No. 08-1371

IN THE

Supreme Court of the United States

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

Petitioner,

—v.—

LEO P. MARTINEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL S. LAZAROFF
SIGAL P. MANDELKER
MARK D. HARRIS
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

NATHAN J. DIAMENT
Counsel of Record
INSTITUTE FOR PUBLIC AFFAIRS
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
800 8th Street, NW
Washington, DC 20001
(202) 513-6484

Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

The Union of Orthodox Jewish Congregations of America ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States.[1] It is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The UOJCA has filed, or joined in filing, briefs with this Court in many of the important cases which affect the Jewish community and American society at large.[2]

Of particular relevance to the case at bar, the UOJCA is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious, and social programming for over 40,000 American teenagers annually

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[1] Pursuant to Rule 37.6 of this Court, no party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] The UOCJA filed *amicus* briefs in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Locke v. Davey*, 540 U.S. 712 (2004); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

through weekend retreats, summer trips, and after-school clubs. NCSY's mission is one that is religious, but the organization invites any Jewish teen, regardless of his or her level of affiliation or observance, to participate. The UOJCA is also the founder and operational partner of the Jewish Student Union ("JSU"), whose mission is to involve Jewish teens attending public high schools in Jewish activities. JSU facilitates regular club meetings in public schools during the lunch hour, or before or after school, and provides a variety of Jewish programming. Each club is governed by elected officers who meet on a regular basis to discuss program topics, outside activities, and other events. The case at bar has grave implications in the long term for youth organizations such as NCSY and JSU, as it may affect their future ability to develop and apply criteria for the selection of group leaders and members.

This case raises the question of whether a religious student organization may be denied the same recognition and rights granted to other student groups by a state institution where the group requires that its voting members and office holders make a statement of faith that they believe in and adhere to its religion. Citing to *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009), but with no analysis, the court below held that the policy of the state university was "viewpoint neutral" and "reasonable" and, therefore, permissible. Since the court did not address either the right to the free exercise of religion or the right of expressive association, presumably it

rejected these arguments. In *Truth*, the Ninth Circuit held that a school district did not violate a Christian student group's First Amendment rights by requiring the group to remove its religious general membership requirements. *Truth*, 542 F.3d at 651.

Amicus supports petitioner because *amicus* believes that the decision below is at odds with this Court's precedents and has placed at risk the First Amendment free exercise and expressive association rights of America's many civic, cultural, and religious groups and associations. The decisions of the Ninth Circuit both in this case and in *Truth* could significantly affect the ability of student clubs and youth movements, such as NCSY and JSU, to prescribe requirements for their membership and leaders based on religious beliefs and commitments.

STATEMENT OF FACTS

Petitioner has provided the Court with a comprehensive statement of the case. *Amicus*, therefore, associates itself with petitioner's recitation of the facts and will only briefly highlight several key facts. Pet'r Br. 2-17.

The University of California-Hastings College of the Law ("Hastings") is a public law school that has various student groups to which it grants "Registered Student Organization" ("RSO") status. *Id*. at 3. RSOs represent diverse interests and viewpoints. RSOs may, among other things, access the University's communication channels by posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual Student Organizations Fair. RSOs also may apply for funding to support group activities and use university rooms for meetings. *Id*. at 4.

The Christian Legal Society ("CLS") at Hastings is a small group of students who share religious beliefs. CLS welcomes all Hastings students to attend and participate in its meetings and activities, but it has specific requirements for voting members and officers of CLS—including those that lead its Bible studies. *Id*. at 5; J.A. 118. Voting members and officers must affirm and pledge to abide by the organization's "Statement of Faith." Pet'r Br. 5. Among other things, "[o]fficers must exemplify the highest standards of morality as set forth in

Scripture, abstaining from 'acts of the sinful nature'" set forth in enumerated Bible verses. *Id*. at 6. According to a national CLS resolution, "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." *Id*. at 7; J.A. 146. The resolution applies to "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." Pet'r Br. 7.

Hastings has a Nondiscrimination Policy ("Hastings Policy") which states that the school "is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices," and that "[a]ll groups . . . are governed by this policy of non discrimination." *Id*. at 9. The Hastings Policy further states that Hastings "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation." *Id*.

