No. 08-1371

In The
Supreme Court of the United States

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

v.

LEO P. MARTINEZ, et al.
Respondents.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION, THE AMERICAN ETHICAL UNION, ATHEIST ALLIANCE INTERNATIONAL, FREEDOM FROM RELIGION FOUNDATION, INSTITUTE FOR HUMANIST STUDIES, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS AND SECULAR STUDENT ALLIANCE, IN SUPPORT OF RESPONDENTS

ROBERT V. RITTER
Counsel of Record
Appignani Humanist Legal Center
1777 T Street, N.W.
Washington, D.C. 20009
(202) 238-9088
britter@americanhumanist.org
Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CLS HAS A CONSTITUTIONAL RIGHT TO ASSOCIATE WITH WHOMEVER IT CHOOSES, BUT NOT TO BE PRIVILEGED BY THE STATE 4

A. Private Organizations Have a Right to Determine Their Own Membership 4

B. The Free Exercise Clause Does Not Confer the Privilege of Funding or Official Group Status. 6

II. HASTINGS' NONDISCRIMINATION POLICY IS A VALID NEUTRAL REGULATION OF GENERAL APPLICABILITY AND CLS MUST ADHERE TO IT OR RISK LOSING SCHOOL RECOGNITION. 9

A. The Free Exercise Clause Does Not Require Hastings to Make an Exception Because Its Policy Is Neutral and Generally Applicable. 9

B. Granting the Exemption Would Require Hastings to Violate the Establishment Clause. 13

C. The present case is distinguishable from other cases where the court appears to have held for a religious group in a public institution. 16

III. HASTINGS HAS A COMPELLING INTEREST IN PREVENTING THE DISCRIMINATION AND STIGMATIZATION OF OUTSIDERS; ITS NONDISCRIMINATION POLICY WORKS TO ACHIEVE THIS PURPOSE 19

CONCLUSION 25

APPENDIX

IDENTIFICATION OF *AMICI CURIAE* ……..App. 1

American Humanist Association …… App. 1

The American Ethical Union …….. App. 1

Atheist Alliance International ……... App. 1

Freedom From Religion Foundation …….. App. 2

Institute for Humanist Studies ……... App. 3

Military Association of Atheists and Freethinkers ……..…….. App. 3

Student Secular Alliance ……..… App. 4

TABLE OF AUTHORITIES

Cases:

Barenblatt v. United States, 360 U.S. 109 (1959) 19

Bob Jones v. United States, 461 U.S. 574 (1983) 5, 6, 20

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 5, 6

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 2

Cantwell v. Connecticut, 310 U.S. 296 (1940) 7

Christian Legal Society v. Kane, 2006 U.S. Dist. LEXIS 27347 ..... 4, 7, 8, 12

Christian Legal Soc'y v. Walker, 453 F3d 853 (7th Cir. 2006) 16, 17

Church of Lukumi Babalu Ay v. Hialeah, 508 U.S. 520 (1993) 9, 11, 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 22

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 18, 19

County of Allegheny v. ACLU of Greater Pittsburgh, 492 U.S. 573 (1989) 23

Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) 10

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 14

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 3

Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 6

Lee v. Weisman, 505 U.S. 577 (1992) 23

Lemon v. Kurtzman, 403 U.S. 602 (1971) 13, 23, 24

Locke v. Davey, 540 U.S. 712 (2004) 8

Lynch v. Donnelly, 465 U.S. 668 (1984) 23

McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) 24

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 9, 20, 21

Rosenburger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 17

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 23, 24

Terry v. Ohio, 392 U.S. 1 (1968) 19

Texas Monthly Inc. v. Bullock, 489 U.S. 1 (1989) 14, 15

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 7

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 19

Constitutional Provisions:

U.S. CONST. amend. I, § 1 ..... 3, 7

U.S. CONST. amend. XIV, § 1 2

Statutes:

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 42 U.S.C. § 2000a, et seq. ... 2, 18

Miscellaneous:

American Religious Identification Survey 22

INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondent is being filed on behalf of the American Humanist Association, The American Ethical Union, Atheist Alliance International, Freedom From Religion Foundation, Institute for Humanist Studies, Military Association of Atheists and Freethinkers and Secular Student Alliance, comprising a diverse array of secular and religious organizations that advocate on behalf of religious liberty and equal opportunity, and offers a unique viewpoint concerning the history of religious freedom and civil rights in the United States of America.

