**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 KANÉ, ET AL.,
*Appellees*.

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

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# BRIEF OF APPELLANT

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## DISCLOSURE STATEMENT

Appellant Christian Legal Society Chapter of the University of California, Hastings College of the Law, is an unincorporated association and is a local chapter of the Christian Legal Society, a not-for-profit, tax-exempt, religious professional membership organization incorporated under the laws of the State of Illinois. Neither the Appellant chapter nor the national organization have issued shares of stock.

## REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument in this case. The court below held that a public law school could deny access to recognition, facilities, funding, and channels of student communication to a student religious group because of the religious criteria used by the group to select officers and voting members. Because the decision cannot be squared with established Supreme Court precedent requiring equal access to university recognition and benefits for religious student groups, oral argument is appropriate.

## JURISDICTION

Appellant filed this suit under 42 U.S.C. § 1983 for deprivations of its rights secured by the First and Fourteenth Amendments to the United States Constitution. The district court possessed subject matter jurisdiction over this suit under 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4), and 28 U.S.C. § 1331. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

This appeal is from the district court's final judgment entered on April 17, 2006. The district court denied Appellant's motion for summary judgment and granted the Appellees' motions for summary judgment. Appellant filed a notice of appeal on May 17, 2006, within the 30-day time period provided by Federal Rule of Appellate Procedure 4(a)(1)(A).

## STATEMENT OF THE ISSUE

Whether the Constitution permits a public law school to deny a religious student group numerous valuable benefits because the group requires its officers and voting members to agree with its religious viewpoint.

## STATEMENT OF THE CASE

This is a civil rights action brought by a student religious group against state college officials challenging as unconstitutional their refusal to accord the group the status and benefits of a registered student organization.

The student group, a chapter of the Christian Legal Society at the University of California, Hastings College of the Law ("CLS"), filed suit on October 22, 2004. On December 20, 2004, Hastings College of the Law ("Hastings") filed a motion to dismiss CLS's Equal Protection, Due Process, and Establishment Clause claims and to remove the College's board of directors from the case. After a hearing on Hastings' motion on April 1, 2005, the court ordered on April 12, 2005, that the board of directors stay in the case, dismissed CLS's Due Process and Establishment Clause claims, and granted CLS leave to amend its Equal Protection claim. CLS filed an amended complaint on May 3, 2005.

On May 25, 2005, Hastings Outlaw ("Outlaw"), a registered student organization at Hastings, filed a motion to intervene. The motion was granted by the court on August 1, 2005, without a hearing.

In October 2005, CLS, Hastings, and Outlaw filed cross-motions for summary judgment. After a hearing on December 2, 2005, the court on April 17, 2006, denied CLS's motion for summary judgment and granted summary judgment to Hastings and Outlaw.

CLS filed a motion to amend the judgment on April 20, 2006, seeking to remove the assertion that CLS admitted to discriminating on the basis of sexual orientation from the district court's opinion. The motion was denied on May 19, 2006.

On May 17, 2006, CLS filed a Notice of Appeal, seeking review of the district court's ruling on Hastings' motion to dismiss and the cross-motions for summary judgment. CLS filed an amended Notice of Appeal on June 1, 2006, which added the district court's denial of the motion to amend judgment and the order taxing costs against CLS.

## STATEMENT OF FACTS

### A. The Christian Legal Society and the CLS Chapter at Hastings Generally.

#### 1. National Christian Legal Society.

Founded in 1961, Christian Legal Society is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. Excerpts of Record ("ER") at 343. That

shared devotion is reflected in the organization's Statement of Faith, the affirmation of which indicates a member's commitment to beliefs commonly regarded as orthodox in the Protestant evangelical and Roman Catholic traditions. ER at 18, 344, 541.

In light of contemporary controversies regarding human sexuality within various religious denominations, Christian Legal Society reaffirmed in March 2004 its understanding of biblical principles of sexual morality and explained how that understanding derives from its Statement of Faith. ER at 334. Speaking through its Board of Directors, Christian Legal Society stated, "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." ER at 334. Christian Legal Society reaffirmed that *all* people—not just those who have participated in extramarital sexual conduct—fall short of biblical standards, and that Christ alone is able to restore the fellowship with God that has been disrupted by humankind's universal departure from those standards. ER at 334.

As expressions of the beliefs its members hold in common, Christian Legal Society's purposes include providing a means of society, fellowship, and nurture among Christian lawyers; promoting justice, religious liberty, and biblical conflict resolution; encouraging, discipling, and aiding Christian law students; and encouraging lawyers to furnish legal services to the poor. ER at 540.

2. The CLS chapter at Hastings.

In furtherance of these purposes, the national Christian Legal Society organization maintains attorney and law student chapters across the country. ER at 343. Appellant CLS is a law student chapter of the national organization. ER at 343, 395-399. CLS started at Hastings in September 2004. ER at 343, 395-399. Fellowships of Christian law students existed prior to the formation of the CLS chapter. ER at 382-387, 391-392. Some of them used the name "Christian Legal Society," but they had not gone through the process of affiliating with the national Christian Legal Society and thus were not CLS chapters. ER at 237, 250. The mission of the CLS chapter is to maintain a vibrant Christian law fellowship that enables its members,

individually and as a group, to fulfill Christ's mandate to love God and to love their neighbors as themselves. ER at 395-399.

CLS welcomes all students to attend and participate in its meetings and other activities, without regard to their religious beliefs, sexual orientation, or sexual conduct. ER at 344. If students wish to become official voting members of CLS, and thus eligible to choose the group's leaders, stand for leadership positions themselves, and amend the group's constitution, they must affirm their commitment to the group's foundational principle: a shared faith in Jesus Christ. ER at 344, 395-399, 541-543. Those desiring these privileges affirm that commitment by signing the Christian Legal Society Statement of Faith. ER at 344, 395-399, 541-543. As noted above, Christian Legal Society reaffirmed in March 2004 that its Statement of Faith entails certain standards regarding sexual conduct; therefore, a Hastings chapter leader's or voting member's embrace of the Statement of Faith necessarily entails a commitment to abide by those standards. ER at 248-249, 334.

CLS holds weekly Bible studies led by one of the group's officers. ER at 346-347. The Bible studies cover a variety of topics, but are

centered on the Christian beliefs reflected in the Christian Legal Society's Statement of Faith. ER at 347. The group sponsors speakers at the law school covering such topics as integrating Christian faith and legal practice. ER at 346. The group invites students to attend Good Friday and Easter Sunday church services where its Christian beliefs are taught. ER at 346. The group also hosts a beginning of the year beach barbeque, an annual Thanksgiving feast, monthly fellowship dinners, and an end-of-year banquet, all of which are open to any student who desires to come and learn more about the group's Christian commitments, without regard to his or her religious beliefs, sexual orientation, or sexual conduct. ER at 346.

B. Hastings and Student Groups Generally.

Hastings encourages the formation of student groups by providing them a number of benefits. ER at 337-339, 371-373. Student organizations access these benefits by registering with the law school. ER at 337-339. These benefits include meeting space, student activity fee funding and travel funds, and a number of channels by which student groups communicate with the campus community. ER at 337-339, 372. Among these channels of communication are: (1) participation

in the annual Student Organizations Fair where student organizations recruit first year students; (2) the ability to send "mass" email messages to all members of the law school community through the student government; and (3) appearing in lists of student organizations in law school publications, including its website, College Bulletin, and first year orientation packets. ER at 337-339, 372.

There were approximately 60 registered student organizations at Hastings during the 2004-2005 school year. ER at 353-361. During the 2005-2006 school year, there were almost as many. ER at 573-581. Registered student organizations cover a range of topics, including politics, religion, sexuality, and leisure, and often hold conflicting viewpoints. ER at 353-361, 573-581. Among them are the Black Law Students Association, the Clara Foltz Feminist Society, Silenced Right: National Alliance Pro-Life Group, Law Students for Choice, Hastings Republicans, Hastings Democratic Caucus, and the Vietnamese American Law Society. ER at 353-361, 573-581.