In 2004, CLS applied to become an RSO. Hastings rejected CLS RSO status because "CLS's by-laws were not compliant with the religion and sexual orientation provisions of the Nondiscrimination Policy." *Id*. at 11; J.A. 228. Hastings also informed CLS that to be an RSO, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." Pet'r Br. 11; J.A. 294, 228-229. According to petitioner, Hastings changed its position as to the terms of that policy mid-

litigation. Pet'r Br. 14; J.A. 93. Regardless, at bottom, CLS was refused RSO status because CLS's leaders and voting members were required by Hastings to affirm and live by the group's stated religious beliefs.

SUMMARY OF ARGUMENT

Hastings, a public university and an arm of the University of California, denied CLS's application for RSO status because CLS requires voting members and officers to affirm and abide by a statement of religious beliefs—its Statement of Faith—that Hastings deemed not compliant with the religion and sexual orientation provisions of its Nondiscrimination Policy. Because of its beliefs, CLS was denied benefits accorded all other student groups. Hastings's application of its policy, therefore, amounted to the regulation of CLS's and its members' religious beliefs. A regulation of belief is always prohibited under the Free Exercise Clause. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible."). On that ground alone, the decision of the court below upholding the Hastings Policy must be reversed.

Alternatively, the Hastings Policy is a regulation of religiously motivated conduct. It impermissibly forced the students who wanted to coalesce as a religious Christian group to choose between forming such a group but being denied the benefit of access to the forum, or being granted access to the forum but without the

ability to express a religious viewpoint. Where, as here, "the object of a law is to infringe upon or restrict practices because of their religious motivation," it is not neutral. *Id.* Even if the policy were considered neutral, however, Hastings's policy is an unconstitutional infringement of CLS's "hybrid" rights to the free exercise of religion and freedom of speech or freedom of association. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). Among other things, Hastings's policy infringes speech because it is an attempt to regulate the ability of CLS to have members make a particular *statement* of faith and thereby shape the message of the group.

As a regulation implicating these free exercise and "hybrid" rights, Hastings's policy is subject to strict scrutiny, meaning that it can survive only if Hastings used the least restrictive means to achieve a compelling interest. It did not. First, the freedom to insist that its leaders share its beliefs is the "means by which a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of religious association. Second, a stated government interest in "nondiscrimination" is not sufficiently compelling to justify forcing a religious group to admit individuals as members and officers who do not adhere to its core principles and can and will interfere with the religious expression and conduct of the group itself.

Finally, Hastings violated CLS's right of expressive association by denying it status as a RSO based on the decision to allow only voting members and officers who share and abide by its core beliefs. This Court has long recognized the right of individuals to coalesce, without government intervention, around a particular set of ideas. In *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held that the state may not force a group to include an unwanted person, under the guise of a "non-discrimination" or "public accommodation" law, where the forced inclusion would substantially burden the contents of the group's speech and have the likely effect of changing its point of view. Hastings's "non-discrimination" policy is no different. It is an attempt to interfere with CLS's membership criteria and, therefore, its point of view. Moreover, even greater deference must be accorded a religious group's conviction that interference with the criteria by which it chooses its voting members, officers, and Bible study leaders would substantially burden its expressive association.

Nor does it cure any violation that the group can continue to exist without University recognition. In *Healy v. James*, 408 U.S. 169, 180, 184 (1972), this Court determined that the denial of the benefits accorded to recognized student organizations is sufficiently burdensome to establish a First Amendment violation. In addition, a government interest in eliminating discrimination has been held by this Court to

override an expressive association's rights only where enforcement of nondiscrimination statutes "would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657-658. There is no question that the regulation here materially interferes with the ideas that CLS seeks to express.

ARGUMENT

I. The Hastings Policy As Written and As Applied Deprives CLS and Its Students of the Right to the Free Exercise of Religion

A. The Ninth Circuit Abrogated the Rights of CLS and Its Members to Freely Express Their Religious Beliefs

The First Amendment's protection of freedom to believe is "absolute." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Thus, the Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *see Lukumi*, 508 U.S. at 533 ("[A] law targeting religious beliefs as such is never permissible."); *Smith*, 494 U.S. at 877 ("[T]he First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'") (citations omitted); *Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"). A regulation of belief is always prohibited.