Amici feel that this case addresses core Humanist concerns about discrimination at public institutions. Many of *amici's* members have, are or will attend public institutions of higher education and be unfairly excluded from participating in student clubs that deny membership (or other privileges) on the basis of god-belief or sexual orientation.

Amici wish to bolster the principle of religious neutrality—that government may not prefer one

---

[1] *Amici*, identified in Appendix 1, file this brief with the consent of all parties. A copy of the Petitioner's consent letter is being filed herewith. The Respondent has filed a general consent with the Court. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The amici have no parent corporations, and no publicly held companies own 10% or more of their stock.

religion over another, or religion over nonreligion—by informing the Court that an adverse decision would have the constitutionally impermissible effect of advancing the Christian faith by granting the Christian Legal Society an exemption to Hastings' neutral policy of general applicability.

SUMMARY OF ARGUMENT

"WE THE PEOPLE" is more than a mantra, it is the foundation upon which the Constitutional Convention of 1787 built the Great American Experiment.[2] Equally a part of that experiment—and most relevant to this case—is the quintessential public policy that America is to be governed for the common benefit.

The Fourteenth Amendment (1868) rededicated America's commitment to this concept of "all" with its guarantee of "equal protection of the laws",[3] as did the Court's decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)[4] and the enactment of the Civil Rights Act of 1964.[5]

---

[2] The Constitution of the United States of America established a representative form of government—of, by and for **all** the people. The experiment is ongoing, there having been 27 amendments to the Constitution.

[3] Const., amend. 14, sec. 1 (Equal Protection Clause): "No State shall … deny to any person within its jurisdiction the equal protection of the laws."

[4] "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." At 495.

[5] The Civil Rights Act of 1964 outlawed certain forms of discrimination (Pub.L. 88-352, 78 Stat. 241, July 2, 1964). For

This case raises the question of whether Hastings College of the Law ("Hastings")—part of the California system of higher education—may enforce its neutral and generally applicable nondiscrimination policy in a manner that results in the denial of official recognition to any student organization that does not adhere to the policy.

Conflicting constitutional rights are at stake here. On the one hand, there is the right of all students attending a public institution of higher education to have the opportunity to participate in student-funded activities. This right emanates from the Equal Protection Clause, as well as, the Establishment Clause[6] which prohibits government funding of religion. On the other hand, CLS asserts First and Fourteenth Amendment rights of free exercise of religion, expressive association and equal protection, including the right to be free from the prohibitions of Hastings' nondiscrimination policy.

Amici will argue below that while the Christian Legal Society has a fundamental constitutional right to select its members based on its core values,

---

example, Title II (42 U.S.C. § 2000a, et seq.) prohibits discrimination in hotels, motels, restaurants, theaters, sports arenas and all other public accommodations engaged in interstate commerce on the basis "race, color, religion or national origin" and Title VII (42 U.S.C. § 2000e, et seq.) prohibits discrimination by covered employers on the basis of "race, color, religion, sex or national origin."

[6] Const., amend. 1: "Congress shall make no law respecting an establishment of religion …" This provision is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Hastings' nondiscrimination policy, as a neutral policy of general applicability in furtherance of its obligation to the entire academic community, does not violate CLS's free exercise of religion, expressive association and equal protection rights because the policy regulates conduct—invidious discrimination—not speech.[7]

Accordingly, *amici* respectfully request the Court affirm the decision of the court below.