Registration entails submitting a registration form, a licensing agreement for use of the College name and logo, and a copy of the student organization's constitution to the Office of Student Services.

ER at 39, 371. The Office of Student Services reviews student organization constitutions to determine, among other things, whether they comply with Hastings' Nondiscrimination Policy. ER at 340. The Nondiscrimination Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

ER at 340, 374.

In spite of the specific protected statuses listed in the Nondiscrimination Policy, Hastings claims to interpret the policy such that student organizations must allow *any* student, regardless of their status, beliefs, or conduct to become voting members and leaders of their group. ER at 341. Hastings contends that the policy requires the Hastings Democratic Caucus to allow a Republican to be president of

the organization. ER at 341. A student organization's failure to comply with the Nondiscrimination Policy results in the denial of the status and benefits of registration. ER at 341, 372.

Registration with Hastings does not commit the College to support a student organization's goals or objectives. ER at 366, 371-372. Not only does Hastings disclaim all sponsorship of student organizations, but it requires student organizations to inform their members and those with whom they do business that they are not sponsored by the College. ER at 366, 372.

C. Hastings' Denial of Recognition of CLS.

Early in the 2004-2005 school year, CLS vice-president Dina Haddad inquired with the Hastings Director of Student Services, Judy Chapman, about the process for registering CLS with the law school. ER at 228. Haddad informed Chapman at that time that the group was a local chapter of the national Christian Legal Society. ER at 228-229. Chapman handed Haddad a copy of the College's Nondiscrimination Policy and cautioned her that national organizations, like the Christian Legal Society, often have membership or leadership policies that conflict with the Nondiscrimination Policy. ER at 229-230.

Shortly after her meeting with Chapman, Haddad applied to the Office of Student Services for travel funds to cover a portion of the costs for her and CLS president Isaac Fong to attend the Christian Legal Society's 2004 annual conference. ER at 344-345. On September 9, 2004, Chapman awarded Haddad and Fong $250.00. ER at 344-345.

About a week later, on September 17, 2004, Haddad submitted CLS's registration materials, including its constitution, to the Office of Student Services. ER at 345. Chapman reviewed the CLS constitution and had two objections based on the Nondiscrimination Policy: (1) the omission of the terms "religion" and "sexual orientation" from the group's nondiscrimination pledge; and (2) the chapter's Statement of Faith requirement for officers and members. ER at 260, 345. Chapman referred the matter to Hastings General Counsel, Elise Traynum, for her review. ER at 260, 345.

Four days later, on September 21, 2004, Chapman emailed Fong informing him that Traynum concluded that CLS's constitution violated the religion and sexual orientation provisions of Hastings' Nondiscrimination Policy and that the group's constitution would need to be revised. ER at 345. Chapman also invited Fong to meet with her

to discuss the school's objections to CLS's constitution. ER at 345.

On September 23, 2004, Fong, Haddad, and CLS secretary-treasurer, Julie Chan, met with Chapman, who informed the officers that CLS's constitution did not comply with the Nondiscrimination Policy because the group failed to open its leadership and membership to all students regardless of their religious beliefs, including religious beliefs regarding homosexual conduct. ER at 231-232, 260, 345. Chapman further informed the officers that until the chapter's constitution was brought into compliance, the group could not register with the College. ER at 345.

Near the close of the meeting, Haddad handed Chapman a letter prepared by counsel. ER at 345, 403-409. The letter explained that all students are welcome to attend and participate in CLS's meetings. ER at 403-409. The letter also stated that a person "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 (emphasis added). The letter described CLS's shared belief in certain core principles, as well as the application of those principles to the subject of human sexuality, and explained how compliance with these

principles was among the criteria for choosing leaders and voting members. ER at 403-409.

On October 1, 2004, Hastings General Counsel Traynum sent a letter to CLS reaffirming that "to be one of our student-recognized organizations, CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." ER at 345, 411.

### D. Hastings' Treatment of Other Recognized Student Organizations.

Hastings allows other registered student organizations to require that their leaders and/or members agree with the organization's beliefs and purposes. Outlaw is free to remove officers if they fail to support the organization's pro-gay rights purpose (ER at 325); Silenced Right: National Alliance Pro-Life Group may require its members to support its pro-life purposes (ER at 285); Vietnamese American Law Society is free to require its members to support the promotion of Vietnamese culture (ER at 282); Hastings Motorcycle Riders Club may require its members to share an interest in owning and riding motorcycles (ER at 293); Hastings Democratic Caucus may require its members to support the mission of the Democratic Party (ER at 296); Hastings Health Law

Journal is free to restrict membership to students expressing interest in the areas of law and medicine (ER at 271); Association of Trial Lawyers of America at Hastings may limit membership to students supporting the national and local organization's objective of promoting the civil justice system (ER at 301); and Students Raising Consciousness at Hastings may require members to support its mission to educate the student body about the issues facing certain communities, particularly race, sexual orientation, and gender (ER at 278).

E. Consequences of Hastings' Denial of Recognition.

Since the end of September 2004, CLS has been unregistered. ER at 345. CLS is the only group to ever be denied registration. ER at 263-264, 348. About a week after Hastings denied the group registration, Haddad received an email from Chapman informing her that the $250.00 set aside for her and Fong to travel to the Christian Legal Society's National Conference had been withdrawn. ER at 345, 413. CLS may not meet on campus as an official student organization. ER at 339.

On August 19, 2005, Fong inquired with Chapman about a number of issues, including sending mass emails through student

government, placing an announcement in the Office of Student Service's weekly newsletter, the "Hastings Weekly," and posting signs on the designated student organization bulletin boards. ER at 348. Chapman informed Fong that CLS could not use any of these channels of communication. ER at 348.

On August 29, 2005, Fong received an email from Chapman informing him that she had consulted Traynum and determined that because CLS is not a registered student organization, it must remove any reference to "Hastings" from its name. ER at 348, 415.

## SUMMARY OF ARGUMENT

Hastings denied CLS the status and benefits of official recognition because the chapter requires the persons who lead the group and the persons who select the leaders to agree with its religious purposes and mission. In so doing, Hastings closed CLS off from the channels of communication, funding, and ability to meet that allow CLS to have a meaningful presence on campus.

The First Amendment provides a right of expressive of association that protects the right of individuals to organize around and promote shared beliefs. A sister circuit, the Seventh Circuit Court of Appeals,

has already concluded that the application of a nondiscrimination policy to force a CLS chapter to open its leadership and voting membership to persons who reject its religious beliefs violates this right of expressive association. *Christian Legal Society v. Walker,* 453 F.3d 853, 863 (7th Cir. 2006). As this Court seeks to avoid unnecessary conflicts with other circuits, the decision should be given deference. *Hale v. Arizona,* 993 F.2d 1387, 1393 (9th Cir. 1993).

The Free Speech Clause of the First Amendment prevents Hastings from denying speakers access to its student organization forum when they fall within the parameters of the forum. Hastings recognizes a wide range of political, cultural, religious, and recreational student groups. These groups require that their officers and members agree with the mission and purposes of their organizations. CLS fits the criteria of the forum and as such cannot be excluded.

The Free Speech Clause also prevents Hastings from discriminating against student groups because of their viewpoints. Hastings' Nondiscrimination Policy is viewpoint discriminatory, as it allows a vegetarian club to require that officers and members not eat

meat, but prohibits an Orthodox Jewish group for requiring its officers and members to abstain from pork for religious reasons.

This discrimination against CLS simultaneously violates the Free Exercise Clause of the First Amendment. Hastings may not prohibit conduct done for religious reasons while allowing the same conduct done for secular reasons. *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 543-45 (1993).

The Equal Protection Clause requires Hastings to treat similarly situated student groups equally. Hastings allows a whole host of student organizations to require that their officers and members agree with their mission and purposes, but it precludes religious student organizations, like CLS, from doing the same.