Here, CLS and its members expressed their religious beliefs by requiring CLS's officers and voting members to sign and affirm a statement of

belief in specific religious principles. Hastings denied recognition and all its benefits to CLS because of this requirement. As applied to CLS, the Hastings Policy amounted to the regulation of the religious beliefs of CLS and its members because they were denied benefits offered to others *because of* their profession of a particular religious belief. Any such regulation is categorically prohibited.

Alternatively, the regulation of the CLS membership requirement may be viewed as the regulation of religiously motivated conduct, which is not forbidden categorically. *See Cantwell*, 310 U.S. at 303-304. Typically, neutral, generally applicable laws may be applied to religiously motivated conduct even when not supported by a compelling government interest. *See Smith*, 494 U.S. at 883-884.[3]

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[3] *Amicus* submits (as it has done in previous cases) that the Court should revisit its decision in *Smith* and provide a clear safe harbor for the activities of America's religious associations and institutions. The holding of the court below that Hastings's non-discrimination policy is "viewpoint neutral and reasonable," *Christian Legal Soc'y Chapter of Univ. of California v. Kane*, 319 F. App'x 645, 646 (9th Cir. 2009), *cert. granted sub. nom. CLS v. Martinez*, ___ S. Ct. ___, 175 L. Ed. 2d 558 (Dec. 7, 2009), illustrates the risk religious associations are exposed to should the decision below be affirmed and this Court not revisit its decision in *Smith*. Religious associations will continue to be at the mercy of public universities, state and local legislatures, and other government institutions. In the absence of a robust protection for the free exercise of religion—one which insists that state laws or regulations that infringe upon that "first freedom" may do so only when serving a compelling state interest via the means least restrictive to religious liberty—nothing stands in the way of religious associations being coerced to disband or violate their tenets.

However, where the government regulation burdens religiously motivated conduct and imposes a choice between "religious beliefs and receiving a government benefit," the regulation is permissible only if it survives strict scrutiny, meaning that the government must have used the least restrictive means to achieve a compelling interest. *Locke v. Davey*, 540 U.S. 712, 720-21 (2004); *see also Smith,* 494 U.S. at 883.

This is such a case. Hastings offers a forum for its students to coalesce as groups to communicate ideas and beliefs. Hastings thus created a forum for the expression of free speech or expressive association. Hastings made participation in this forum dependent upon the Hastings Policy which required religious groups to permit non-adherents of the religion to become voting members and officers. As applied to CLS, Hastings denied CLS the right to have its voting members and officers sign an affirmation of faith. Since CLS voting members and officers lead Bible studies and define the goals of the organization, the Hastings Policy made it effectively impossible for CLS to ensure that it would remain a Christian group expressing Christian viewpoints. Hastings therefore impermissibly forced the students who wanted to coalesce as a religious Christian group to choose between, on the one hand, forming such a group but being denied the benefit of access to the forum or, on the other hand, being granted access to the forum but without being able to express a religious viewpoint. *See, e.g.*, *McDaniel*, 435 U.S. at 626 (holding that state statute violated the

Free Exercise Clause when it prohibited clergy from holding political office and therefore forced a minister to choose between the right of free exercise and the right to seek and hold office); *Sherbert v. Verner*, 347 U.S. 348, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

CLS has a First Amendment right to maintain its beliefs, require statements of faith from its members, and, at the same time, receive the same speech and expressive associational benefits as other student organizations. Any regulation which forces CLS to choose between these rights can be justified only if it serves a compelling interest which, as explained *infra*, does not exist here.

B. The Ninth Circuit Abrogated CLS's "Hybrid" Rights to Free Exercise and Expressive Association or Speech under *Smith*

1. "Hybrid" Rights are Implicated by the Hastings Policy

Alternatively, the Hastings Policy as applied to CLS is not governed by the general rule from *Smith* because it implicates both the Free Exercise Clause and either the freedom of speech or the right to expressive association. In *Smith,* the Court explained that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" when the case involves "not the Free Exercise Clause alone, but the Free Exercise

Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Smith*, 494 U.S. at 881; *see, e.g.*, *Cantwell*, 310 U.S. 307 ("The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged."); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) ("It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.").

The Hastings Policy implicates CLS's and its members' right to the free exercise of religion. Governmental action that dictates how a religious group chooses its voting members and leaders burdens its right to free exercise. This is particularly true here, where the policy prevented CLS from requiring its members to affirm a statement of faith. Pet'r Br. 6. As Justice Brennan explained, "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Amos*, 483 U.S. 341 (Brennan, J., concurring) (internal quotation marks omitted); *see also Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (church has interest in effecting binding resolution of internal governance disputes); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (state statute purporting to transfer

administrative control from one church authority to another violates Free Exercise Clause).

