

No. 08-1371

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IN THE  
*Supreme Court of the United States*

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CHRISTIAN LEGAL SOCIETY CHAPTER OF THE 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

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**BRIEF OF THE SOCIETY OF AMERICAN LAW TEACHERS  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST<sup>1</sup>

The Society of American Law Teachers (“SALT”) is an association of law faculty, administrators, and legal education professionals from over 170 law schools. SALT was founded by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT was incorporated in 1974. As a membership organization of law teachers, SALT is particularly sensitive to the historic role the courts have played in upholding both nondiscrimination and anti-censorship principles, as well as in preserving the autonomy of academic institutions in pursuing their educational missions. SALT has appeared as *amicus curiae* in federal and state courts on behalf of historically under-represented groups to support their claims to equal access to education, employment and health care, and to full participation in civic life. SALT also has supported groups asserting First Amendment rights in courts and elsewhere.

The issues raised in this case are of particular significance to SALT’s members, because the issues directly affect the law schools at which SALT’s members teach, as well as the students whom they teach, mentor and advise. In particu-

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

lar, this Court's decision could have significant consequences on the ability of law schools to institute and enforce neutral, generally applicable rules designed to further schools' educational objectives, some of which have been developed with the participation of SALT members.

### SUMMARY OF ARGUMENT

This case arises as a result of the University of California, Hastings College of the Law ("Hastings") denying recognition as a registered student organization to the Christian Legal Society Chapter of University of California, Hastings College of Law ("CLS") for the 2004-2005 school year based on CLS' refusal to abide by Hastings' policy that all student organizations be open to any Hastings law student wishing to join (the "Open Membership Policy" or the "Policy"). As stipulated by the parties before the trial court, the Open Membership Policy requires, as a prerequisite to registration, that a prospective student organization's bylaws (1) "provide that its membership is open to all students"; and (2) indicate an agreement that the organization will abide by Hastings' nondiscrimination policy (J.A. 221), which prohibits discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation" (J.A. 220). There is no dispute CLS failed to comply with the Open Membership Policy because it refused to agree that it would not discriminate on the basis of religion or sexual orientation. Nor is there any dispute that CLS' failure to comply with the Open Membership Policy is the reason its registration application was denied.

Under existing Court precedent, CLS' failure to comply with Hastings' Open Membership Policy should be dispositive. This Court has long acknowledged the unique nature of academic institutions and afforded them great deference in pursuing their educational objectives. Consonant with that deference, this Court explicitly recognized in *Healy v. James*, 408 U.S. 169 (1972), and again in *Widmar v. Vincent*, 454 U.S. 263 (1981), that universities permissibly may exclude prospective student organizations—notwithstanding the First Amendment—if the group fails to adhere to “reasonable campus rules.” In light of this Court’s repeated affirmations of the compelling interest in eradicating discrimination and its effects, as well as this Court’s acknowledgment of the pedagogic value of fostering a university environment where students are exposed to classmates with a diversity of backgrounds, beliefs and experiences, there can be little question Hastings’ Open Membership Policy is at least reasonable.

CLS contends, however, that the Constitution requires that CLS be exempted from compliance with the Open Membership Policy, and in particular the requirement that CLS agree to adhere to Hastings’ general nondiscrimination policy, because the Open Membership Policy interferes with CLS’ ability to constitute itself of only students who live their lives in accordance with, and share, CLS’ conservative view of Christianity, including its views relating to homosexuality. Thus, CLS argues that although it will allow any student to attend CLS meetings, it is unconstitutional to preclude it from denying membership in CLS (and the privileges associated with it) to non-Christians—or even Christians with views that

differ from those of CLS—and to lesbian, gay, bisexual or transgender (“LGBT”) students. However, there is no constitutional right to discriminate, in the name of religion or otherwise. Nor is there any basis in this Court’s precedents or the factual record for invalidating Hastings’ Open Membership Policy.

First, neither the Open Membership Policy, nor its requirement of compliance with Hastings’ nondiscrimination policy, discriminates against CLS in words or effect. The Open Membership policy is directed solely at conduct—the act of excluding students from membership—and does not restrict CLS’ ability to convey any message it chooses, including discriminatory messages on homosexuality. Moreover, neither the Open Membership Policy in general, nor its component requirement of adherence to Hastings’ nondiscrimination policy, disparately impacts religion: the Open Membership Policy affects *every* group at Hastings, and the general nondiscrimination policy affects all groups, *secular or religious*, that seek to create a policy excluding students at Hastings on the basis of status or belief. Indeed, to the extent there are any concerns CLS might be impacted adversely by the Open Membership Policy, this Court need only look to the many years prior to the events at issue to allay those concerns. CLS existed at Hastings for more than a decade without an exclusionary membership policy of the sort it now seeks, and it concededly suffered no detrimental impact to its message.

Second, this Court should continue to defer to academic institutions with respect to their reasonable, viewpoint-neutral policies regarding reg-

istration of student groups. From *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court has recognized the significant educational role played by institutions of higher learning, and the need for those institutions to have discretion in operating their institutions and making educational decisions. The Open Membership Policy is aimed directly at advancing Hastings' educational mission by ensuring an atmosphere of equality that permits students to obtain the full benefits of diversity, and by providing individual students access to a breadth of extracurricular opportunities in support of the formal curriculum. There may be other ways of achieving those goals but, absent differential application or enforcement of the Open Membership Policy (which was not found here), it is for Hastings—not CLS or the courts—to determine the most appropriate educational program for Hastings' students.

