No. 08-1371

In The
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, AKA HASTINGS CHRISTIAN FELLOWSHIP,
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 JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A victory for CLS will be a victory for all Hastings law students. The school's nondiscrimination policy serves honorable purposes in assuring a wide range of educational and social opportunities to all of its students. But its particular application to CLS grates on the First Amendment by requiring this one association to sacrifice its core identity in order to participate in a forum the school has opened to a broad range of student groups. This oppressive application

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

will ultimately defeat the purpose of the school policy. There will be neither liberty nor equality if Hastings squelches protected speech, association, and free exercise rights under the illusion that a more just university environment will result if no one is ever excluded from anything. Exclusion is an inevitable fact of life. The narrowly crafted CLS criteria, creating its unique "voice," is not the arbitrary, unreasonable discrimination the school policy rightly prohibits.

I. AS AN EXPRESSIVE ASSOCIATION, CLS MUST CREATE A "VOICE" THAT WILL FAITHFULLY COMMUNICATE ITS MESSAGE.

An association is a composite of individual persons that can only speak through its authorized representatives. "[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 643 (1984) (O'Connor, J., concurring) ("*Jaycees*"). Speech is often most effective when many voices are combined. Government restrictions on expressive association can have a chilling effect on protected speech. *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 68 (2006) ("*Rumsfeld*"); *Jaycees, supra*, 468 U.S. at 622. Leaders speak for an organization through their conduct and spoken words. If they are not committed to the association's purposes, they are likely to be disloyal or misrepresent the group.

Regulating the identity of a political party's leaders may interfere with the content and promotion of its message. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 579 (2000). Similarly, associational autonomy is

critical to preserving the expressive freedom of religious organizations. Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L. Rev. 189, 283 (1999); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 436 (1987). A religious institution may not be forced to say "anything in conflict with [its] religious tenets." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Government cannot constitutionally regulate the membership of a religious organization, "because changes in membership would be highly likely to alter both content and the mode of expression of its shared commitments over time." Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, supra*, 67 B.U. L. Rev. at 434.

It is inadequate to argue that CLS can still speak freely--even if it could. This Court has consistently held that the unconstitutional restriction of some First Amendment activity (association) is not acceptable merely because some other protected activity (speech) is left intact. There is no substitute for an expressive association's right to select its members and leaders. *Cal. Democratic Party v. Jones, supra*, 530 U.S. at 581. The ability of an organization to speak is severely curtailed if the group is denied the right to identify the members who comprise it. The freedom to associate presupposes the freedom to *not* associate. *Id.* at 574. This limited right to *discriminate* enables an expressive association to create its unique voice.

A. The CLS Policy Itself Is Speech--Not Conduct That Can Be Detached From Its Core Message And Subjected To Government Regulation.

The relationship between conduct and speech can be complicated. Some protected categories, such as race and national origin, are unrelated to conduct and morally neutral. Religion is a category that intersects belief and behavior, as religious faiths typically advocate a code of moral conduct.

The First Amendment protects expressive conduct along with "pure" speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 505 (1969) (students wearing black armbands to protest the Vietnam War were protected by the Free Speech Clause). Moreover, speech that has concrete effects is not automatically converted into nonexpressive conduct. It can be regulated when it is "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969). In the public school context, student expression is regulable when it "materially and substantially disrupt[s] the work and discipline of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., supra,* 393 U.S. at 513. No such dangers are present in this case, where CLS merely preserves its identity by requiring its leaders, and the members who will elect them, to affirm the association's core religious tenets.

Hastings might argue there is no "speech" involved in the "act" of excluding non-believers from certain CLS positions. Alternatively, if the "conduct" and "speech" elements could be segregated, incidental limitations on CLS's free speech rights might be

justified if the burden promoted a substantial government interest that Hastings could not achieve in a less restrictive manner. *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Rumsfeld, supra*, 547 U.S. at 67. But the possibility of separating "speech" and "conduct" is questionable. In *Hsu*, the term "speech" included a high school Bible club's leadership policy provisions to the extent these were created to protect the club's religious message. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 856 (2d Cir. 1996) ("*Hsu*"). Under this analysis, the CLS policy itself constitutes speech. Moreover, the burden on CLS is hardly incidental, since its restrictive policy is essential to preserve its identity and distinctive "voice." CLS is not like the individual in *O'Brien* who burned his draft card as a means of communication--symbolic conduct--but could still disseminate his message through ordinary speech. *United States v. O'Brien, supra*, 391 U.S. 367. CLS has no comparable alternative channels if Hastings cuts off its ability to mold and preserve the message it was formed to express.