These violations of CLS's expressive association, freedom of speech, free exercise of religion, and equal protection subject Hastings' exclusion of CLS to strict scrutiny. Hastings does not have a compelling interest in prohibiting religious students from "discriminating" on the basis of religious belief and conduct in their selection of leaders and voting members. The obvious relevance of religious convictions to the

mission of religious organizations, like CLS, means their officer and member decisions are not properly considered discrimination at all.

This Court should reverse the district court and provide CLS the First and Fourteenth Amendment protections to which it is entitled under well-established Supreme Court precedent.

## ARGUMENT

### I. Standard of Review.

This Court reviews *de novo* a district court's decision on cross-motions for summary judgment. *Central Delta Water Agency v. Bureau of Reclamation,* 452 F.3d 1021, 1025 (9th Cir. 2006). Summary judgment is appropriate if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in the moving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). There are no material issues of fact in this case and well-established First and Fourteenth Amendment principles require judgment in CLS's favor.

II. The District Court Erred as a Matter of Law in Holding that a College's Denial of Recognition of a Religious Student Group Because the Group Requires Its Leaders and Voting Members to Agree with Its Religious Convictions Does Not Burden the Group's Expressive Association.

A. Hastings' application of the religion and sexual orientation provisions of the Nondiscrimination Policy burdens CLS's expressive association.

The Supreme Court has recognized that implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—what the Court terms a "right of expressive association." *Rumsfeld v. FAIR*, ___ U.S. ___, 126 S.Ct. 1297, 1311-12 (2006); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Expressive association is protected because "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *FAIR*, 126 S.Ct. at 1312.

Interference with the right of expressive association may "take many forms," *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), including "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and

"interfer[ing] with the internal organization or affairs of the group." *Roberts,* 468 U.S. at 622-23.

The Seventh Circuit Court of Appeals in *Christian Legal Society v. Walker,* 453 F.3d 853 (7th Cir. 2006), a case that directly parallels this one, held that the application of an antidiscrimination policy to force a CLS chapter to open its leadership and voting membership to persons that reject its religious beliefs violates the right of expressive association. Although the case was decided on a motion for preliminary injunction, the legal issues which dominated the Seventh Circuit's analysis are indistinguishable from those raised here. As this Court "do[es] not lightly create a conflict with other circuits," the *Walker* decision warrants this Court's careful consideration. *Jones v. Gomez,* 66 F.3d 199, 204 (9th Cir. 1995). *See also Hale v. Arizona,* 993 F.2d 1387, 1393 (9th Cir. 1993) (holding that "[f]or prudential reasons, we avoid unnecessary conflicts with other circuits").

In *Walker,* Southern Illinois University ("SIU") denied CLS the status and benefits of official university recognition, because of the group's religious criteria for officers and members. The Seventh Circuit held that SIU's application of the antidiscrimination policy to CLS

violated the group's right of expressive association. "SIU's 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. Application of the antidiscrimination policy in this way "burdens CLS's ability to express it ideas." *Id.* The application of the Nondiscrimination Policy to CLS in this case is no different.

1. CLS is an expressive association.

"Hastings does not dispute that CLS engages in expressive association." *Christian Legal Society v. Kane,* 2006 WL 997217, at *20 (N.D. Cal. May 19, 2006); *see also* ER at 427. The district court also "assume[d] for purposes of these motions that CLS engages in expressive association." *Kane,* 2006 WL 997217, at *20. These concessions are compelled by *Dale,* where the Boy Scouts were found to be an expressive association because they sought to instill values in young people through instruction and activities, like camping and fishing. 530 U.S. at 649-50.

CLS similarly seeks to instill certain values in its members. It is a group of people bound together by their shared Christian faith. ER at

395. Officers and voting members must dedicate themselves to the religious beliefs and moral principles embodied in the group's Statement of Faith. ER at 395 ("All members and officers of this Chapter must agree to and affirm the following Statement of Faith"); ER at 396 ("All members and officers must endeavor to live their lives in a manner consistent with the Statement of Faith.").

CLS officers teach weekly Bible studies to instruct members and attendees concerning the beliefs and moral principles reflected in the Statement of Faith. ER at 346-347. They invite guest speakers to campus to teach, consistent with the group's mission, about integrating Christian faith and legal practice. ER at 346. Officers serve as examples of these Christian beliefs for the voting members and attendees. ER at 396 (calling officers to "exemplify the highest standards of morality as set forth in Scripture"). Officers also naturally act as representatives of CLS to the campus community by communicating with the College administration about issues such as registration and funding, or by having their names listed in advertisements as contact persons.

Voting members similarly contribute to CLS's expression. Voting members also elect and remove officers and amend the group's constitution. ER at 344, 396-397. Voting members represent the group at the Student Organizations Fair, where recognized student organizations recruit new members from the first year class. ER at 339, 569-570. "It would be hard to argue—and no one does—that CLS is not an expressive association." *Walker,* 453 F.3d at 862.

2. Forced inclusion of leaders and voting members who reject CLS's religious convictions significantly impairs its expressive association.

When First Amendment expressive activity is at stake, a court must examine whether compliance with the government regulation will "significantly affect" the association's ability "to advocate public or private viewpoints." *Dale,* 530 U.S. at 650. In its analysis, a court "must . . . give deference to an association's view of what would impair its expression." *Id.* at 653. In *Dale,* the Supreme Court determined that the Scouts sought to "teach[] that homosexual conduct is not morally straight." *Id.* at 651. Forcing the Scouts to include a gay scoutmaster, the Court said, "would . . . surely interfere with the Boy

Scouts' choice not to propound a point of view contrary to its beliefs." *Id.* at 654.

One of the religious values CLS seeks to instill in its members, but certainly not the only value, is that sexual conduct is proper only within the bounds of a marriage relationship between a man and woman. ER at 334. As such, CLS disapproves of pre-marital sex, adultery, and homosexual conduct, and believes that participation in or affirmation of such sexual conduct is inconsistent with its Statement of Faith. ER at 334.

To comply with Hastings' Nondiscrimination Policy, religious groups must bestow the privileges of leadership and membership on persons who do not accept their beliefs. The school "requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, *regardless of their . . . beliefs*." ER at 341 (emphasis added).

CLS's meetings and activities are open to all; however, the students who *lead the group* and *elect the leaders* must agree to the group's Statement of Faith, including the belief that extramarital sexual conduct is immoral. ER at 341, 396, 540-541. To obtain

recognition, CLS must abandon this requirement. It must allow persons who reject its beliefs to teach Bible studies, to elect and remove 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.

CLS's Christian beliefs, including those about extramarital sexual conduct, are what give the group its unique voice within the College community. "[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring). Forcing CLS to accept leaders and voting members who reject its religious beliefs, including its disapproval of extramarital sexual conduct, "causes the group as it currently identifies itself to cease to exist." *Walker*, 453 F.3d at 863. Application of the Nondiscrimination Policy in this way undoubtedly affects CLS's expressive association.

### B. The district court erred in holding that the Supreme Court's decisions in *Dale* and *Hurley* do not apply to CLS's expressive association claim.

Despite controlling Supreme Court precedent and the clear burden imposed on CLS's expressive association, the court below

concluded CLS's right of expressive association was not burdened. *Kane,* 2006 WL 997217, at *17-18. In so doing, the court erred in several fundamental ways by: (1) holding that Hastings' denial of recognition only affects CLS's conduct, not its expression; (2) holding that forcing CLS to have officers and voting members who do not subscribe to the organization's religious viewpoints does not affect its expressive message; (3) holding that even if there were an effect on CLS's expressive message, it is an indirect and constitutionally acceptable burden; and (4) relying upon two lower court decisions rather than controlling Supreme Court precedent.

1. The district court erred in holding that Hastings' Nondiscrimination Policy does not regulate CLS's expression.

The court below erred as a matter of law when it held the Nondiscrimination Policy only regulated conduct, ignoring the effect of the policy on CLS's expressive association. *Kane,* 2006 WL 997217, at *8. It erred in ignoring the Supreme Court's analysis in *Dale* and *Hurley v. Irish-American Gay Lesbian & Bisexual Group,* 515 U.S. 557 (1995), which require a court to first examine whether a nondiscrimination policy's application—even if it does not regulate

speech on its face—nonetheless would force an association to alter its expression. And the court below erred in applying the *O'Brien* test despite the Court's rejection of the test in *Dale*.