Finally, this Court should decline CLS' invitation to create a constitutionally-mandated exemption from generally applicable nondiscrimination policies. Whatever the merits of granting religious groups exemption from any law, there is no constitutional right to such an exemption, as this Court held in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). Indeed, particularly under the facts of this case, granting CLS an exemption would yield a jurisprudentially incoherent result and undermine decades of social progress. Contrary to CLS'

assertions, this is not a case where religious groups or viewpoints have been disadvantaged vis-à-vis their secular counterparts, as was the case in *Widmar*, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Here, CLS has been affected in exactly the same way as every other student group at Hastings. If this Court rejects Hastings' neutral policy, the result will be (1) viewpoint discrimination in favor of religious points of view in violation of the First Amendment Free Speech Clause, and (2) preferential treatment of religion in violation of the First Amendment Establishment Clause. Just as it is impermissible under the Constitution to disadvantage religion, it is equally impermissible to give it preferential treatment.

## ARGUMENT

### I. THE OPEN MEMBERSHIP POLICY DOES NOT DISCRIMINATE AGAINST CLS OR ANY OTHER RELIGIOUS GROUP.

The central premise of CLS' position is that the Open Membership Policy impermissibly targets religious speech or practice in a way that is unconstitutional under this Court's holdings in its religious speech, expressive association, and free exercise decisions. Thus, CLS contends that the aspect of the Open Membership Policy requiring adherence to Hastings' nondiscrimination policy constitutes unconstitutional viewpoint discrimination because it has a unique impact on religious

speech. CLS also argues that restrictions on its ability to enforce a discriminatory membership policy substantially impede its ability to communicate its religious message.

However, this Court's precedents do not support CLS' position and, in fact, they illustrate why the Open Membership Policy is constitutional. Unlike in this Court's religious speech cases, on its face the Open Membership Policy does not regulate speech or any particular viewpoint, nor does the record reflect any identifiable message or viewpoint CLS was prevented from communicating as a result of the application of the Policy. Similarly, in contrast to the expressive association decisions relied upon by CLS, the record flatly belies CLS' assertion that the Open Membership Policy impairs CLS' ability to convey its intended message. Finally, there has been no religious discrimination here that would necessitate remediation by this Court; CLS is making a straightforward Free Exercise Clause claim involving a neutral law of general applicability, which should be denied under *Smith*.

#### **A. The Open Membership Policy Is Viewpoint Neutral.**

There can be no dispute that the Open Membership Policy is viewpoint neutral. The Policy applies to every registered student organization at Hastings, and prohibits any organization, irrespective of its viewpoint, from maintaining a closed membership policy. Nevertheless, CLS attempts to manufacture viewpoint discrimination at Hastings by focusing solely on the component of the Open Membership Policy that requires compliance with Hastings' nondiscrimination policy.

As to that aspect of Hastings' Policy, CLS argues it is "unconstitutional for precisely the same reason the discriminatory policies in *Widmar*, *Lamb's Chapel*, *Good News Club*, and *Rosenberger* were unconstitutional: It places groups organized on the basis of a religious viewpoint at a disadvantage compared to other groups." (Brief for Petitioner at 37 [hereinafter, "Pet. Br. at \_\_\_\_"].) However, even if CLS were permitted to change the case to focus solely on the nondiscrimination policy aspect of the Open Membership Policy, which Respondents contest (Brief of Hastings College of the Law Respondent at 19-23; Brief on the Merits for Respondent-Intervenor Hastings Outlaw at 18-25), *Widmar*, *Lamb's Chapel*, *Good News Club* and *Rosenberger* (the "Religious Speech Cases") do not support CLS' argument.

Although the Religious Speech Cases each stand for the proposition that discrimination on the basis of religious viewpoint (or any viewpoint for that matter) is impermissible, they do not speak to whether a nondiscrimination policy constitutes religious viewpoint discrimination. Each of those cases involved restrictions that facially regulated only religious speech or groups, and the application of the restrictions in each case precluded specific, identifiable speech. *See Good News Club*, 533 U.S. at 103 (religious group prohibited from using school to teach moral lessons through storytelling and prayer under regulation barring use of school "by any individual or organization for religious purposes"); *Rosenberger*, 515 U.S. at 822-23 (denying funding to student publication because the paper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality"); *Lamb's Chapel*, 508 U.S. at 386-87 (reli-

gious group prohibited from using school to present film discussing need for traditional, Christian family values under regulation barring use of school “for religious purposes”); *Widmar*, 454 U.S. at 265 (restricting use of buildings only “for purposes of religious worship or religious teaching”). There is no facial regulation of religious speech here.