ARGUMENT

I. CLS HAS A CONSTITUTIONAL RIGHT TO ASSOCIATE WITH WHOMEVER IT CHOOSES, BUT NOT TO BE PRIVILEGED BY THE STATE.

A. Private organizations have a right to determine their own membership.

This case presents the question of whether a public university may require student organizations to comply with a neutral and generally applicable nondiscrimination policy in order to receive access to school funding and other benefits. *Amici*

[7] The District Court found that Hastings nondiscrimination policy "regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization—not engage in discrimination—not what CLS may or may not say regarding its beliefs on non-orthodox Christianity or homosexuality." (Emphasis in original.) *Christian Legal Soc. v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *23-*24.

acknowledge the Christian Legal Society's constitutional right to exist in precisely the form it wishes and do not dispute that if CLS did not wish to have priority access to Hastings' facilities or receive funds from student activity fees that it would be free to exclude any of Hastings' students that it wanted to. This issue is not before the Court, as "th[e] Court has long held the Free Exercise Clause[8] of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs." *Bob Jones v. United States*, 461 U.S. 574, 603 (1983) (quoting *Wisconsin v. Yoder*, 406 U.S 205, 219 (1972)). The Free Exercise Clause protects religious organizations from government interference as well as individuals from governmentally sanctioned religious interference. The Clause gives CLS the freedom to regulate membership based upon beliefs or sexual orientation as the organization finds appropriate.

This Court has repeatedly affirmed the right of privately funded groups, both religious and secular, to choose their own messages. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), found that forcing the Boy Scouts to allow gay men into the organization would significantly burden the organization's ability to communicate its message, and that the Boy Scouts have the right to exclude gay people. *See Boy Scouts*, 530 U.S. at 635 ("As we give deference to an association's assertions regarding the nature of its expression, we must also

[8] *Amici* recognize that other clauses of the First Amendment have also contributed to the development of the right of expressive association.

give deference to an association's view of what would impair its expression.") This Court also allowed discrimination when a private college forbade interracial dating and marriage—*Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)—and when parade organizers excluded a homosexual and bi-sexual community group from marching in the organizers' parade, *Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

In these three cases, however, the Court protected only privately run and funded organizations from governmental interference: the Boy Scouts is a "private, not for profit organization." *Boy Scouts*, 530 U.S. at 644. Likewise, the court in *Bob Jones* affirmed the denial of tax exempt status to the school, rendering it a completely private organization. *Bob Jones*, 461 U.S. at 605. Finally, the parade at issue in *Hurley* was organized by private citizens without formal city sponsorship. *Hurley*, 515 U.S. at 558. Because these organizations were private and did not receive public benefits, the Court in each case upheld their right to discriminatory membership.

Precedent mandates a different result, however, when the organization wishing to discriminate is public or seeks funding and/or other benefits from a public institution.

B. The Free Exercise Clause does not confer the privilege of funding or official group status.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). However, the academic village is not a mere soapbox—it is a round conference table for the exchange of ideas by all members of the academic community.

CLS has no right to compel Hastings to recognize it or to provide funding or other privileges when its membership practices violate Hastings' nondiscrimination policy. As will be more fully discussed in section II, *infra*, the Free Exercise Clause[9] does not confer the privilege of public funding by a university. If this Court allows mandatory student activity fees to fund CLS activities, it would force non-theistic and homosexual students to fund their own discrimination and encourage them to feel like they must lie about their beliefs or sexual orientation in order to participate fully within the law school community.

Hastings' universally applicable nondiscrimination policy is based on a compelling interest to protect all of its students, including "on the basis of religion and sexual orientation"[10] and that interest "is particularly critical in the context of

---

[9] Const., amend. 1: "Congress shall make no law *** prohibiting the free exercise [of religion]"; made applicable by the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[10] "States have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of religion and sexual orientation." *Christian Legal Society v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *27-*28.

education."[11] Moreover, the District Court found Hastings' incidental restriction on CLS's alleged First Amendment freedoms and "was no greater than necessary."[12] If CLS wishes to continue limiting membership to people attesting to similar morals, without public funding from student activity fees and with limited access to the forum.

In *Locke v. Davey*, 540 U.S. 712 (2004), the Court held that a state providing college scholarships for secular instruction, could lawfully exclude from the program those students pursuing a degree in theology. The First Amendment's free exercise clause, the Court found, did not require it to fund religious instruction because the "State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on [students]." *Id.* at 713.