The Hastings Policy also limits CLS's right to both free speech and expressive association. First, Hastings's attempt to regulate the ability of CLS to have members make a particular *statement* of faith and thereby shape the message the group expresses implicates the First Amendment speech rights of CLS and its members, as is evident from this Court's prior decisions. In *Hurley,* for example, the Court treated an entire parade as speech and held that the organizers had a First Amendment right "to control one's own speech." *Hurley*, 515 U.S. at 574. The Court explained that the organizers "clearly decided to exclude a message it did not like from the communication it chose to make and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.*

Similarly, in *Healy,* the Court viewed the denial of recognition by the University of a student group as a regulation of speech. The Court held that the right to be recognized by a University as a student group is protected by the First Amendment which ensures "the right of individuals to associate to further their personal beliefs." *Healy*, 408 U.S. at 181. Here, it is all the more evident that Hastings's attempt to curtail the ability of CLS and its voting members and officers to make particular statements of core beliefs is an encroachment of free speech when considered in conjunction with the fact that the very purpose for which Hastings maintains

RSOs is "to ensure an ongoing opportunity for the expression of a variety of viewpoints." Pet. App. 82a, 74a.

Second, as discussed in more detail *infra*, this Court has held that where a governmental entity attempts to force inclusion of unwanted people in a group, this infringes the group's freedom of expressive association. *See*, *e.g.*, *Dale*, 530 U.S. at 657.

Since Hastings's actions implicate the "hybrid" First Amendment rights, they are subject to strict scrutiny. *Smith*, 494 U.S. at 881. Therefore, any burden to these "hybrid" rights caused by Hastings can be justified only if it is in furtherance of a compelling governmental interest and it is the least restrictive means of furthering that interest.

2. The Hastings Policy Creates a Significant Burden on "Hybrid" Rights

The Hastings Policy as applied imposes an undue government burden on CLS's "hybrid" religious and speech or expressive association rights. Hastings has conditioned access to its speech forum upon CLS allowing voting members and officers who do not share the core Christian beliefs of the group and a commitment to live life in accordance with these beliefs. These voting members and leaders conduct Bible studies and represent the organization at various events. If individuals who do not believe in CLS's principles could vote, lead CLS activities, and determine its agenda, they would be able to express religious viewpoints and teach the Bible

in a manner that was opposed to the core religious values CLS was created to express. CLS students would be denied the ability to express their religious beliefs as a group on campus. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." *Amos*, 483 U.S. at 342 (Brennan, J., concurring). The freedom to insist that its leaders share its beliefs is the "means by which a religious community defines itself." *Id*. To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of religious association.

As explained more fully *infra*, this Court has found that even for non-religious groups, forcing the inclusion of an individual who does not adhere to the group's beliefs "would significantly burden" the group's desire to promote the group's particular belief. *Dale*, 530 U.S. at 653. In *Dale*, the Court concluded that a requirement that the Boy Scouts retain an assistant scoutmaster who was a gay rights activist significantly burdened the Boy Scouts' desire to promote a specific message. Similarly, in *Hurley*, the Court held that organizers of a march had a right to exclude participants in order to propound a particular message. *Hurley*, 515 U.S. at 575. If the presence of a person with a different viewpoint would substantially burden the right of a secular organization to freely present its viewpoint, then surely forced inclusion on an avowedly religious organization would substantially burden the "hybrid" rights of the exercise of religion and religious expression.

Indeed, it is easy to understand the burden a religious organization would experience in exercising its religious identity if required to permit as voting members, officers, or prayer leaders individuals who do not adhere to its core beliefs and practices. Religious organizations, moreover, have an interest in defining who can participate in their activities—leaders or otherwise. Under the Ninth Circuit's decision, for example, JSU or NCSY would have to allow members who are missionaries. A Jewish campus organization such as Hillel would be compelled to admit adherents of Jews for Jesus into its membership. Not only would such requirements redefine the group, they would likely drive away members who wish to congregate with co-religionists, free from proselytizing. This alone suffices to meet the substantial burden requirement.