To the contrary, Hastings’ nondiscrimination policy (like the Open Membership Policy generally) does not regulate speech at all, and it certainly does not regulate any particular viewpoint. As this Court consistently has found, nondiscrimination policies regulate conduct and are viewpoint neutral under the First Amendment. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) (“focal point” of state antidiscrimination law was not to target speech, “its prohibition being rather on the act of discriminating against individuals”); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (act barring discrimination in public accommodations does not distinguish activity based on viewpoint); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (adoption and enforcement of nondiscrimination policy is “unrelated to the suppression of expression”); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1930 (2006) (“By any traditional First Amendment definition of content neutrality, though, antidiscrimination rules are content-neutral . . . Associations are covered whether they express racist views or antiracist views, religious views or atheist views, pro-gay-rights views or anti-gay-rights views.”); see also

*Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (Solomon Act regulates conduct as opposed to speech); *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 643 (1994) (“[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”). Accordingly, while nondiscrimination policies, such as the one incorporated by reference into the Open Membership Policy, unquestionably prohibit the act of discrimination, they in no way limit the ability of groups to express any viewpoint at all, even discriminatory viewpoints.

Notwithstanding this Court’s clear interpretation of the viewpoint neutrality of nondiscrimination policies, CLS argues that requiring compliance with Hastings’ nondiscrimination policy as a prerequisite for student group registration is viewpoint discriminatory because religious groups are the only “opinion-based organizations . . . stripped of their right to control their message by controlling their leadership” (Pet. Br. at 37), and “every other student group is permitted to insist that its leaders . . . practice what they preach” (Pet. Br. at 39). CLS grounds this argument in the premise that “religion” is the only category of the nondiscrimination policy that is belief-based (Pet. Br. at 36), and that “sexual orientation” is the only category that is conduct based (Pet. Br. at 39), which therefore burdens religious groups like CLS more than other student groups. However, CLS misconstrues both the nature of the protected categories and the impact of the nondiscrimination policy on other Hastings student groups.

First, religion is not the only “belief-based” group affected by application of the nondiscrimination policy, unless “belief” is defined exclusively in terms of religious faith. Other groups are organized around identity, and commitment to certain moral and ethical principles, and are equally affected by the policy requiring compliance with the nondiscrimination policy. Women’s groups may not exclude avowed misogynists; the Black Law Students Association cannot exclude a white supremacist. No one is prohibited from forming a group that expresses a belief, but everyone is prohibited from excluding from their group individuals who do not share those beliefs.

Similarly false is CLS’ contention that sexual orientation is the only protected category with a conduct element, and therefore religious groups are uniquely impacted by a proscription against sexual orientation discrimination. Other protected categories have conduct elements as well. For instance, disability has an integral conduct element to it, and members of a sports-oriented group, for example, could strongly feel that their organization is being fundamentally altered by not being permitted to exclude disabled students. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (challenge by professional golf association to order allowing disabled player to use a golf cart at tournaments). Even religion has a conduct element to it, as an integral component of virtually every faith is some form of worship or ritual. But more to the point, religious groups have no monopoly on sexual orientation discrimination. Therefore, nondiscrimination policies do not single out religious groups with respect to sexual orientation discrimination; the nondiscrimination policy pre-

cludes with equal force both religiously-motivated and secularly-motivated discrimination against LGBT students.

The principal fallacy of CLS' position, however, is that it assumes that a "belief based" group, or group in which "conduct" is significant to the group's identity, is burdened more than other student groups by a policy that prohibits exclusionary membership practices. Yet, by their nature, groups are organized around commonalities that are important to their members, and there are groups at Hastings that cover the entire spectrum of categories covered by the nondiscrimination policy. As to each of them, the nondiscrimination policy would preclude them from pursuing homogeneity no differently than it precludes CLS from doing so. Thus, the Vietnamese-Americans group cannot limit its membership to Vietnamese-Americans. A group of "non-traditional" law students, which includes those who are usually older students, could not limit membership to students over 27. An LGBT group could not exclude heterosexuals.

In all, nearly half (29 out of 60) of the registered student groups at Hastings during the 2004-2005 school year were prevented under the nondiscrimination policy from maintaining a membership limited solely to the group's core identity, because those groups are defined by such things as religion, ethnicity, gender, sexual orientation, or race. CLS is simply the only one of those student organizations unwilling to comply with Hastings' requirements, which speaks far more to the neutrality and reasonableness of Hastings' student group registration requirements than it does

to their purportedly discriminatory effect. Accordingly, although the plainly viewpoint-neutral Open Membership Policy is the relevant policy in this case, even if CLS could narrow the scope of this case to Hastings' requirement that student groups comply with the nondiscrimination policy, there is no basis to find Hastings' registration requirements unconstitutional as impermissible viewpoint discrimination.<sup>2</sup>

**B. Application Of The Open Membership Policy Does Not Substantially Impact CLS' Ability To Communicate Its Message.**

Just as the Open Membership Policy does not directly impact CLS' message through viewpoint discrimination, it is clear that CLS' ability to communicate its message has not been, nor will be, materially impacted by the Open Membership Policy in any indirect manner either. Relying principally on this Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), CLS argues—without pointing to any evidence what-

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<sup>2</sup> Although CLS does not specifically make the argument, this case also is very different from *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, this Court struck down St. Paul, Minnesota's "hate crimes" ordinance as being viewpoint discriminatory because it penalized fighting words in opposition to certain protected classes, but left other fighting words unregulated. *Id.* at 395-96. The general nondiscrimination policy here, however, does not suffer from such one-sidedness. To the contrary, nondiscrimination regulations restrict both discriminatory conduct and anti-discriminatory conduct (*i.e.*, reverse discrimination), *see Grutter*, 539 U.S. at 355, and thus regulate the full spectrum of discriminatory conduct relating to the traditional protected categories.

soever—that the Open Membership Policy threatens CLS’ survival because CLS is precluded from having a membership of its choosing. (Pet. Br. at 30-31.) However, as this Court has explained, a group cannot “erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message,” *Dale*, 530 U.S. at 653, but rather the group must provide evidence to support such an assertion, *see Roberts*, 468 U.S. at 627-28. The evidence here, however, not only does not support CLS’ claim, it proves the exact opposite.