In the present case, then, CLS does not have a right to receive funding at all, as Hastings has no obligation to fund any student group or make its facilities available for their use. However, because Hastings has chosen to establish a limited public forum for (1) all Hastings' non-commercial student groups that (2) agree to adhere to its nondiscrimination policy, CLS's eligibility for access and funding do not begin until it agrees to abide by Hastings' viewpoint neutral nondiscrimination policy that is applicable to all other groups.

---

[11] *Id.* at *28.

[12] *Christian Legal Society v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *55.

II. HASTINGS' NONDISCRIMINATION POLICY IS A VALID NEUTRAL REGULATION OF GENERAL APPLICABILITY AND CLS MUST ADHERE TO IT OR RISK LOSING SCHOOL RECOGNITION.

A. The Free Exercise Clause does not require Hastings to make an exception because its policy is neutral and generally applicable.

The freedoms of religion, speech and association are among the most fundamental and cherished freedoms in the United States. In order for a state actor to intervene with a private religious group's rules or policies, there must be a "compelling state interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). This is a high bar. However, the standard is not applicable in this case because Hastings' policy is a neutral rule of general applicability, and such rules "need not be justified by a compelling governmental interest [even if they happen to] "burden a particular religious practice." *Church of the Lukumi Babalu Aye v. Hialeah,* 508 U.S. 520, 531 (1993). Additionally, even if the *Jaycees* standard did apply, Hastings' nondiscrimination policy, which seeks to protect all students from invidious discrimination, is compelling and important enough to justify the minor and

narrow means used by the school to prevent it. This is discussed more fully in Section III below.

In *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-11, 1993 U.S.C.C.A.N (107 Stat.) 1488, *applicability to the states invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997), employees of a private drug rehabilitation organization were fired for using hallucinogenic drugs as part of a religious ceremony. The Court declined to use the compelling governmental interest test and concluded that because the prohibition on the drug was constitutional and applied to all citizens, it did not warrant a religious exception. *Smith,* 494 U.S. at 892. The employees were not allowed to break the law for religious reasons. *Smith,* 494 U.S. at 895.

If this Court rules in CLS's favor, it would overturn precedent upholding the validity of laws and regulations of uniform applicability by permitting exemptions for certain groups. Exemptions allowing some student groups to avoid complying with laws "contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . would permit . . . [an individual], by virtue of his beliefs, 'to become a law unto himself.'" *Employment Div.,* 508 U.S. at 879 (quoting *Reynolds v. United States,* 98 U.S. 145, 167 (1879)). This Court must not permit CLS to "excuse [itself] from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Division,* 494 U.S. at 878-79.

Hastings Law School, therefore, does not need a compelling interest in order to enforce its nondiscrimination rule, so long as the rule is neutral and of general applicability.

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi,* 508 U.S. at 523. First, the Court examines the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

In this case, Hastings' policy restricts "unlawful discrimination" and "covers admission, access and treatment in Hastings-sponsored programs and activities."[13] The word "discrimination" is not

[13] Hastings' Policy on Nondiscrimination states as follows:

> 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 admissions, access and treatment in Hastings-sponsored programs and activities.

inherently religious, unlike words such as "prayer," "worship" "sacrifice" and "ritual," or the words in the statute at issue in *Church of Lukumi*. *See, Church of Lukumi,* 508 U.S. at 521.

In addition to its facial neutrality, the Hastings' policy does not "target[] religious conduct for distinctive treatment" while "compl[ying] with the requirement of facial neutrality." *Church of Lukumi,* 508 U.S. at 535. There is no evidence that Hastings holds a secret agenda to target CLS because of its religion or religious viewpoints. To the contrary, Hastings inclusion of "religion" as a protected class in its nondiscrimination policy demonstrates just the opposite. This inclusion seeks to protect CLS and Christians from discrimination as much as it does any other student group or non-Christians students.

"Categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of Lukumi*, 508 U.S. at 542. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id*. at 543.

The Hastings' nondiscrimination policy passes the generally applicable requirement test on its face:

Pet.App. 88a (Pet.Br. at 9). *Same Christian Legal Society v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *7.

"all groups . . . sponsored by the college are governed by th[e] policy of nondiscrimination."[14] The policy prohibits discrimination universally by all groups without consideration of whether a given group is religious or secular. The policy prohibits discrimination "on the basis of . . . religion . . . or sexual orientation"[15] without regard to the viewpoints of a particular student organization. The policy seeks to protect students of a diverse spectrum of backgrounds against discrimination. CLS has offered no proof that Hastings enforcing its nondiscrimination policy is aimed at CLS's religious viewpoints. Hastings' policy simply does not single out orthodox Christian viewpoints as CLS argues.

Because Hastings' nondiscrimination policy is neutral on its face and applicable to all student groups seeking recognition, CLS cannot claim exception to it. Denial of recognition and financial benefits is a reasonable means of enforcing the important policy, and thus Hastings acted correctly in the present case.

B. Granting the exemption would require Hastings to violate the Establishment Clause.

A government action violates the Establishment Clause when it has the "purpose" or "principal or primary effect" of advancing religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A government entity that gives preference to a group failing to

---

[14] Hastings' nondiscrimination policy at footnote 12.
[15] *Id.*

comply with a school policy would be advancing the group's beliefs over the beliefs and policies of other groups.

In *Texas Monthly Inc v. Bullock*, 489 U.S. 1 (1989), the Court held that a state actor could not exempt religious publications from paying taxes because this promoted religion over non-religion. *Id.* at 15. Every dollar in tax that the publication did not pay was a subsidy that affected nonqualifying taxpayers, forcing them to become "indirect and vicarious 'donors.'" *Texas Monthly,* 489 U.S. at 14 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983)). This is analogous to the current case, because allowing taxes and non-discretionary student activity fees to be used to fund religious groups, while exempting those groups from the discrimination policy, is essentially forcing students to fund these practices. Additionally, exempting groups from the nondiscrimination policy would be "a[n] endorsement of religion" and would "produce greater state entanglement with religion than the denial of an exemption." *Texas Monthly,* 489 U.S. at 20. *See also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985), (holding invalid a statute that provided Sabbath observers with an absolute right to not work on their Sabbath. The statute represented an unconstitutional governmental preference for Sabbath observers over others who may want a day off for a compelling but nonreligious reason.)

In the present case, allowing religious groups exemption from an otherwise neutral policy of general applicability, as with the taxes in *Texas*

Monthly, Hastings too would be impermissibly endorsing religion.

Texas Monthly found that it was not the act of exempting a publication that was unconstitutional, it was that the exemption was given only to religious publications. Had the state exempted all publications, regardless of topic, from paying taxes, the statute would be constitutional. *Id*. at 18. Similarly, Hastings could set up a policy and use a secular determination—for example, any club that required ownership of a particular item—to allow secular and religious groups the right to discriminate without violating the Establishment Clause, but this is not mandatory. Here it is Hastings' choice, and choosing to forbid all student groups from participating in discrimination against other students is not only the easier and more even handed choice; it maintains a policy more consistent with the ideals of a state organization dedicated to religion.

Because Hastings' nondiscrimination policy is both neutral and generally applicable to all student groups, granting CLS an exemption would have the effect of treating at least one religious group preferentially from the other complying and recognized groups. Granting an exemption to CLS would violate the Establishment Clause by having the effect of advancing one religion over all others and religion over nonreligion, and by excessively entangling itself with the group.

C. The present case is distinguishable from other cases where the court appears to have held for a religious group in a public institution.

One issue addressed in CLS's Petition for Writ of Certiorari at 18-20 is CLS's assertion that there is a circuit split between the Seventh Circuit—*Christian Legal Soc'y v. Walker*, 453 F3d 853 (7th Cir. 2006)—and the Ninth Circuit, in the present case. These cases are distinguishable in important respects and, therefore, the cases do not create a circuit split to be reconciled.

