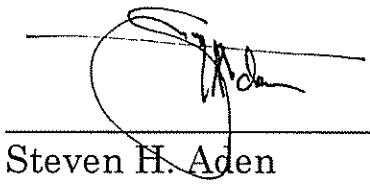

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