B. CLS Is Entitled To Participate In The Intellectual Life Of The College.

By applying its nondiscrimination policy to CLS, Hastings threatens to chill expression in "one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 836 (1995) ("*Rosenberger*"). The First Amendment must thrive on campus, allowing young adults to discuss and consider many ideas. "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker,* 364 U.S. 479,

487 (1960). This Nation is dedicated to safeguarding academic freedom. *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967); *Healy v. James*, 408 U.S. 169, 180-181 (1972). The academic environment is hardly the place to invoke censorship. *Gay Lib. v. Univ. of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977).

This Court has acknowledged that a public college campus is much like a public forum, at least for its own students. *Widmar v. Vincent*, 454 U.S. 263, 268 n. 5 (1981). Persons entitled to be there enjoy First Amendment rights of speech and association. *Shelton v. Tucker, supra,* 364 U.S. at 487; *Healy v. James, supra,* 408 U.S. at 180; *Widmar v. Vincent, supra*, 454 U.S. at 268-269. The university chills campus debate when it denies access to the customary means of communicating with other students, faculty, and administration. Denial of access to particular student groups should be analyzed according to the same level of scrutiny applicable to any other prior restraint. *Id.* at 268 n. 5.

Even if the student groups at Hastings do not have all the benefits of a traditional public forum, the law school has surely opened a limited forum and "must respect the lawful boundaries it has itself set." *Rosenberger, supra*, 515 U.S. at 829. Limitations on access must be reasonable in light of the forum's purpose and viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 392-393 (1993) (public school cannot deny a church access to limited public forum, based on Free Speech Clause).

As applied to CLS, Hastings nondiscrimination policy is neither reasonable nor viewpoint neutral. On the contrary, it has the perverse effect of excluding religious voices from campus dialogue rather than granting them the protection the policy itself claims to offer.

1. CLS Serves The Reasonable Purposes Of Both The Forum And The Policy By Opening Its Meetings And Events To All Students.

The reasonableness of restricting access to a limited forum is evaluated by considering the purpose of the forum and surrounding circumstances. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., supra,* 473 U.S. at 809.

This Court has recognized that public universities should be "accessible to all individuals regardless of race or ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). Campus groups offer students important educational and social opportunities, including discussion and debate on many topics. The Hastings nondiscrimination policy ensures that all students can participate. Opp. to Pet., 3, 12. CLS does not detract from that goal merely by establishing criteria to select its voting members and officers. Its meetings and events are open to all students, thus serving the reasonable educational and social purposes of the forum.

In *Evans v. Berkeley*, 38 Cal. 4th 1 (2006), the city required the Boy Scouts to allow all persons to participate in its programs at the city marina facilities. Participation in those programs did not impact the

Scouts' choice of leaders or expression of the organization's message. By opening its events to all students, CLS does exactly what the Scouts in *Evans* would not promise to do. It is unreasonable for Hastings to demand that CLS also risk sacrificing its core identity.

2. The Nondiscrimination Policy Is Not Viewpoint Neutral Because It Suppresses The Religious Convictions Of CLS.

Even if there were reasonable to apply the nondiscrimination policy as a condition of access to Hastings' student groups, the application to CLS is improper if it is "in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., supra,* 473 U.S. at 811. The university may not "favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., supra*, 508 U.S. at 394. Hastings may not exclude CLS from the forum it has created merely to suppress its religious viewpoint, because CLS is within the class of speakers for whom the limited forum was created--Hastings law students--and addresses topics encompassed by the forum--including religion. Pet., 3; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., supra*, 508 U.S. at 394. Hastings must allow discussion of those topics from all perspectives, even where there is controversy among students.

Nondiscrimination laws have long protected morally neutral traits such as race and national origin. Religious organizations are typically exempt from

religious nondiscrimination laws that would prevent them from pursuing their mission. An antidiscrimination policy may pursue the goal of producing a society that is free of bias. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 578 (1995) ("*Hurley*"). But that objective is fatally flawed when applied to expressive associations and used to limit speech to "orthodox expression." *Id.* at 579. This is a frontal attack on the First Amendment free speech guarantee:

> 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.
>
> *Id.* at 578-579

While Hastings does not exclude religious speech per se, applying its nondiscrimination policy to CLS effectively discriminates against religious speech generally. This is an unconstitutional content-based exclusion of religious speech in the context of a forum generally open to all law student groups. *Widmar v. Vincent, supra*, 454 U.S. at 277.