In *Walker*, Southern Illinois University ("SIU") derecognized a Christian group from official status as a result of the school having received a complaint that the group's "membership and leadership precluded active homosexuals from becoming voting members or officers." *Id.* at 858. Of relevance here is that the Seventh Circuit said "it is doubtful that CLS [chapter at SIU] violated either of the policies SIU cited as grounds for derecognition." *Id.* at 860. In the present case, Hastings' nondiscrimination policy is more specific and there is no substantial dispute regarding its applicability to its student organizations.

In addition, the consequences of denying recognition at the two schools were vastly different, possibly tipping the scales toward the Christian group in the Seventh Circuit case and Hastings in the present case. In *Walker*, the student group was virtually banned from the university as it was not

permitted to reserve law school rooms for private meetings and denied access to SIU's bulletin boards and other means of communications. *Id.* at 588. In the present case, the failure of CLS to comply with Hastings' nondiscrimination policy did not result in a total ban from use of the law school's facilities. Indeed, it was permitted to use Hastings' facilities on a non-priority basis and had access to some of Hastings' channels of communication. Given the totality of circumstances, the incidental burden put upon CLS by Hastings' nondiscrimination policy does not rise to the level of deprivation experienced by the student group in *Walker*.

In *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court held that a university could not pay for a secular student newspaper's printing costs while denying religious publications the same opportunity for subsidy. *Id.* at 834-35. The problem in *Rosenburger* was the quite different of that in the present case. There, the university treated student publications differently based on viewpoint and religious content, *Id.* at 830, and the Court held that the University's assertion that the exclusion was necessary to avoid violating the Establishment Clause was incorrect because the funds were apportioned neutrally to any group meeting certain criteria that requested the funds. *Id.* at 828. Applying that reasoning to the present case, Hastings is treating everyone the same by holding them all to the nondiscrimination policy equally. To allow CLS to violate this policy and retain official status, along with receiving travel subsidies paid from student activity fees, Hastings would be treating different groups differently based

on viewpoint, which is forbidden by *Rosenburger* and numerous other decisions of this Court.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), also mandates a ruling in favor of Hastings. In *Amos*, the Court upheld amended section 702 of the Civil Rights Act of 1964, which exempts religious organizations from the rest of the title's prohibition on discrimination based on religion. *Amos,* 482 U.S. at 327. The amended section exempted religious groups with all their hiring decisions, regardless of whether the position was religious or secular in nature. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241 *amended by* 42 U.S.C. § 2000e. The exemption was designed to reduce government interference and allow religious groups to effectively promote their religious purpose. *Id.* The distinction between *Amos* and the present case rests on funding. The Church in *Amos* was not a publicly funded institution and did not seek funding. *Id.* at 330.

As described above, if CLS was only interested in being a private group without access to funds from student activity fees or priority access to the use Hastings' facilities, Hastings' nondiscrimination policy would not have applied. But CLS asks for much more than the mere right to exclude members based on beliefs or to be permitted to spread their anti-homosexual message. CLS asks to do these things while receiving funding from the public school. This key fact distinguishes the present case from *Amos.*

In addition to funding, *Amos* is distinguishable because the statute at question did not "impermissibly entangle[] church and state . . . [but instead] effectuat[ed] a more complete separation of the two." *Amos*, 483 U.S. at 339. By upholding the exemption, the Court protected activities of the church from meddling by the state and prevented the state from having to decide what is and is not religious employment. In the present case, by refusing to fund or register CLS as an official group, Hastings too is keeping itself from becoming excessively entangled with religion.

III. HASTINGS HAS A COMPELLING INTEREST IN PREVENTING THE DISCRIMINATION AND STIGMATIZATION OF OUTSIDERS; ITS NONDISCRIMINATIOIN POLICY WORKS TO ACHIVE THIS PURPOSE.

Even if the Court were to go against precedent and employ a heightened scrutiny analysis under the Free Exercise Clause, Hastings' nondiscrimination policy should still be upheld.