CLS’ long history at Hastings empirically demonstrates that CLS is not at risk of “ceas[ing] to exist,” or having its voice compromised in any way, if it complies with the Open Membership Policy. (Pet. Br. at 30.) The National Christian Legal Society has had an affiliated chapter at Hastings since at least 1989. (J.A. 280.) In the years before this dispute arose over CLS’ refusal to comply with the nondiscrimination policy, CLS’ bylaws either acknowledged that CLS would abide by the *Policies and Regulations Applying to College Activities, Organizations, and Students* (J.A. 258), which require compliance with the nondiscrimination policy (J.A. 220), or the bylaws explicitly stated that CLS “welcomes all students of” Hastings (J.A. 272). Yet, there is no evidence in the record that at any time during that period any student attempted to “sabotage[ ]” CLS’ message (Pet. Br. at 31) or acted in any way detrimental to CLS.

In fact, during the 2003-2004 school year, when CLS had a membership policy explicitly tracking Hastings’ Open Membership Policy, two students

described as not having beliefs consistent with “orthodox Christianity,”<sup>3</sup> and one lesbian student, attended CLS meetings. (J.A. 224.) Significantly, the lesbian student actively engaged in at least one discussion in which she took the position that CLS’ view on homosexuality “might not have been Biblically centered”—*i.e.*, a position directly at odds with CLS’ viewpoint. (J.A. 325.) Yet, rather than such a discussion proving injurious to CLS, one CLS officer testified that “[i]t was a joy to have her” (J.A. 325), admitted she learned from the discussion (J.A. 327), and conceded that the student’s participation was not inconsistent with the faith professed by CLS (J.A. 325; *see* J.A. 455 (counsel’s explanation that, as a result of the discussion, “the contents and expression of CLS at Hastings was not changed in any way nor could it have been”)). Indeed, when asked whether there was any expectation that any LGBT student might seek to join CLS during the 2005-2006 school year—after this dispute arose—the CLS officer testified: “I don’t know. We would more than love to have people come in.” (J.A. 329.)

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<sup>3</sup> What “orthodox Christianity” means is unclear, although presumably it is intended to indicate beliefs consistent with CLS’ view of Christianity. There is enormous diversity among Christian churches (Baptist, Unitarian, Episcopal, Methodist, Universalist, Church of Christ, Jehovah’s Witnesses, Pentecostal, Mormon, Lutheran, Catholic, Presbyterian, etc.), and numerous divisions within many churches, reflecting widely diverse Christian views on many topics, including sexuality. To suggest that CLS’ vision of Christianity is more “orthodox” than the Mormon view, or the views of the Greek Orthodox Church or the Oriental Orthodox Church, serves little purpose other than as a rhetorical mechanism to marginalize interpretations of the Biblical teachings that do not conform to CLS’ beliefs as being outside the “mainstream.”

This case is thus fundamentally different than *Dale*. In *Dale*, the Boy Scouts of America had revoked the membership of James Dale after learning he was gay. As this Court found, the Boy Scouts took a consistent position that homosexuality is contrary to the Scout Oath and Scout Law, and therefore the Boy Scouts would not allow any homosexuals in the Boy Scouts. *Dale*, 530 U.S. at 652. On that basis, this Court reversed the New Jersey Supreme Court ruling that application of the state’s public accommodations law required the Boy Scouts to readmit Dale, holding that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” *Id.* at 653.

Here, CLS cannot argue that the Open Membership Policy changes its message because the Policy would allow non-Christians or LGBT students to be associated with CLS—CLS already allows non-Christians and LGBT students to attend meetings, lead prayers and engage in discussions on the selected Bible topics. (J.A. 231; Pet. Br. at 5.) Nor can CLS argue that its message is being altered by having “heterodox” attendees express views contradicting CLS’ beliefs on homosexuality—CLS concedes that such discussions are not inconsistent with the faith professed by CLS (J.A. 325), and do not change “the contents and expression of CLS . . . in any way” (J.A. 455). Indeed, CLS cannot even argue that it has taken a consistent position that its membership must be limited on the basis of religion or sexual orientation, as CLS agreed to comply with the nondis-

crimination policy every year prior to the year of this dispute. The only argument CLS can make is that having a non-Christian or LGBT student as a member threatens CLS' message in some unique way. However, that is pure speculation, and it is belied by fifteen uneventful years. Thus, even putting aside that *Dale* did not involve the unique academic setting, and therefore is entirely inapposite, *Dale* offers no support for CLS' position.<sup>4</sup>

In contrast, this case is virtually indistinguishable from *Roberts* and *Rotary Club*, where this Court rejected expressive association claims. In both cases, this Court found that, because women—the group to be excluded from membership—were already participating in the organizations as non-voting members or attendees, there