A court cannot determine that a policy merely regulates an association's conduct until it first determines that the application of the policy will not "impair the ability of the original members to express only those views that brought them together." *Roberts,* 468 U.S. at 623. Accordingly, in *Hurley*, while observing that a state public accommodations law "does not, on its face, target speech or discriminate on the basis of its content," 515 U.S. at 572, the Supreme Court nonetheless held that the state's application of the law triggered strict scrutiny because the law had been applied to force an organization "to alter the expressive content of their parade." *Id.* at 572-73. While the public accommodations law did not on its face regulate speech, the Court scrutinized the *effect* of the application of the law on the parade organizer's expression to hold that application of the nondiscrimination law violated the organization's freedom of speech.

Likewise, in *Dale,* the Supreme Court held unconstitutional the application of another state public accommodations law to an expressive

organization. 530 U.S. at 659. The Court made the unremarkable observation that such laws "do not, as a general matter, violate the First or Fourteenth Amendments." *Id.* at 658, *quoting Hurley,* 515 U.S. at 572. But because the nondiscrimination law's application "interfere[d] with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," *id.* at 654, the Court held the law's application violated the organization's First Amendment rights.

The Court specifically rejected application of the analysis in *United States v. O'Brien*, 391 U.S. 367 (1968), and instead applied "traditional First Amendment analysis." *Dale,* 530 U.S. at 659.

> A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. *Thus,* O'Brien *is inapplicable.*

*Id.* (emphasis added).

2. The district court erred in holding that the inclusion of leaders and voting members who reject CLS's religious viewpoints would not affect the group's expression.

Hastings illustrates the application of the Nondiscrimination Policy by explaining that for the Hastings Democratic Caucus to gain

recognition, it must open its leadership and voting membership to Republicans. ER at 341. The Supreme Court struck down a similar requirement over twenty-five years ago. In *Democratic Party v. Wisconsin,* 450 U.S. 107 (1981), Wisconsin law required the Democratic presidential primary to be open to voters regardless of party affiliation. The Democratic Party challenged the open primary requirement as violating its associational rights. The Court held the law unconstitutional, since "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves from intrusion by those with adverse political principles." *Id.* at 122 (citations omitted).

The same is true here. According to the court below, CLS should just "take[] the risk" and open its leadership and voting membership to persons who oppose its religious beliefs. *Kane,* 2006 WL 997217, at *23. But forcing CLS to hold "open primaries," bestowing voting rights on whoever walks in the door, "seriously distort[s] its collective decisions" and "impairs [its] essential functions." *Democratic Party,* 450 U.S. at 122.

CLS has no guarantee that it can elect officers who will speak its message if it cannot limit the officers and voting members to persons who share its religious beliefs. Hastings protests that "no known gay, lesbian, bi-sexual or non-Christian student sought to join CLS as member or officer" during the 2004-2005 academic year. *Kane,* 2006 WL 997217, at *23. Only one year earlier, however, three persons with religious beliefs and practices at odds with CLS's Statement of Faith regularly attended meetings of a law school Christian fellowship. ER at 342-343. Just as the First Amendment allows political parties "to protect themselves from intrusion by those with adverse political principles," *Democratic Party,* 450 U.S. at 122, it also permits CLS to safeguard its message from intrusion by those with adverse religious beliefs.

a. CLS's official position on extramarital sexual conduct is sufficient for First Amendment purposes.

The district court erred when it ignored CLS's official position on extramarital sexual conduct and held that CLS's expression would not be affected by including persons that rejected its beliefs, since "it is not clear how anyone at Hastings, other than individual members and

officers, would even be aware that CLS's members and officers are living their private lives in accordance with a certain code of conduct." *Kane,* 2006 WL 997217, at *22.

In *Dale,* the Court specifically rejected the notion that First Amendment protections should turn on whether an association "trumpet[s] it views from the housetops." 530 U.S. at 656. The Scouts in fact "discourage[d] Scout leaders from disseminating views on sexual issues . . . ." *Id.* at 655. Nonetheless, "[t]he Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes." *Id.* Likewise, the *Hurley* parade did not espouse any views about sexual orientation; even so, the Court held that parade organizers had a right to exclude a contingent of self-identified homosexual persons. 515 U.S. at 573.

Similarly, CLS takes an official position prohibiting advocacy or participation in extramarital sexual conduct and calls its officers and voting members to adhere to that position. The board of national CLS adopted a resolution in March 2004 reaffirming what CLS believes to be the "Biblical standards for sexual morality." ER at 334. It 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. CLS's official position regarding extramarital sexual conduct "is sufficient for First Amendment purposes." *Dale,* 530 U.S. at 655.

Officers of local chapters, such as the one at Hastings, are also specifically called upon to "exemplify the highest standards of morality as set forth in Scripture." ER at 396. In this way, they act as role models to members and attendees as well as the wider campus community. In *Dale,* the fact that Scoutmasters taught about sexuality by example rather than by verbal instruction had no bearing on the Scouts' expressive association claim. 530 U.S. at 655. "If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief . . . ." *Id.*

Even if CLS's message regarding sexual morality is transmitted to the campus only by example, the message is hardly lost. Religious faith and sexual abstinence are undoubtedly counter-cultural messages.

Those students that band together to express that message are distinct enough from the rest of campus that they are heard loud and clear.

b. The viewpoints of Christian law fellowships that existed prior to the CLS chapter's formation have no bearing on whether CLS's expression is burdened.

The court below erred in relying on the fact that fellowships of Christian law students existed at Hastings prior to the formation of the CLS chapter without problem. *Kane,* 2006 WL 997217, at *22. These organizations opened their membership and leadership to students regardless of their religious beliefs and views on extramarital sexual conduct. *Id.; see also* ER at 382-387, 391-392. None of these fellowships, however, were CLS chapters. ER at 237, 250. The first chapter approved by the national organization started at Hastings in September 2004. ER at 343, 395-399. Some of the Christian law fellowships used the national Christian Legal Society's form constitution and even its name; however, the national organization was not affiliated with these groups and had no control over their religious beliefs or practices. ER at 237, 250.

The CLS chapter at Hastings reaffirms the traditional Christian view on sexual conduct. ER at 334. The fact that fellowships of Christian law students that existed prior to the formation of the chapter departed from this view simply reinforces why CLS needed to reaffirm its adherence to the traditional Christian view of sexual morality. This reaffirmation is, in part, a response to the broader debate within mainstream Christian denominations regarding whether unrepentant homosexual conduct disqualifies a person from leadership or membership. Jamie Deal, *Schism on the Horizon,* WEEKLY STANDARD, Jul. 5, 2006, available at http://www.weeklystandard.com/ Content/Public/Articles/000/000/012 /397abmpd.asp (discussing debate over homosexuality within the Episcopal Church); Ervin Dyer, *Methodist General Conference to tackle agenda ranging from gays to pensions*, PITTSBURGH POST-GAZETTE, Apr. 25, 2004, available at http://www.post-gazette.com/pg/04116/305561.stm (considering whether "the issue of gay acceptance will split the church"); Cathy Lynn Grossman, *God and gays: Churchgoers divided,* USA TODAY, Jun. 14, 2006, available at http://www.usatoday.com/news/ religion/2006-06-12-

god-gays-cover_x.htm (discussing church "battles over the rights and roles of homosexuals").

Even had CLS changed its stance regarding sexual conduct, which it did not, the Supreme Court has held that changes in religious belief are entitled to First Amendment protection. *Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 144 (1987). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

Crucially, "it not within the judicial ken to question the centrality of particular beliefs or practices to faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). The First Amendment prohibits a court from "lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). For this reason, the Tenth Circuit in *Bryce v. Episcopal Church,* 289 F.3d 648, 651 (10th Cir. 2002), refused to entertain a sexual harassment suit brought against a church for "remarks made about homosexuals." The court declined to "insert itself into a theological

discussion about the church's doctrine and policy towards homosexuals—one of the most important ongoing dialogues in many churches today." *Id.*

Hastings has inserted itself on one side of the current religious debate regarding whether religious leaders may endorse or engage in homosexual conduct. The First Amendment precludes the government from weighing in on this debate. Therefore, CLS's own articulation of its beliefs and what would impair its exercise of those beliefs must be given deference. *Dale,* 530 U.S. at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

3. The district court erred in holding that the burden on CLS's expression was indirect and rendered *Dale* and *Hurley* inapplicable.