Regardless, CLS's assertion that the Hastings Policy substantially burdens its exercise of religion and its rights of free speech and expressive association is entitled to substantial deference. Pet'r Br. 11-12. In *Dale,* the Court deferred to the Boy Scouts' opinion that forced inclusion would be a substantial burden on its right to expressive association. *Dale*, 530 U.S. at 653. Certainly, a religious organization's opinion that a decision unduly burdens its exercise of religion and speech rights deserves as much if not more deference.

If the Court does not defer to CLS's understanding, it would be impermissibly interfering with decisions usually made by religious organizations. Indeed, the Court has

often refrained from interfering with or sanctioning government interference with a religious group's practices, including matters related to the appointment of religious leaders. *See Milivojevich,* 426 U.S. at 713 ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."); *see also Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969). The Court has also cautioned against government making independent value-laden judgments about a particular set of religious beliefs. "[R]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("[T]he resolution of [the question of what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

C. There is No Compelling Governmental Interest Justifying the Hastings Policy

There is no compelling governmental interest to permit Hastings to burden CLS's free exercise or "hybrid" rights. While eliminating discrimination is an important state objective, it cannot

justify forcing religious groups to admit individuals as members and officers who do not adhere to its core principles and can interfere with the religious expression and conduct of the group itself.

Even when evaluating a non-religious organization, the Court concluded that the New Jersey public accommodations law forbidding discrimination did not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association" as requiring the Boy Scouts to have a leader whose beliefs and actions were opposed to their values. *Dale*, 530 U.S. at 659. Similarly, in *Hurley*, a gay rights group sought an order enforcing a Massachusetts public accommodations law to prevent "discriminatory treatment." *Hurley*, 515 U.S. at 578. The Court rejected this justification as sufficiently compelling to intrude upon a First Amendment right. *Id.* at 578-579 (internal citations omitted).

It is certainly therefore the case that such an interest would not justify the abrogation of the Free Exercise or the "hybrid" rights at issue here. If the Court upholds the Hastings Policy, it would permit government institutions to make access to rights and benefits contingent upon non-adherence to religious values under the guise of some secular value. State entities could exclude religious groups from a variety of benefits granted to other groups. This result would be contrary to the very purpose of the Free Exercise Clause. As Justice Brennan explained in his concurrence in *Amos*, the religious exemptions from Title VII anti-discrimination laws were necessary to protect the free exercise

of religion because "we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities." *Amos*, 483 U.S. at 342-343.

D. The Ninth Circuit's Decision Raises the Specter of Governmental Entanglement with Religion

A government policy like the Hastings Policy that regulates practices of religious groups including matters related to membership and the appointment of officers raises the specter of impermissible governmental entanglement with religion. Pursuant to this policy, or one like it, a governmental agency could in a more detailed and demanding fashion review the practices of a religious organization to ensure that they treated all people equally in all circumstances or for some other purpose. That would entail governmental review of the internal structure, organization, beliefs, and practices of religious organizations.

The Court in other contexts has cautioned against government making independent value-laden judgments about a particular set of religious beliefs and practices. *See id.* at 336 (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30

(1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs).

Indeed courts "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Thomas*, 450 U.S. at 714 ("[T]he resolution of [the question of what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). In *Widmar,* the Court observed that a university risks "greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'" This was true because "the University would need to determine which words and activities fall within 'religious worship and religious teaching.' . . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule." *Widmar v. Vincent*, 454 U.S. 263, 271 n.11 (1981) (internal citations omitted). As the Court noted, "[m]erely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with

religion in a manner forbidden by our cases." *Id.* at 269 n.6. The logic of the Ninth Circuit's decision raises similar concerns about future governmental review and entanglement.

II. The First Amendment Right to Expressive Association Does Not Permit Public Universities to Deny a Student Group Recognition Based on the Composition of the Group's Leadership or Voting Members

This Court has long recognized the First Amendment expressive association right of individuals to coalesce around a particular set of ideas, common interests, and values. Indeed, in the face of discrimination, organized groups have often done so. The purpose of the right to expressive association is not only "especially important in preserving political and cultural diversity," but also crucial to "shielding dissident expression from suppression by the majority." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

Whether it is to petition the government, to promote a set a values, to educate, or to pursue any other group objective, the ability of a group to express itself effectively and free from government intervention arises in part from the characteristics by which its individual members define the group and the criteria by which they freely choose their leaders. *Id.* at 633 ("[T]he association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). The very capacity to

define membership confers upon the group the authority to speak with one voice against discrimination or otherwise.