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<sup>4</sup> CLS also relies on *Hurley* to support its expressive association claim. However, *Hurley* is equally inapposite. In *Hurley*, the organizers of the St. Patrick's Day parade in Boston, Massachusetts, refused a place in the parade to the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") because it did not like GLIB's "gay pride" message that would have been expressed by GLIB members walking behind their banner. This Court held that the parade operators had a First Amendment right to exclude GLIB because the operators had a right to control the message conveyed by their parade. *Hurley*, 515 U.S. at 569-70, 575. Just as with *Dale*, however, *Hurley* was not decided in the academic context and, in any case, nothing about the Open Membership Policy, or the participation of students with views different from CLS, alters CLS' message. In fact, according to one of CLS' officers, CLS does not even have a unified message—it is a group of several individual messages: "Each person, part of the group has a position and is able to say what they believe [CLS] stands for. . . . So there was never, you know, a banner that flew on a flag in the sky that said [CLS] says this." (J.A. 326-27.)

was no harm to the groups' messages. As this Court explained in *Roberts*,

the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.

468 U.S. at 627; see *Rotary Club*, 481 U.S. at 541 (noting that while women were not allowed to be members, they were permitted to attend meetings, give speeches, and receive awards). CLS' inclusion of non-CLS Christians and LGBT students in its meetings already has taken CLS down the road to openness. Simply going back to the open membership policy CLS had in 2003-2004 would have a limited effect, if any, on CLS, and does not give rise to an expressive association claim under *Dale* or *Hurley*.

Finally, the record belies any claim that CLS' speech rights currently are being impacted as a result of Hastings' denial of group registration. It is undisputed that Hastings has offered CLS access to classrooms, certain bulletins boards available for posting announcements, and chalk boards to communicate with students. (See J.A. 232.) This Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), found similar alternative channels sufficient to ensure that the Appellant teachers' union was not "seriously impinged" in its ability to communicate. *Id.* at 53 (union had access to channels ranging from

“bulletin boards to meeting facilities to the United States mail”). CLS declined to use those facilities (J.A. 232), yet its membership tripled in the year its registration was denied, and it continued to meet off-campus throughout the year. (J.A. 224, 229-30). Plainly, use of Hastings’ facilities was not necessary for CLS either to access students or to carry on its mission, and it should hardly be heard now—after refusing access to facilities—to argue that the absence of such access was a substantial burden.

**C. CLS Has Not Been Subjected To Intentional Religious Discrimination.**

In a further effort to create the appearance that Hastings singled out CLS (or religious groups generally) for unequal treatment, CLS also asserts that its right to free exercise of religion has been infringed upon because the Open Membership Policy prevents it from choosing its leaders and requiring its members to conform to CLS’ moral standards. (Pet. Br. at 41.) In this regard, CLS relies upon this Court’s decision in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1983), in which this Court struck down four ordinances after finding they had been adopted for the express purpose of preventing the Santeria religious group from performing ritual animal sacrifices that were a significant aspect of their faith. As this Court found, the ordinances were facially directed at the church’s conduct, as demonstrated by the use of the words “sacrifice” and “ritual” in the statute, and there was significant evidence of gerrymandering such that, “although Santeria sacrifice is prohibited, [animal] killings that are

no more necessary or humane in almost all other circumstances are unpunished.” *Id.* at 534-36.

This case, however, is very different than *Lukumi*. This is not a case where a regulation was manufactured specifically to target a religious group. The nondiscrimination policy with which CLS refused to comply has been in existence since 1990 (J.A. 167), and was compelled by California state law, *see* Cal. Educ. Code § 66292.2. Moreover, the Open Membership Policy is neither facially directed at CLS or other religious groups, nor does it contain exemptions that evidence an intent to discriminate against CLS or any other religion or religious group. *Lukumi*, 508 U.S. at 521. Rather, the Open Membership Policy applies to all student groups equally, whether the group is religious or secular, and, until this dispute arose, no religiously-oriented student group at Hastings—including CLS—ever felt it needed an exemption from the Policy to survive. Moreover, there is no evidence of any discriminatory intent against CLS. To the contrary, Hastings’ Director of the Office of Student Services said it was “great” and “fantastic” that CLS wanted to register as a student organization. (J.A. 130.) In fact, even after CLS refused to comply with the Open Membership Policy, as noted above, Hastings nonetheless offered to make some law school facilities available to CLS. (J.A. 233.) This plainly is not the conduct of an institution holding religious animosity generally, or animosity specifically toward CLS, and it does not support a claim under *Lukumi*.

## II. THE OPEN MEMBERSHIP POLICY IS A CONSTITUTIONAL EXERCISE OF HASTINGS' EDUCATIONAL AUTHORITY.

Unable to establish a viable claim that the Open Membership Policy disparately treats CLS (or religion generally) based on the viewpoint of its message, CLS can prevail under this Court's First Amendment jurisprudence only if the Open Membership Policy is found to be unreasonable. However, there is nothing unreasonable about the nondiscrimination principles promoted by the Open Membership Policy, which are a standard component of the constitutional and legislative framework of this nation, and have been both enforced and invoked by this Court to proscribe private conduct for decades. Nor is there anything unreasonable about the inclusive purpose and effect of the Policy, which reflects a pedagogic philosophy based on the benefits of diversity that is not only prevalent in academia, but has been recognized by this Court's decisions since *Bakke*. This Court has "never denied a university's authority to impose reasonable regulations compatible with [its educational] mission upon the use of its campus and facilities." *Widmar*, 454 U.S. at 268. CLS has provided no basis for this Court to do so here.