This Court often applies a balancing test when there is a possible infringement on a personal right. *See generally*, *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (balancing public interest in fighting crime with privacy interest of individual); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (applying privacy interest balancing test in upholding checkpoints for detecting illegal aliens); *Barenblatt v. United States*, 360 U.S. 109 (1959) (balancing

First Amendment interest in not divulging associational relationships and governmental interest in investigating communist activities). In Free Association Clause cases the Court balances individual rights with governmental rights and has declared: "the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Bob Jones v. United States*, 461 U.S. 574, 603 (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)); *see also id.* at 602 (revoking tax exempt status for university that forbade interracial marriage because the "Government's fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.").

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court held that Minnesota's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" was compelling enough to justify forcing the private organization to admit previously excluded women. *Id.* at 624. The facts in *Jaycees* and the Court's decision are instructive in the present case. Both cases involve private organizations wishing to exclude certain people. As Hastings described in its merits brief, its open-membership policy "serves important educational and public policy objectives"[16] including that (1) "all Hastings students have equal access to all school-

[16] Resp.Br. at 8.

recognized and school-funded activities,"[17] (2) "public funds and mandatory student activity fees as well as the School's facilities and own name and logo are not used to support groups that choose to engage in conduct that the School and the State of California do not wish to subsidize or lend their name to,"[18] (3) "a simple open-membership policy allows Hastings to avoid the difficulties, needless entanglement with RSOs' internal operations, and potential allegations of bias or favoritism that would be associated with undertaking to judge whether an RSO's particular reasons for excluding a particular student were legitimate or illegitimate (or, indeed, lawful or unlawful)"[19] and (4) "strives to bring together students of different backgrounds and viewpoints in order to foster discourse, cooperation, and learning."[20]

Similarly, the stated policy in *Jaycees* was to eliminate discrimination within the community. Jaycees, 468 U.S. at 623. In *Jaycees*, the Court found Minnesota's policy compelling enough to require the private group to admit the previously excluded women. In the present case, Hastings does not wish to compel CLS to admit atheists and homosexuals—rather its purpose is to refrain from endorsing discrimination with its public funds. This is a relatively minor intrusion on CLS's ability to associate as it desires. The group can still meet and spread its message as it wishes. "It is beyond dispute

---

[17] *Id.* at 10.
[18] *Id.* at 11.
[19] *Id.* at 12.
[20] *Id.*

that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality opinion). Here, therefore, Hastings has a compelling state interest to use its powers, including recognition of student groups, to ensure that all of its students are full and equal members of the law school community. Requiring organizations which it sanctions to have non-exclusionary membership ensures that all members of the law school community are treated with equal dignity. It is also consistent with the law.

Hastings' policy of non-exclusion of minorities is of particular interest to *amici*. In the United States, self-identifying Christians make up approximately 76% of the population. Trinity College, *American Religious Identification Survey (ARIS 2008)*, *Summary Report March 2009*, available at: http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf (last visited March 11, 2010).[21] Most members of *amici* do not identify themselves as Christian and are therefore part of a minority. Additionally, people who identify themselves as homosexual also are members of *amici*. Young people are particularly vulnerable to the effects of being cast as outsiders and carrying a

[21] *See* Table 1 – *Religious Self-Identification of the U.S. Adult Population 1990, 2001, 2008* at 3. The survey estimates 76.0% of U.S. adults self-identifying themselves as Christian (173,402,000), 3.9% as "other religions" (8,796,000) and 15.0% as "nones" (34,169,000 (Atheists, Agnostics or no religion)). 5.2% refused to reply to question (11,815,000).

stigma because others think they hold unconventional beliefs. If CLS is permitted to exclude non-Christians and homosexuals, members of *amici* would be barred from being voting members and officers. On the face, this exclusion stigmatizes *amici* members as outsiders—as unfit for membership.

Additionally, when exclusion is condoned by an institution that should be a neutral and safe place for learning, the impact is much greater. Government endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (internal quotations omitted). These types of endorsements are "invalid." *Id.* at 690. If the school allowed CLS's discriminatory membership practices to continue, Hastings would, at minimum, appear to be sending the messages Justice O'Connor warned of. The school's approval would emphasize the harm of the stigma, forcing homosexual and atheist students to feel like outsiders within the law school community.