The Supreme Court in *Healy v. James,* 408 U.S. 169 (1972), rejected the notion that a university could indirectly interfere with a student organization's expression. There, a college refused to accord the benefits of official recognition to Students for a Democratic Society ("SDS"), believing that the organization's philosophy conflicted with

college policy. *Id.* at 175. The college argued, just as Hastings does here, that denial of official recognition violated no constitutional rights, because the "administration has taken no direct action to restrict the rights of petitioners to associate freely." *Id.* at 183. SDS "may still meet as a group off campus, . . . they still may distribute written material off campus, and . . . they still may meet informally on campus." *Id.* at 182-83. Despite the alleged "indirect" nature of the college's actions, the Court held "[t]here can be no doubt that the denial of official recognition, without justification, to college organizations burdens or abridges that associational right." *Id.* at 181.

The Court specifically rejected the idea that First Amendment protections are restricted to direct interference:

> *[T]he Constitution's protection is not limited to direct interference with fundamental rights. . . . [T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action* . . . . "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

*Id.* at 183 (emphasis added; citations omitted).

Likewise, in *Widmar v. Vincent,* 454 U.S. 263 (1981), the Court required official recognition of the religious group despite the fact that

it could have continued to meet a block away from campus. *Id.* at 288 (White, J., dissenting). In *Board of Education v. Mergens*, 496 U.S. 226, 247 (1990), the Court also required official recognition for the Christian club despite school officials' protests that it could meet informally. *See also Prince v. Jacoby,* 303 F.3d 1074, 1082, 1086 (9th Cir. 2002) (same). The possible ability for these groups to engage in expression elsewhere did not satisfy the government's obligations under the First Amendment. *See Schneider v. New Jersey,* 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

Finding *Healy* to be controlling, the Seventh Circuit in *Walker* rejected SIU's argument that *Dale* and *Hurley* did not apply because "it was not forcing CLS to do anything at all, but only withdrawing its student organization status." 453 F.3d at 864. The Court acknowledged that CLS could turn to alternative modes of communication and meeting places, but nonetheless held that SIU violated CLS's right of expressive association. *Id.* The Court reasoned, "SIU may not do indirectly what it is constitutionally prohibited from

doing directly." *Id.* *See Speiser v. Randall,* 357 U.S. 513, 526 (1958) (holding that government may not attach strings to a benefit to "produce a result which [it] could not command directly").

Thus, the district court erred when it distinguished *Healy*, in part, on the basis that SDS "was barred from using *any* campus facilities to hold meetings." *Kane,* 2006 WL 997217, at *18 (emphasis in original). To the contrary, SDS was permitted to "meet together informally on campus," but not permitted to meet as a formally recognized student group. *Healy,* 408 U.S. at 183.

The court further erred in disregarding the considerable benefits CLS has been denied. As in *Healy* and *Mergens*, CLS may meet on campus only informally. ER at 339. It cannot meet as an officially recognized student organization. ER at 339. Moreover, the informal access CLS enjoys is purely at Hastings' good pleasure. Responding to the district court's inquiry whether the College could simply banish CLS from campus, counsel for Hastings stated:

> Yes. And the only exception I will give the Court is the policies and regulations contain one provision that says to the extent that there are public areas on campus that are open to the public generally, that are traditional pubic forum, anybody can use them—community groups or whoever—and the regulations go on and designated what

> they are. They are effectively the street in front of the law school and immediate outside perimeter of the campus. *But with that one exception, where there is a traditional public forum, yes, Hastings 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).

CLS is also excluded from the primary channels of communication on campus. 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 student government's mass emails or the law school mail system. 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.

The chapter is denied eligibility for student activity fee funding and travel funds. ER at 338, 345-346. *Rosenberger v. Rector of the*

*Univ. of Virginia,* 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).

CLS is the only unrecognized student organization at Hastings. ER at 348. 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. Mathews,* 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."

4. The district court erred in relying on *Wyman* and *Evans.*

Rather than applying controlling Supreme Court precedent, the court below invoked two lower court decisions, *Boy Scouts of America v. Wyman,* 335 F.3d 80 (2d Cir. 2003), and *Evans v. City of Berkeley,* 129 P.3d 394 (Cal. 2006). Neither of these decisions is applicable to this case.

a. The obvious differences between the forum in *Wyman* and the forum in this case make *Wyman* inapplicable.

In *Wyman,* the Scouts were denied participation in Connecticut's state employee charitable campaign. Connecticut denied the Scouts' application to be an approved charity because they bar homosexual persons from membership. 335 F.3d at 85. The Scouts sued arguing that the exclusion from the charitable campaign violated its expressive association rights under *Dale. Id.* at 88. The Second Circuit held that the Scouts' expressive association rights had not been violated, distinguishing *Dale* as an attempt to directly *force* the Scouts to accept a member that would compromise its message. *Id.* at 91.

As an initial matter, the underlying premise of *Wyman*—that an indirect burden on associational rights is constitutionally permissible—is counter to well-established Supreme Court precedent. *See* Part I.B.3, *supra.* If that were not clear pre-*Wyman,* the Supreme Court's decision in *FAIR* makes it clear. *FAIR,* 126 S.Ct. at 1207 ("the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students").

The Second Circuit in *Wyman* also erred in ruling that the Scouts' expression was not burdened because of the nature of the forum. 335 F.3d at 91. The right of expressive association does not depend on forum analysis. *See Walker,* 453 F.3d at 861-64.

Finally, the court below erred because the nature and purpose of the forum at issue in *Wyman* is vastly different than the forum at issue in this case. The state employee charitable campaign was a nonpublic forum established for the limited purpose of funding charities. *Wyman,* 335 F.3d at 91. According to the Supreme Court, employee charitable campaigns are nonpublic fora because their aim is to reduce the workplace disruptions caused by charities coming onto government property to solicit in person. *Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 805 (1985). The campaigns are intended to "*lessen[]* the amount of expressive activity occurring on [government] property." *Id.* (emphasis in original).

Whereas the purpose of the forum in *Wyman* was to "*lessen[]* the amount of expressive activity," Hastings' forum is established "to promote a diversity of viewpoints among registered student organizations, including viewpoints on religion and human sexuality."

ER at 347. Hastings' forum facilitates student association and speech. *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 the Univ. of Wisconsin System v. Southworth,* 529 U.S. 217, 229 (2000) (purpose of University's student activity fee forum was "facilitating the free and open exchange of ideas by, and among, its students"). The university campus is "peculiarly 'the marketplace of ideas,'" *Healy,* 408 U.S. at 180, and, thus, the quintessential speech forum. Hastings' decision to exclude CLS from that marketplace places a "'heavy burden' . . . on the college to demonstrate the appropriateness of that action." *Id.* at 184.

More applicable than *Wyman* is the Second Circuit's decision in *Hsu v. Roslyn Union Free School District No. 3,* 85 F.3d 839 (2d Cir. 1996). In *Hsu,* the Second Circuit held that a school district's refusal to recognize a religious student group because it "discriminated" on the basis of religion in selecting officers was a violation of the Equal Access Act, 20 U.S.C. § 4071, *et seq.* *Id.* at 862; *see also id.* at 857 (calling the Equal Access Act "an analog" to the First Amendment). The court

explained that absent a showing of invidious discrimination or material disruption, "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.

b. To the extent *Wyman* relied on *Regan* and other government speech cases, the decision is inapplicable to this case.