### A. Hastings Is Permitted To Adopt Reasonable, Viewpoint Neutral Requirements For Registration Of Student Groups.

"[U]niversities occupy a special niche in our constitutional tradition." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 724 (2007) (quoting *Grutter*, 539 U.S. at 329). In recognition

of universities' unique role, this Court often has noted that education is the province of educators, and the courts are ill-suited to delve into matters of pedagogy. *See, e.g., Grutter*, at 328-29. As such, it is well settled that the First Amendment protects a university's freedom to make its own judgments regarding the education of its student body. *See id.* at 329; *Bakke*, 438 U.S. at 312; *Keyishian*, 385 U.S. at 602-603. As this Court has found:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

*Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

Consistent with that freedom, this Court has recognized the right of a university to establish reasonable requirements for the registration of student groups. *Widmar*, 454 U.S. at 268; *Healy*, 408 U.S. at 192-193. Thus,

[a] college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to peti-

tion for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

*Healy*, 408 U.S. at 193; *see Widmar*, 454 U.S. at 276-77 (“[W]e affirm the continuing validity of cases . . . that recognize a University’s right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.”). In this regard, a university acts as a limited public forum, in which the university is permitted to impose even content-based restrictions on the use of the forum, so long as those restrictions are “reasonable in light of the purpose served by the forum” and are not viewpoint discriminatory. *Rosenberger*, 515 U.S. at 829 (internal citation omitted); *see also Perry Educ. Ass’n*, 460 U.S. at 46 (“In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”).

### **B. The Open Membership Policy Is Reasonable.**

The Open Membership Policy plainly is viewpoint neutral and, as discussed above, Hastings’ general nondiscrimination policy is as well (*see*

*supra* Section I.A.). Accordingly, the Open Membership Policy should be invalidated only if it is unreasonable in light of the purpose of the forum created for student organizations. It is not.

The student organization forum was created to “provide Hastings students with opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience.” (J.A. 349.) This purpose is consistent with the prevalent view that law student organizations play a critical role in encouraging interaction among diverse students, which leads to a greater understanding and acceptance among them of diverse perspectives and backgrounds.

Students spend only about ten to thirteen hours a week in the classroom, and thus much learning occurs outside the classroom. Student groups often provide the most sustained and intensive collaborative interactions that law students will experience. These collaborative engagements directly feed the core academic goal of familiarizing and enriching students with learning through exposure to diverse ideas and backgrounds. Student organizations also further the robust exchange of ideas that underlie the core value of academic freedom, and it is in substantial part through these student groups that the educational mission of inculcating principles of justice and fairness takes root.

The Open Membership Policy, at a minimum, is a reasonable effort to promote the educational objectives underpinning the student group forum. Through its incorporation by reference of the gen-

eral nondiscrimination policy, the Open Membership Policy appropriately promotes a campus environment built on the principle of equality. This Court has recognized that principle as being “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection.” *Romer v. Evans*, 517 U.S. 620, 633 (1996). As Justice Kennedy noted in *Parents Involved*:

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.

551 U.S. at 787 (Kennedy, J., concurring). To that end, this Court has held in numerous decisions that measures to eradicate discrimination and its effects are not just reasonable, but reflect a compelling state interest. *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 193 (1990) (“As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest.”); *Rotary Club*, 481 U.S. at 549 (A “slight infringement on . . . members’ right of expressive association . . . is justified because it serves the State’s compelling interest in eliminating discrimination against women.”); *Roberts*, 468 U.S. at 624 (“[E]liminating discrimination . . . plainly

serves compelling state interests of the highest order.”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (upholding denial of tax benefit to religious university based on “the Government’s fundamental, overriding interest in eradicating racial discrimination in education”). That interest is particularly vital in the educational setting because, without equality, students can be denied access to the opportunities for collaborative interaction, thereby undermining the educational purpose for which student organizations exist in the first place.

The open membership aspect of the Policy is equally reasonable as a method of furthering the educational benefits of the student group system. The open membership concept is reflective of an educational philosophy that inclusive activities enhance education by creating opportunities not only to interact with students of similar views and interests, but also with students of dissimilar views and interests. Lee C. Bollinger, *On Grutter and Gratz: Examining “Diversity” in Education*, 103 COLUM. L. REV. 1589, 1591 (2003) (“A fundamental goal of education . . . is to help students expand their capacities to imagine other ways of experiencing life and of seeing the world. For various reasons, this is extraordinarily hard to do, and we are never fully successful at doing it.”).

This philosophy is hardly novel, and in fact was expressed by the President of Princeton University more than thirty years ago in *Bakke*:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who

come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, “People do not learn very much when they are surrounded only by the likes of themselves.”

*Bakke*, 438 U.S. at 312 n.48 (internal citation omitted); see *Keyishian*, 385 U.S. at 603 (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” (internal citation omitted)). Indeed, the belief in the benefits of diversity forms the basis of this Court’s decision in *Grutter*. 539 U.S. at 325; see also *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring) (“The Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.”).