Government actors have attempted to infringe upon this right in a variety of ways that "unconstitutionally infringe upon this freedom," including by "interfer[ing] with the internal organization or affairs of the group." *Id.* at 622-623. Time and again, this Court has invalidated such government-imposed mandates, including where these mandates impose membership requirements.

Both *Dale* and *Hurley* held that the state may not require a group to include an unwanted person or group, under the guise of a "non-discrimination" or "public accommodation" law, where inclusion would affect the contents of the group's speech and likely cause it to change its point of view. *Dale*, 530 U.S. at 648 ("[T]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."); *Hurley*, 515 U.S. at 573 ("[A] speaker has the autonomy to choose the content of his own message."); *see Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("If 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.").

Government actions that burden freedom of expressive association, moreover, are subject to

the highest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461 (1958) ("Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). It can be satisfied only "'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

Here, both the expressive association right of the First Amendment and also its Free Exercise Clause are at stake. These rights were disregarded at the hands of government officials who, based on a professed "nondiscrimination policy," denied CLS status that it accorded all other student groups simply because CLS refused to confer voting membership or leadership status on individuals who would not or could not affirm a particular statement of faith. Infringement of the freedom of expressive association is particularly egregious where it bars a student religious group *because of its beliefs* from organizing as a group in the same fashion that all other students groups are permitted to coalesce.

In *Dale*, this Court used a three-part inquiry to conclude that the application of New Jersey's public accommodations law violated the Boy Scouts' First Amendment right of expressive association. *Dale*, 530 U.S. at 648, 650, 653. The

Court should apply that test here and likewise hold that Hastings's rejection of CLS violated the First Amendment.

A. Religious Organizations Presumptively Engage in Protected Expressive Association

Under *Dale*, the threshold question was whether a group engages in "expressive association" or whether it engages in "some form of expression." *Id.* at 648. The Court made this determination by independently reviewing the factual record because it was a First Amendment case where the conclusions of law were "virtually inseparable from findings of fact." *Id.* at 648-649. The Court reviewed the mission statement of the Boy Scouts and concluded that it was "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 650.

It should likewise be "indisputable" that CLS, as a religious group, engages in expression. *See Christian Legal Soc'y Chapter of Univ. of Cal v. Kane*, 2006 WL 997217, at *20 (N.D. Cal. Apr. 17, 2006) ("Hastings does not dispute that CLS engages in expressive association."), *aff'd*, 319 F. App'x 645 (9th Cir. 2009), *cert. granted sub. nom. CLS v. Martinez*, ___ S. Ct. ___, 175 L. Ed. 2d 558 (Dec. 7, 2009). CLS, among other things, invites speakers to give public lectures addressing how to integrate Christian faith with legal practice, and organizes Bible studies including discussion of the text, prayer, and other forms of worship. Pet'r Br. 5; J.A. 229, 302-303.

B. Forced Inclusion of Individuals Who Do Not Follow a Religious Organization's Tenets Significantly Burdens the Group's Ability to Advocate Its Viewpoint

In *Dale*, the Court next considered whether the forced inclusion of an individual who acts contrary to the values of the group would significantly affect or burden the Boy Scouts' ability to advocate public or private viewpoints. *Dale*, 530 U.S. at 650. The Court initially considered "the sincerity of the professed beliefs" by reviewing, "to a limited extent, the nature of the Boy Scouts' view of homosexuality." *Id.* at 650-651. But, here, the Court should not analyze the *sincerity* of the beliefs of a religious organization like CLS. *See Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

The Court in *Dale* next evaluated whether the presence of an individual who does not adhere to the group's beliefs "would significantly burden" the group's desire to promote the group's particular belief. *Dale*, 530 U.S. at 653. The Court there concluded that the presence of an activist scoutmaster such as Dale did significantly burden the Boy Scouts' desire to promote their message. While giving "deference" to a considerable extent to the Boy Scouts' views on "what would impair [their] expression," the Court reviewed in some detail the Boy Scouts' justification for excluding Dale. *Id.*

Likewise, in *Hurley*, the Court reviewed a Massachusetts law that required the organizers of a private St. Patrick's Day parade to include among its marchers an Irish-American gay, lesbian, and bisexual group. The Court concluded that the organizers of the march had a right to exclude certain participants because, "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

Here, the Court should give greater deference to CLS, a religious organization, than it accorded to the Boy Scouts in determining the burden of forced inclusion on the ability of CLS to promote its particular belief. In fact, as explained *supra*, courts and other government officials have neither the competence nor the authority to determine independently how forcing religious groups to include individuals who do not adhere to the core beliefs and practices of the religious group will affect its ability to express its message.