The *Wyman* Court relied heavily on *Regan v. Taxation with Representation,* 461 U.S 540 (1983), to frame its analysis. 335 F.3d at 91-92. *Regan* is a government speech case. *See Southworth,* 529 U.S. at 229. The Supreme Court has twice refused to equate government speech cases with cases involving university regulation of student speakers and groups.

The university in *Rosenberger* relied on *Regan* and other government speech cases to argue that it could deny religious groups student activity fee funding. 515 U.S. at 832-33. The Supreme Court, however, rejected the applicability of those cases, since "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834. *See also Widmar,* 454 U.S. 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 *Southworth*, the Court again held that a student activity fee fund was a forum for private speech, rather than university speech, explaining:

> The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation.*, 461 U.S. 540, 548-549 (1983). The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular 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.

529 U.S. at 229; *see also id.* at 235 ("In the instant case, the speech is not that of the University or its agents.").

In both *Rosenberger* and *Southworth*, the fact that the universities specifically disclaimed responsibility for student organizations factored heavily into the Supreme Court's determination that the cases involved private speech, rather than government speech. The Court observed in

*Rosenberger,* 515 U.S. at 835, "[t]he University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility." Similarly, in *Southworth,* 529 U.S. at 229, the Court found that the university had expressly "disclaimed that the speech is its own."

Here, Hastings disclaims sponsorship of student organization speech and, in fact, recognizes student organizations with conflicting messages.[1] ER at 366, 372 ("Hastings does not sponsor student organizations and therefore does not accept liability for activities of student organizations."); ER at 371 ("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."). Hastings places an affirmative obligation on 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." ER at 366, 372 (emphasis

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[1] For example, during the 2004-2005 academic year, Hastings recognized Law Students for Choice and Silenced Right: National Alliance Pro-Life Group. ER at 360-361.

added). This not a government speech case and, therefore, to the extent *Wyman* relies on such cases, it is inapplicable.

c. Because *Evans* did not involve an expressive association claim, it is inapplicable.

Nor does the California Supreme Court's decision in *Evans*, 129 P.3d 394, apply. In *Evans,* the Sea Scouts specifically denied making any expressive association claim, which is the focus in this case:

> Plaintiffs repeatedly disavow, both in their complaint and in their briefs in this court, any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination as a condition of the free berths, is restricting their freedom to limit their membership for purposes of expressive association.

*Id.* at 216, *citing Dale,* 530 U.S. at 640, *Hurley,* 515 U.S. at 557.[2]

Moreover, the Sea Scouts in *Evans* were not excluded from a forum for expression, as CLS has been in this case, but from a free place to dock their boat. *Id.* at 210-11. While it may be unclear how the First Amendment applies in *Evans* in the absence of a speech forum, First

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[2] The Sea Scouts made an associational claim, but it was not an expressive association claim. The Sea Scouts claimed that if they gave the assurances of nondiscrimination the city wanted, the Boy Scouts would cut ties with them. Not surprisingly, the Court held that it was aware of "no authority" for such a claim. *Id.* at 216.

Amendment protections are in full force where the government uses its facilities and funds to encourage private expression, *Rosenberger,* 515 U.S. at 830; *Widmar,* 454 U.S. at 267-68, as Hastings has done here. ER at 337 ("Hastings seeks to promote a diversity of viewpoints among registered student organizations, including viewpoints on religion and human sexuality.").

### III. Under *Widmar* and *Rosenberger*, a College Violates a Religious Student Group's Freedom of Speech by Denying it Official Recognition, including Access to Meeting Space, Student Activity Fee Funds, and Channels of Communication.

The Supreme Court has repeatedly held that when a university opens its facilities or provides funding for expressive activity, as Hastings has done, it creates a forum. *Widmar,* 454 U.S. at 267; *Rosenberger,* 515 U.S. at 830; *Southworth,* 529 U.S. at 229-30; *Prince,* 303 F.3d at 1091. Like the universities in *Widmar, Rosenberger,* and *Southworth* and the high school in *Prince,* Hastings' system of recognizing student groups is a speech forum subject to the First Amendment.

### A. Hastings' student organization forum is open to a broad range of student groups addressing a variety of interests.

When the government opens "properties for expressive use by the general public or by a particular class of speakers," it creates "designated public fora." *Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 678 (1998); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). "[A] public forum may be created by government designation of a place or channel of communication . . . for assembly and speech, for use by certain speakers, or for discussion of certain subjects." *Cornelius,* 473 U.S. at 802.

Here, Hastings' intent to open a designated public forum for use by student organizations is clear. Hastings recognizes student organizations and provides them funding and channels of communication for the express purpose of "promot[ing] a diversity of viewpoints among registered student organizations, including viewpoints on religion and human sexuality." ER at 337.

Significantly, other than CLS, no student group has ever been denied access to Hastings' speech forum. ER at 263-264, 348. Registration and its attendant benefits are offered to any group of

Hasting students, faculty or staff. ER at 371. Hastings registered approximately sixty student organizations during the 2004-2005 school year. ER at 337, 353-361. During the 2005-2006 school year, it recognized almost the same number. ER at 573-581. Groups cover a wide range of topics, including politics, religion, sexuality, and leisure, and often advocate conflicting viewpoints. ER at 353-361, 573-581. For example, the College recognizes the Hastings Republicans and Hastings Democratic Caucus and Law Students for Choice and Silenced Right: National Alliance Pro-Life Group. ER at 355-356, 358, 360, 575, 578-579.

The open nature of Hastings' forum is consistent with the Supreme Court's determination that public colleges are "peculiarly 'the marketplace of ideas,'" *Healy,* 408 U.S. at 180, and "one of the vital centers for the Nation's intellectual life." *Rosenberger,* 515 U.S. at 836. Hastings' marketplace is wide open for expressive use by a particular class of speakers, student organizations. *Widmar,* 454 U.S. at 268 n. 5 ("[T]he campus of a public university, at least for its students, possess many of the characteristics of a public forum."); *Justice for All v. Faulkner,* 410 F.3d 760, 769 (5th Cir. 2005) (holding that outdoor open

areas of state university's campus were designated public fora for student expression).

B. Denial of recognition is subject to strict scrutiny.

The Supreme Court has consistently held that a university's denial of recognition to a student organization is subject to strict scrutiny. *Healy*, 408 U.S. at 184 (denying recognition to student group was "a form of prior restraint" and put a "heavy burden" on a university to justify exclusion); *Widmar*, 454 U.S. at 268 n. 5 (holding that denial of recognition "must be subjected to the level of scrutiny appropriate to any form of prior restraint").

Because CLS falls within the parameters of Hastings' forum, Hastings' exclusion of the group is subject to strict scrutiny. *Widmar* is controlling on this point. The Court held that the university's refusal to provide meeting space to a religious student group was subject to strict scrutiny, because a broad range of groups were already in the forum. *Id.* at 268-70. The university, according to the Court, "must show that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Id.* at 270.

Hastings' speech forum is made available to *any* organization comprised of Hastings students, faculty, or staff. ER at 371; *see also* Part III.A, *supra*. The forum includes other religious groups, such as Hastings Koinonia (a Christian student group), the Hastings Association of Muslim Law Students, and the Hastings Jewish Law Students Association. ER at 355, 357, 575-577. As a religious student organization comprised of Hastings students, CLS falls squarely within the parameters of the forum, and its exclusion is subject to strict scrutiny. *Widmar,* 454 U.S. at 270; *Healy,* 408 U.S. at 184.

The court below found that Hastings had reserved its forum to student organizations that do not discriminate in violation of the Nondiscrimination Policy. *Kane,* 2006 WL 997217, at *10. To the contrary, Hastings routinely recognizes student groups that limit membership or leadership on the basis of belief. To name but a few, the College 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 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 objective of the organization." ER at 296. The Vietnamese American Law Society is recognized, but members must "not exhibit consistent disregard and lack of respect for the objective of the organization." ER at 282. Hastings' actual practice demonstrates that the forum is not reserved to student organizations that do not discriminate on the basis of belief.