CLS’ challenge to the Open Membership Policy offers little in the way of substance, and nothing to justify this Court deviating from its long-standing practice of deferring to universities’ educational judgments. For example, CLS argues Hastings has no right to tell it not to discriminate and, in any event, Hastings has no interest in impeding the ability of “co-religionists to flock

together.” (Pet. Br. at 43-44.) However, CLS’ myopia distorts the issue. Hastings has not told CLS it cannot discriminate; it simply has told CLS it cannot both discriminate in its membership policies and also be registered as a student group. This is no different than the Internal Revenue Service telling Bob Jones University that it could not receive charitable organization tax treatment while it was discriminating against interracial couples, which this Court held was an appropriate exercise of governmental authority. *See Bob Jones*, 461 U.S. at 595.

Moreover, CLS is focused solely on the burden imposed on *it* by the Hastings Policy, but ignores both the interests of those individuals CLS seeks to exclude, and the need for the law school to maintain protections against religious discrimination even by religious student groups. It seems self evident, although ignored by CLS, that discrimination is a two-sided act involving both the discriminating party and the party who is being discriminated against. Even assuming there was a right to discriminate, and that it was equal to the right not to be discriminated against, Hastings’ choice to side with the victim of discrimination rather than the perpetrator can hardly be considered unreasonable. This is particularly true in light of the universal condemnation of discrimination, and this Court’s decision in *Romer* to strike down Colorado’s effort to constitutionally prohibit nondiscrimination laws based on sexual orientation. 517 U.S. at 635.

Indeed, even CLS’ call for selective application of religious nondiscrimination rules ignores the necessity of those rules in the context of student

organizations. CLS presents its argument against applying religious nondiscrimination rules to religious student groups through stark inter-faith examples, such as a Muslim leading a Bible study, or a Baptist leading a study of the Talmud. In such cases, CLS contends that it is not religious discrimination that motivates an exclusionary membership policy, but merely a desire to ensure that its members are able to practice their own faith. However, CLS entirely ignores the potential for *intra*-faith religious discrimination that arises from the fact that the vast majority of religious student organizations are nondenominational and adhere only to a generalized, faith-based belief system. CLS, for instance, is not limited to any particular Christian sect, and has explained during the course of litigation that its Statement of Faith reflects “certain Christian viewpoints commonly regarded in both the Roman Catholic and Protestant evangelical traditions as orthodox.” (J.A. 66.) If the Protestant evangelical members of CLS decided they were going to stop admitting Roman Catholics simply because they are Roman Catholics, notwithstanding that the Roman Catholic students shared the exact same beliefs as the Protestant evangelical students, there would not be a faith-based rationale for that exclusion. That is invidious religious discrimination, which should not be permitted on any grounds.

It is not unreasonable (and certainly not illegitimate) for Hastings to choose to avoid the quagmire of trying to determine when an act of a religious group is an exercise of religious belief or one of religious discrimination. This is particularly the case where *intra*-faith or *intra*-church

discrimination based on subjective notions of orthodoxy are involved. Hastings has struck a balance that appears to work for religious groups at Hastings, with the lone exception of CLS, and this Court should defer to that balance.

Finally, CLS' assertion that the Open Membership Policy effectively creates "a majoritarian heckler's veto" that will stifle diversity is neither justified, nor a compelling basis to find the Hastings Policy unreasonable. (Pet. Br. at 51.) As CLS' own experience illustrates, there is little risk of such a "veto" emerging. CLS existed on the Hastings campus for fifteen years without the exclusionary membership policy it now asserts is central to its belief system. Yet, there is no evidence that a non-Christian ever sought membership, nor was CLS' message compromised at all (J.A. 455). It did, however, have a lesbian student participate in CLS meetings and express views contrary to the beliefs of CLS' teachings. The result: the participants "learned from each other," which is precisely the point of the Open Membership Policy. (J.A. 327; J.A. 455.)

In sum, rank speculation that there might be instances in the future where other groups of students exercise a "heckler's veto" cannot be the basis for any decision regarding the reasonableness of the Open Membership Policy. *See Perry Educ. Ass'n*, 460 U.S. at 48-49. There is little justification for such paternalism in the law school setting. Law students are adults, and the law should presume they will act like adults and respect their fellow classmates' right to meet, irrespective of whether they disagree with the group's view. Indeed, this is a critical aspect of a legal education, where interacting with people who

have different views and perspectives on issues implicates standards of behavior that are important to members of a profession—courtesy, mutual respect, and thoughtful consideration, even if in the end there is no agreement. There may be risks to an open membership policy, but schools certainly have mechanisms to deal with disruptive students if that occurs. But as future leaders of this country, *Grutter*, 539 U.S. at 308, law students should not be denied—or more importantly sheltered from—the opportunity to learn the obligations, burdens and benefits of participating in a pluralistic culture simply because some future student may have more to learn. And Hastings should not be denied the ability to decide that an open membership policy best effectuates its goal of developing future leaders who are prepared to operate effectively in that pluralistic culture.