The Court has adopted Justice O'Connor's approach along with the *Lemon* standard to disallow the presentation of a Christian Nativity scene on public property, *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, (1989), prayers at public school graduations and football games, *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch.*

Dist. v Doe, 530 U.S. 290 (2000), as well as the presentation of the Ten Commandments in a courthouse absent integration with a secular message, *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005). Under the *Lemon* standard, a court must invalidate a governmental act challenged under the Establishment Clause if it lacks a secular purpose. *Lemon*, 403 U.S. at 612. The Court, then, has a history of protecting people outside the Christian religion through decisions that remove the appearance of favoritism. So here the Court should extend this reasoning to the present case and allow Hastings to remain neutral to all groups.

Santa Fe, which disallowed student-led and student-initiated prayer at extracurricular football games is particularly instructive here. By allowing students to pray before a school football game, the school was "explicitly and implicitly encourag[ing] public prayer." 530 U.S. at 309. It is true that students at Hastings could simply choose not to join CLS like the students in *Santa Fe* could choose not to attend football games. But a policy that allows for the endorsement of religious beliefs by allowing religious-based discrimination or by allowing public student prayer has the effect of endorsing religion. One need look only as far as the First Amendment to discover the strong policy against such an endorsement. Likewise a policy that ensures a religiously neutral, discrimination-free atmosphere for all should be vigorously protected by this Court.

CONCLUSION

For the foregoing reasons the *Amici Curiae* respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

ROBERT V. RITTER
Counsel of Record
Appignani Humanist Legal Center
1777 T Street, N.W.
Washington, D.C. 20009
(202) 238-9088
britter@americanhumanist.org
Counsel for *Amici*

March 15, 2010

APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association advocates for the rights and viewpoints of Humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of Humanism, raise public awareness and acceptance of Humanism and encourage the continued refinement of the Humanist philosophy. Most recently, the American Humanist Association has filed *amicus* briefs with the Court in *Salazar v. Buono*, No. 08-472 (pending), and *Pleasant Grove City v. Summum*, No. 07-665, 555 U.S. ___ (2009).

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a Humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has participated in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

The Atheist Alliance International is an organization of independent religion-free groups and

individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Freedom From Religion Foundation ("Foundation"), a national nonprofit organization based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason rather than faith, tradition or authority. The Foundation's two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico. The Foundation's membership, which is dedicated to the principle of separation between state and church, includes college/university students across the country. Moreover, the Foundation offers annual scholarships to college students and college-bound high school seniors, which are awarded through an essay competition. This is one of the few scholarship programs in the country awarding freethinking and nonreligious students for their independent views. The Foundation receives thousands of applications for this program each year further demonstrating students' keen interest in keeping state and church separate.

The Institute for Humanist Studies (IHS) is a think tank whose mission is to promote greater public awareness, understanding and support for humanism. The Institute specializes in pioneering new technologies and methods for the advancement of humanism. In all its work, the Institute aims to exemplify the humanist values of reason, innovation, and cooperation. In our efforts to support humanism we seek to defend the constitutional rights of religious and secular minorities by directly challenging clear violations of the law where it relates to First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is our stance that the role of the government is to not show preference of one religion over another or to provide support of a religious idea when there is no identifiable secular purpose. As a non-membership organization, IHS is able to complement other humanist organizations and cooperates with other humanist groups to ensure that no member of society is discriminated against regardless of religion or lack thereof.

The Military Association of Atheists and Freethinkers is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to community services, MAAF takes action to educate and train both the military and civilian community about atheism in the military and the issues that face military atheists. Where necessary, MAAF identifies,

examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports the separation of church and state and First Amendment rights for all service members.

The Secular Student Alliance is a network of over 200 atheist, agnostic, Humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States. The vast majority of the affiliates are at high schools and colleges in the United States. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.