### C. Hastings' exclusion of CLS is viewpoint discriminatory.

Even if *Healy* and *Widmar* were not controlling, Hastings' exclusion of CLS is viewpoint discriminatory. Viewpoint discrimination violates free speech regardless of the forum. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-92 (1993); *Cornelius,* 473 U.S. at 806.

The district court believed the Nondiscrimination Policy to be viewpoint neutral, because it prohibits *all* student groups from discriminating on the basis of religious belief. *Kane,* 2006 WL 997217, at *11. "Hastings' policy would . . . bar an atheist group from excluding

those who are religious," just as it would a religious group. *Christian Legal Society v. Kane*, 2005 WL 850864, at *8 (N.D. Cal. Apr. 12, 2005).

The Supreme Court rejected the district court's operative premise in *Lamb's Chapel*. There, the school district argued that it was not discriminating against a church that sought access to school premises to show a religious film series because all community groups were banned from speaking on religious subject matter. *Lamb's Chapel,* 508 U.S. at 393.

The Supreme Court firmly rejected this premise:

> 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. See also Rosenberger,* 515 U.S. at 831-32; *Good News Club v. Milford Central Sch.,* 533 U.S. 98, 107 n. 2 (2001).

In precisely the same way, Hastings claims it is not discriminating against religious student groups because *all* groups are prohibited from applying religious membership and leadership criteria. But the fact the restriction on religious qualifications for membership and leadership applies to all groups does not mean the restriction does not discriminate

against religious groups. While the policy applies to all groups, it prevents only the religious groups from registering, because only religious groups need to apply religious qualifications for membership and leadership to protect their expressive purpose.

Hastings forbids student groups to organize around religious ideals, but allows groups to organize around other ideals. For example, Silenced Right: National Alliance Pro-Life Group may require its members to support its pro-life purposes. ER at 285. Hastings Motorcycle Riders Club may require that its members share an interest in riding motorcycles. ER at 293. And Students Raising Consciousness at Hastings may require members to support the group's mission to educate the student body about the issues facing certain communities, particularly race, sexual orientation, and gender. ER at 278. *See also* Part III.B, *supra* (listing additional examples). In each case, Hastings permits the groups to discriminate on the basis of shared personal beliefs.

Hastings, however, forbids religious clubs, like CLS, from requiring their officers and voting members to affirm a common set of religious beliefs. To prohibit religious student groups from using

religious criteria in their leadership and membership practices, while allowing other groups to select officers and members that support their mission and objectives, is religious viewpoint discrimination. *Rosenberger,* 515 U.S. at 826, 831-32 (denying student activity funds to student newspaper because of the "religious editorial viewpoints" taken by the paper on subjects including "stories about homosexuality" was unconstitutional viewpoint discrimination); *Lamb's Chapel,* 508 U.S. at 394 (denying religious group access to school facilities to show film series on child-rearing "because the series dealt with the subject from a religious standpoint" was unconstitutional viewpoint discrimination); *Good News Club,* 533 U.S. at 109 (excluding Good News Club from school facilities because it "seeks to address . . . the teaching of morals and character from a religious standpoint" was unconstitutional viewpoint discrimination).

Consider that under the policy 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. Besides being viewpoint discriminatory under the Free Speech Clause, it is also unconstitutionally underinclusive under the Free Exercise Clause.[3] *See Church of the Lukumi Babulu Aye v. City of Hialeah,* 508 U.S. 520, 543-46 (1993); *see also* Part IV, *infra.*

Hastings' exclusion of CLS is also viewpoint discriminatory because it skews the debate on issues of human sexuality. "[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate." *Rosenberger,* 515 U.S. at 894 (Souter, J., dissenting). Per the terms of the Nondiscrimination Policy, Outlaw can form a group to advocate for gay rights and require officers to support this purpose. ER at 325. Students Raising Consciousness may seek to educate the campus about the struggles facing homosexual communities and require its members to support this objective. ER at 278. But CLS

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[3] Hastings will likely maintain that the Nondiscrimination Policy precludes the vegetarian club and the anti-war club from selecting like-minded officers and members just the same as the Orthodox Jewish group or the Quaker fellowship. But in that case, the policy prohibits any sort of exclusion at all, in which case it violates the associational rights of every student group, including CLS.

cannot form a group to affirm its religious viewpoint regarding homosexual conduct.

D. The exclusion of CLS is unreasonable in light of the purpose of the forum.

"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. The purpose of Hastings' registration system for student organizations is "to promote a diversity of viewpoints . . . including viewpoints on religion and human sexuality." ER at 337. Registered student organizations contribute to Hastings' "marketplace of ideas," *Healy*, 408 U.S. at 180, by "facilitat[ing] a wide range of speech" – even speech that "some students find objectionable and offensive to their personal beliefs." *Southworth*, 529 U.S. at 232.

Forcing CLS to abandon its religious qualifications for officers and voting members as a condition of accessing this marketplace undermines Hastings' alleged purpose for registering student organizations in the first place. There is a wide range of speech and a diversity of viewpoints *not* when student organizations are forced to abandon their identities, *but* when each organization is able to

retain its distinct viewpoint. "[P]rotection of the right of expressive association is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Dale*, 530 U.S. at 648 (citations omitted).

This is why, regardless of what Hastings alleges, almost every student organization requires its officers and members to agree with its mission and objective. ER at 270-326. If they did not, there would be no way to preserve the viewpoint that makes them a unique voice on campus. Opening every religious student group to "any student to participate, become a member, or seek leadership positions in the organization, regardless of their . . . beliefs," removes the religious viewpoint from Hastings' forum. ER at 341. Given the purpose of the forum, such an exclusion is hardly reasonable.

## IV. The Exclusion of CLS Violates the Free Exercise Clause.

Regulations "impos[ing] special disabilities on the basis of religious views or religious status" are presumptively unconstitutional. *Smith*, 494 U.S. at 877. The Supreme Court in *Lukumi* struck down on these grounds an ordinance that prohibited slaughtering animals for

religious purposes, but not for commercial purposes or for sport. 508 U.S. at 543-46. The Court held that the law was "substantially underinclusive" and, therefore, impermissibly targeted religion. *Id.*

The Nondiscrimination Policy similarly targets religion. 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. The policy is fatally underinclusive and unconstitutional under the Free Exercise Clause.

*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." Using the "cf." signal, the *Smith* Court invoked *Roberts,* 468 U.S. at 622, a case involving both freedom of association and a nondiscrimination rule. This case is exactly the hybrid rights case the *Smith* court envisioned.

All this Court requires to prove a hybrid rights claim is a "colorable claim that a companion right has been violated." *Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir. 1999). Colorable means "a fair

probability or a likelihood, but not a certitude, of success on the merits." *Id.* CLS has more than proved that there is a "fair probability" that Hastings has abridged its freedoms of speech and association.

## V. Hastings Has Violated Equal Protection Because It Treats Similarly Situated Student Organizations Differently.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). As noted above, Hastings treats similarly situated student groups differently. Political groups, like Hastings Democratic Caucus, may require members to adhere to the purpose of the group. ER at 296. Cultural groups, like the Vietnamese American Law Society, may insist that members respect the organization's objectives. ER at 282. But a religious student group may not have religious qualifications for their officers and members.

Evidence of discriminatory intent is presumed when the exclusion affects a fundamental right. *Plyler v. Doe,* 457 U.S. 202, 216-17 (1982) (noting that classifications that impinge upon the exercise of a fundamental right are "presumptively invidious"). Hastings' actions

affect the fundamental rights of association, speech, and free exercise. Because the distinction drawn here affects a fundamental right, it is subject to strict scrutiny. *Clark v. Jeter,* 486 U.S. 456, 461 (1988).

VI. Hastings Fails to Satisfy Strict Scrutiny.

Hastings' infringement of CLS's First and Fourteenth Amendment rights is subject to strict scrutiny. *See Dale*, 530 U.S. at 648 (regulation must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through a means significantly less restrictive of associational freedoms"); *Healy,* 408 U.S. at 184 (a "'heavy burden' rests on the college" to demonstrate the appropriateness of denying recognition). *See* Part III.B, *supra.* To satisfy strict scrutiny, Hastings must show that application of the Nondiscrimination Policy to exclude CLS from its speech fora is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar,* 454 U.S. at 270.