In addition to the substantial burdens discussed above, Hastings's denial of registered group status to CLS also means that CLS was denied, among other things, equal access to a public university's meeting rooms and communication channels, such as posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual

Student Organizations Fair. CLS also was deprived of the ability to apply for funding to support group activities. This Court previously determined that denial of these sorts of school benefits significantly burdens a student group's rights of expressive association.

In *Healy*, the Court found "no doubt" that a university denying recognition to Students for a Democratic Society, "without justification . . . burdens or abridges that associational right." *Healy*, 408 U.S. at 181. The university privileges denied SDS were virtually indistinguishable from those denied to CLS (except for funding). Denying use of "campus facilities for meetings and other appropriate purposes" is the "primary impediment to free association flowing from nonrecognition." *Id*. In order to remain viable on campus, a student organization must have the ability to communicate effectively with other students. *Id*. at 182. Nor does the ability to meet without official recognition or off campus "ameliorate significantly the disabilities imposed" by the school. *Id*. at 183.

As it relates to student organizations, denial of eligibility for funding by a state actor like a public university is equally an impermissible substantial burden. It is no different from denying communication channels—both require government expenditures for a particular benefit accorded all other student groups but CLS. In *Rosenberger,* the Court rejected the University's argument that denial of access is different in kind from denial of funding. The Court concluded that the denial of funding to a student newspaper espousing a religious

viewpoint while funding other newspapers with other perspectives was a sufficient burden to the group's First Amendment rights. *Rosenberger*, 515 U.S. at 845-846. Where a university "expends funds to encourage a diversity of views from private speakers," as opposed to where it directs its funds for specific purposes, it cannot "silence the expression of selected viewpoints." *Id.* at 834-835. Likewise, the governmental action here is "a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion." *Id.* at 845-846.

C. Hastings Has No Compelling Interest in Requiring That Religious Groups Accept Non-Adherents As Voting Members or Officers

The right to expressive association may be infringed only "'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 680 (quoting *Roberts*, 468 U.S. at 623). There can be no compelling government interest in requiring that a student Christian group open its leadership and voting ranks to individuals who do not follow the core values of its religion.

As discussed *supra*, this Court has held that an interest in non-discrimination alone cannot justify forcing a group to accept members and officers who are not adherents of the group. In *Hurley*, the Court further explained:

> The very idea that a noncommercial speech restriction be used to produce thoughts and

> statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 579 (internal citations omitted).

Moreover, government interference with membership requirements has been determined insufficiently compelling in a variety of other contexts. For example, the expressive association right has protected the NAACP from having to comply with an Alabama statute requiring it to disclose its membership lists, *NAACP,* 357 U.S. at 460-461, and the Democratic party from state-imposed national convention delegation requirements, *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981).

As CLS's brief points out, a government interest in eliminating discrimination has been held by this Court to override an expressive association's rights only where enforcement of nondiscrimination statutes "would not materially interfere with the ideas that the organization sought to express." Pet'r Br. 42-43; *see Dale*, 530 U.S. at 657-658 (citing cases where organizations failed to demonstrate that admitting women would seriously burden male members' freedom of expressive association). Hasting's policy falls into the category of regulations that do materially interfere with the message the group is seeking to express. It is trying to prohibit

exclusion of individuals who do not adhere to the group's core principles. Even worse, Hastings wants to require CLS to permit such individuals to enter its leadership and voting-member ranks. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The First Amendment prohibits government from unnecessarily regulating a group's expression by manipulating its membership. A government entity cannot destroy these rights by invoking a policy that mandates a group to accept all members in the name of "non-discrimination."

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

MICHAEL S. LAZAROFF
SIGAL P. MANDELKER
MARK D. HARRIS
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

NATHAN J. DIAMENT
Counsel of Record
INSTITUTE FOR PUBLIC AFFAIRS
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
800 8th Street, NW
Washington, DC 20001
(202) 513-6484

Counsel for *Amicus Curiae*

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