Finally, Hastings can facilitate the private speech of its students without compromising its own nondiscrimination policy or appearing to endorse any particular view. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990). Accommodation of

CLS's rights to speech, religion, and association in no way suggests that the school endorses its particular theology.

C. It Is Unconstitutional To Require CLS To Forego *Three* Core First Amendment Rights--Association, Speech, And Religion--As A Condition Of Its Participation In A Program Open To Student Groups With Diverse Viewpoints.

Speech, association, and religion would qualify as fundamental rights even if the First Amendment did not expressly guarantee them. All of these rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). Hastings will only recognize CLS if these students agree to forfeit all three of these fundamental rights.

The government rarely has any duty to subsidize even the most fundamental of rights. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). But when government undertakes a program offering public funds, it must be administered evenhandedly. Examples include the federal tax exemptions and state property tax exemptions offered to charitable organizations covering a wide diversity of viewpoints. In the arena of speech, government can finance its own speech using private entities and ensure that the message is not distorted. *Rosenberger, supra*, 515 U.S. at 833. But when a state actor dispenses funds to encourage the expression of private speakers, the program must be viewpoint neutral. *Id*. at 834.

Parties on both sides of a controversial issue are entitled to speak and associate. At Hastings College of Law, student groups may assert antithetical positions about religion, politics, and other topics. All of them are entitled to contribute to the debate and to preserve their core identity. In order to continue as a viable campus entity and participate in the intellectual discussions, CLS must have access to the study body through customary means of communication. *Healy v. James, supra*, 408 U.S. at 181. Hastings' denial of recognition is a substantial impediment. *Id*. at 182. The speech, association, and free exercise liberties of CLS "are protected not only against heavy-handed frontal attack, but also from being stifled by *more subtle governmental interference*." *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960); *Healy v. James*, 408 U.S. 169, 183 (1972) (emphasis added). Denial of recognition is a prior restraint on these rights. *Healy v. James, supra*, 408 U.S. at 184.

Finally, this Court has held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Library Ass'n,* 539 U.S. 194, 210 (2003), quoting *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996). In *Rumsfeld*, the Court applied this unconstitutional conditions doctrine to hold that "the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students." *Rumsfeld, supra*, 547 U.S. at 59. Since Congress could have directly required the law school to allow access to the military even without the funding incentive, requiring access as a condition to receiving federal funds passed constitutional muster.

Here, Hastings could *not* directly require CLS to comply with its nondiscrimination policy by opening its voting memberships and leadership positions to all students. The university admits as much in its argument that CLS can simply continue to meet on campus without the benefits of official recognition. *Christian Legal Soc'y v. Kane*, No. CV-04-04484-JSW, 2006 U.S. Dist. LEXIS 27347, 31 (N.D. Cal. Apr. 17, 2006); Opp. to Pet. 9, 29-30.

II. PRESERVATION OF CLS'S CORE IDENTITY IS NOT THE ARBITRARY DISCRIMINATION THE SCHOOL POLICY RIGHTLY PROHIBITS.

An organization committed to the transmission of a system of values is engaged in constitutionally protected expression. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) ("*Dale*"). That expression is threatened when the group is compelled to accept a person whose presence may significantly affect its ability to promote a particular viewpoint. *Id*. at 648; *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 13, (1988). This is nowhere more evident than in a religious association that transmits the values of that religion. The presence of a non-adherent, particularly in a leadership position, encroaches on the group's ability to advocate its religious values.

In contrast to the "large and basically unselective" Jaycees [*Jaycees, supra*, 468 U.S. at 621], CLS is a selective religious association. Its very existence as a Christian group is jeopardized by the inclusion of non-believers in positions where they are able to mold the group's message. As in *Hsu*, Christian leadership is imperative to preserve the group's purpose and

identity. *Hsu, supra*, 85 F.3d at 857. Group leaders shape the content and quality of the group's speech. If they are not committed to the association's values, the group voice will be garbled. *Id*. at 857.

The government has no business interfering in the internal affairs of any religious association--whether a church or other group defined by a particular faith. Religious beliefs merit First Amendment protection, whether or not they are "acceptable, logical, consistent, or comprehensible." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 714 (1981). CLS is not a church, but like the high school Bible club in *Hsu*, it is a religious community entitled to define and express itself, "notwithstanding its reliance on a public [law] school to sanction its existence and to give it a roof." *Hsu, supra*, 85 F.3d at 869.