The Court must look beyond "broadly formulated interests," such as a general interest in preventing discrimination, to "the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* __ U.S. __

126 S.Ct. 1211, 1220 (2006). Hastings must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.*

A. Hastings lacks a compelling interest.

Hastings argues that it has a compelling interest in prohibiting discrimination on the basis of religion and sexual orientation. *Kane,* 2006 WL 997217, at *9. Hastings' interest in this case is not compelling and is not advanced by prohibiting CLS from selecting officers and voting members on the basis of their religious beliefs.

Nondiscrimination laws prohibit discrimination because the prohibited characteristic is legally irrelevant to the protected individuals' ability to, for instance, own a home, 42 U.S.C. § 3604(a) (making it unlawful to sell or rent a home to a person on the basis of race, color, religion, sex, familial status or national origin), or be a capable employee. 42 U.S.C. § 2000e, *et seq.*

Thus, the Nondiscrimination Policy should be applied to prohibit discrimination when protected characteristics are irrelevant to a students' ability to serve as an officer or member. While religious

beliefs, including concurrence with beliefs about sexual conduct, may be irrelevant to one's ability to serve as a leader or voting member of Hastings Soccer Club or Hastings Outdoor Club, these religious qualifications are highly relevant to an individual's ability to serve as a faithful leader or member of a religious student organization, like CLS. ER at 357-358. Hastings advances the purpose of the Nondiscrimination Policy when it bars the Soccer Club or the Outdoor Club from discriminating on the basis of religion or sexual orientation, but not so when it does the same to religious groups. The relevance of religious belief to the mission of religious groups, like CLS, changes the nature of religious leadership and membership decisions altogether, and means that decisions based on religious criteria are not properly considered "discrimination."

For this very reason, federal and state nondiscrimination laws almost unanimously exempt religious organizations. For example, Title VII of the Civil Rights Act of 1964, which forbids covered employers from discriminating on the basis of religion, explicitly permits religious organizations to take religion into account in their employment decisions. 42 U.S.C. § 2000e-1(a). California's state employment

nondiscrimination law exempts religious organizations entirely from the ban on employment discrimination, allowing organizations to consider religion and sexual orientation. Cal. Gov. Code § 12926(d).

Under Canon 2(C) of the California Code of Judicial Ethics, judges are prohibited from joining organizations that engage in invidious discrimination. Cal. Code of Jud. Ethics, Canon 2. The Canon, however, *specifically exempts membership in religious organizations*, commenting that "religious beliefs are constitutionally protected." *Id.* If a judge's membership in a religious organization that chooses its leaders and members using religious criteria not only is permissible, but protected, then certainly students' membership in a similar religious organization must be protected.

The Second Circuit recognized the distinction in *Hsu,* observing:

> A religious-based exclusion would have different meanings in different groups. A hypothetical chess club that excluded Muslims could not claim that the exclusion was necessary to guarantee committed chess players. The Hsus' insistence on the exclusion of non-Christians from leadership positions, however, is not a matter of prejudice or clique, just as the girls soccer team at Roslyn High probably does not exclude boys out of enmity. The exclusion in both instances serves a legitimate self-definitional goal for the group. This essential and direct link between the legitimate purpose of the club and the principle of exclusion necessary to achieve that

> purpose distinguishes the girls soccer team and the Walking on Water Club from the hypothetical Chess Club.

85 F.3d at 861 n. 20.

Similarly, the "direct link" between CLS's religious purpose and the exclusions necessary to achieve that purpose distinguish CLS's use of religion from how the Hastings Soccer Club or Hastings Outdoor Club might use religion. Hastings itself acknowledges this type of distinction when it recognizes Legal Vines, a wine tasting club. ER at 321. Hastings allows the group to limit membership to students over the age of twenty-one, because, even though it is technically age discrimination, there is an obvious connection between legally tasting wine and being twenty-one. ER at 321.

Significantly, CLS does not discriminate on the basis of sexual *orientation*.[4] CLS does not differentiate among students on the basis of whether their orientation is heterosexual, homosexual, or bisexual. All voting members and officers, regardless of their sexual orientation, are required to abide by and affirm the group's beliefs regarding

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[4] For this reason, the district court erred when it determined that CLS "admittedly" discriminates on the basis of sexual orientation, *Kane*, 2006 WL 997217, at *1, and, thus, CLS's motion to alter or amend the judgment should have been granted. ER at 719-722.

extramarital conduct. CLS believes that all forms of sexual conduct outside of marriage, whether heterosexual, homosexual, or bisexual, are prohibited by the Bible. ER at 334.

Federal courts have repeatedly rejected charges of sex discrimination by teachers discharged from private religious schools for becoming pregnant when unmarried. The courts have explained if a school's purported discrimination "is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on [gender] in violation of Title VII." *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000). *See also Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 414-15 (6th Cir. 1996).

Likewise, here, CLS's purported sexual orientation discrimination "is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts" of the group. *Cline*, 206 F.3d at 658. Furthermore, CLS distinguishes between conduct and orientation. *Walker*, 453 F.3d at 860 ("CLS's membership policies are thus based on belief and behavior rather than status . . . ."). Because

CLS applies its prohibition on extramarital sexual conduct equally to heterosexual, homosexual, and bisexual students, it does not discriminate on the basis of sexual orientation.

### B. Hastings has not chosen the least restrictive means of pursuing its interest.

Hastings can pursue its goal of prohibiting invidious discrimination without denying CLS recognition. Indeed, recognition of CLS increases the diversity of religious viewpoints on campus and protects the right of minority religious groups to maintain their identity. Instead the least restrictive means of pursuing diversity on campus and protecting religious minorities is to exempt religious organizations from the policy's prohibition of religion and sexual orientation discrimination.

Recognizing the disconnect between the goal of diversity and prohibitions on religious membership and leadership decisions by religious student groups, a number of public universities have exempted religious student organizations from nondiscrimination policies and granted them official recognition. For example, The Ohio State University provides: "Student organizations formed to foster or affirm the sincerely held religious beliefs of their members may adopt a

nondiscrimination statement that is consistent with those beliefs." Student Organization Registration Guidelines, at 7 (2006-2007), available at http://www.ohiounion.osu.edu/posts/documents/Student%20Org%20 Registration%20Guidelines_2006-07%20revision.pdf. Likewise, the University of Minnesota provides: "Religious student organizations may require their voting membership and officers to adhere to the organization's statement of faith and its rules of conduct." Registration and Classification of Student Groups, Official Student Group Handbook (2006-2007), available at http://www.sao.umn.edu/groups/handbook /classification.php. Thus, the least restrictive means requirement is met only if Hastings exempts religious student organizations from the Nondiscrimination Policy's prohibitions on religion and sexual orientation discrimination.

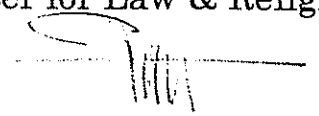
## CONCLUSION

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

grant CLS's motion for summary judgment and motion to alter or amend the judgment.

Dated: September 27, 2006.

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 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 13,388 words.

Dated: September 27, 2006.

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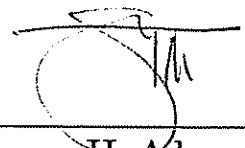

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c), Appellant states that it is aware of no related cases.

Dated: September 27, 2006.

Center for Law & Religious Freedom

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## PROOF OF SERVICE

I hereby certify that on September 27, 2006, two copies of the foregoing Brief of Appellant were served as required by Rule 31(b) of the Federal Rules of Appellate Procedure by overnight delivery service and electronic internet mail on the parties and counsel of record as follows:

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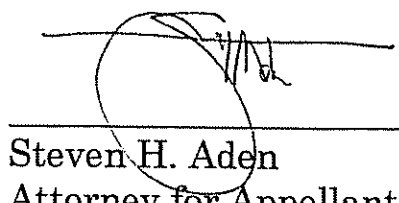

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