### **III. THIS COURT SHOULD NOT CREATE A CONSTITUTIONAL EXEMPTION FROM THE OPEN MEMBERSHIP POLICY FOR RELIGIOUS STUDENT GROUPS.**

Denuded of its untenable free speech and association claims, the true nature of CLS' claim is readily apparent: CLS seeks a constitutional exemption from the Open Membership Policy because it claims the Policy interferes with CLS' ability to exercise its religion. Indeed, CLS explicitly frames this dispute as a free exercise issue, when it explains: "For example, a Talmud study group is not invidiously 'discriminating' when it chooses a Jewish discussion leader rather than a Baptist. This is simply the free exercise of religion." (Pet. Br. at 43.) However, CLS' free exercise claim is flatly precluded under this Court's deci-

sion in *Smith*, which held that religious practices incidentally burdened by neutral laws of general applicability are constitutional so long as the law has a rational basis.<sup>5</sup> 494 U.S. at 878-79.

CLS effectively concedes that its claim fails under *Smith*, making only a half-hearted attempt to liken this case to *Lukumi*. As discussed in Section I.C., *supra*, that argument fails. However, in an apparent effort to make a so-called “hybrid rights” claim, CLS also suggests that because its speech and association claims involve *religious* speech and *religious* associations they are somehow entitled to greater weight or, more specifically, the Open Membership Policy is subject to greater scrutiny. (Pet. Br. at 41.) It is unclear whether such a claim can ever exist as formulated by CLS—*i.e.*, a hybrid claim where each independent claim fails—but we respectfully submit that this case is not an appropriate one for application of the hybrid rights theory in any event.

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<sup>5</sup> CLS’ claim would fail even under pre-*Smith* precedent because the Open Membership Policy also meets the “compelling interest” test set forth in *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). *See Bob Jones*, 461 U.S. at 603-04 (rejecting free exercise claim on ground that eradicating racial discrimination is a compelling state interest); *see also Roberts*, 468 U.S. at 624 (“[E]liminating discrimination . . . plainly serves compelling state interests of the highest order”); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (preventing discrimination on the basis of religious belief is a compelling state interest); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5, 32-38 (D.C. Cir. 1987) (preventing discrimination on the basis of sexual orientation is a compelling state interest).

As an initial matter, to the extent CLS is suggesting that a religious association (or religious speech) claim automatically requires strict scrutiny, notwithstanding the deficiency of the component claims, CLS' position is intellectually incoherent. If an associational religious practice is prohibited by a law of general application, minimal scrutiny is applied to the free exercise claim. Likewise, if the associational religious practice is prohibited in a limited public forum (assuming it does not discriminate based on viewpoint), the association claim also is subject to minimal scrutiny. The law of general applicability does not become less generally applicable because the religious adherent is with a group of co-religionists. Nor does the limited public forum become more open because religion is at issue. The whole should not be greater than the sum of the parts.

The only explanation that could be offered to treat the independently deficient claims as sufficient in combination is that they involve religion. However, such a preference for religious speech or religious associations raises significant constitutional issues. First, it would transform a regime that currently is viewpoint neutral, *see supra* Section I.A., into a regime that discriminates decidedly in favor of religious viewpoints. *See* Alan E. Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 79-80 (2006); *see also* Alan E. Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 172 (2002). Such viewpoint discrimination clearly is impermissible under the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*,

515 U.S. 753, 766 (1995) (plurality opinion) (“Of course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination).”).

Second, creating an exemption for religious speech or association where, as here, the religious group is not being disparately treated, would raise significant Establishment Clause concerns. This Court frequently addresses Establishment Clause issues in its religious speech cases, and has found that granting religious groups equal access in schools does not constitute the establishment of religion. *See Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 839; *Lamb’s Chapel*, 508 U.S. at 395. Granting CLS an exemption from the Open Membership Policy, however, does not promote equal access, but rather grants CLS (and other religious groups) *unequal* access. Such preferential treatment plainly violates the Establishment Clause. *See, e.g., City of Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring) (describing the Religious Freedom Restoration Act of 1993 as “a law respecting an establishment of religion” because “the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain” (internal quotation marks omitted)); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 766.

Finally, and more generally, granting CLS an exemption to the Open Membership Policy in this case will set a precedent that likely will result in the same concerns regarding entangling this Court in religion that this Court sought to put to

rest in *Smith*. While CLS seeks an exemption from the Open Membership Policy for itself, it is beyond debate that CLS would not be the only organization to which such an exemption would apply. At a minimum, every single religiously-oriented student organization could claim it. See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 685 (1992). However, because the basis for the exemption is religious belief—not religious status—it seems inescapable that secular groups acting under cover of their religious beliefs would try to shield their discriminatory conduct in the exemption as well.

Given the inherent difficulties with evaluating beliefs, and religious beliefs in particular, if this Court were to grant CLS' request for an exemption from the Open Membership Policy, it would effectively be creating a limitless and uncontrollable exemption in the name of religious beliefs. That is exactly what this Court sought to prevent in *Smith*:

Laws . . . are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

**CONCLUSION**

In the final analysis, CLS is not seeking redress from a facially discriminatory policy, nor is it seeking redress from a neutral policy that has been discriminatorily applied to it. Rather, what CLS seeks is preferential treatment relieving it from the obligation to comply with a neutral, generally-applicable policy that comprises a fundamental aspect of Hastings' educational program, and that every other student organization at Hastings—including three religious groups—has satisfied. There is no precedent for granting such preferential treatment to a religious group, and SALT respectfully submits that such a precedent should not be set here.

Respectfully submitted,

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