The law school is rightly concerned to offer equal educational opportunities to all of its students. But Hastings subjects the student CLS members to *unequal* treatment by conditioning recognition on their abandonment of First Amendment rights. *Hsu, supra*, 85 F.3d at 862. The school's nondiscrimination policy need not coincide with the private speech of every student group on campus. Indeed, it could not, because the groups express diverse and even conflicting viewpoints. CLS asks Hastings only for the benefits available to all other student organizations, not endorsement of its religious tenets. On the contrary, this public law school must remain neutral in matters of religious doctrine.

A. Nondiscrimination Provisions Have Expanded To Cover More Places And Protect More Groups--Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Antidiscrimination policies have ancient roots. In America, this Court rightly upheld civil rights legislation enacted to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964). The Massachusetts public accommodations law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service to a customer without good reason. *Hurley, supra*, 515 U.S. at 571. But like many similar statutes across the country, the Massachusetts legislation broadened the scope, adding more protected categories of persons and more places subject to the law. *Id*. at 571-572. This Court noted the same trend in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations--increasing the potential for collisions with First Amendment association rights. *Dale, supra*, 530 U.S. at 656. Protection also expanded, adding criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656, n. 2.

But as protection expands to more places and people, so does the potential to employ nondiscrimination provisions to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement. When antidiscrimination policies are applied to religious entities, there is

enormous potential for collision with First Amendment rights--free exercise of religion, speech, and association. Political power can be used to squeeze religious views out of public debate about controversial social issues. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 188 (1993). Hastings' application of its nondiscrimination policy to CLS effectively ejects this religious group from the university's "marketplace of ideas." *Healy v. James, supra*, 408 U.S. at 180.

B. The CLS Mission Necessitates Selection Criteria.

Everyone experiences discrimination. Student groups at Hastings are open only to Hastings law students--not the general public or even law students from other schools. The university is not required to grant unlimited access to its campus. *Souders v. Lucero*, 196 F.3d 1040, 1044 (9th Cir. 1999) (former student excluded for stalking). Hastings, like the high school in *Hsu*, might argue that "its nondiscrimination policy is the only way it can achieve an important educational objective: that students be free of any type of 'discrimination.'" *Hsu, supra*, 85 F.3d at 871. But students are subjected to discrimination all the time--honor rolls, sports teams, or activities requiring a certain grade point average. *Id*. Although it is a worthy goal to eliminate certain forms of invidious discrimination--where the selection criteria are truly irrelevant--it is impossible to eradicate all discrimination.

C. The Narrowly Crafted CLS Policy Is Not The Arbitrary, Unreasonable Discrimination The School Policy Rightly Prohibits.

CLS freely opens its meetings and events to all Hastings law students. But it cannot follow the nondiscrimination policy without sacrificing allegiance to its core convictions. Nondiscrimination policies serve admirable purposes but must sometimes yield in order to avoid directly burdening the First Amendment rights of others.

Under the First Amendment, a speaker has autonomy over the content of his own message. *Hurley, supra*, 515 U.S. at 573. Where an expressive association is lumped in with places of public accommodation and subjected to a nondiscrimination policy, this principle is compromised. In *Hurley*, the application of the state's antidiscrimination statute effectively converted the parade organizers' *speech* into a place of public accommodation and forcibly transformed the message. *Hurley, supra*, 515 U.S. at 573. The same is true here. If CLS must follow Hastings' nondiscrimination policy, its message will be shaped by all those students protected by the policy--including those who reject the core religious convictions the group was formed to promote. This extends far beyond the "meal at the inn" promised by the old common law and encroaches on the right of an expressive association to preserve the integrity of its message. *Id.* at 578. This Court, when it rejected a 400-member dining club's facial challenge to a state antidiscrimination law, recognized that the state could not prohibit the exclusion of members whose views conflicted with positions advocated by an expressive

association. What the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Assn., Inc. v. City of New York, supra,* 487 U.S. at 13. Similarly, *Hsu* acknowledged the impropriety of a student club excluding members "solely for reasons of hostility or cliquishness" rather than "to foster the group's shared interest in particular speech." *Hsu, supra*, 85 F.3d at 859; *see* William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 78-80, 90-91 (1986).

Not all discrimination is created equal. Discrimination may or may not be invidious--and thus rightly circumscribed--depending on the context and the identity of the person or group who discriminates. *Hsu, supra*, 85 F.3d at 869. Some antidiscrimination regulations, like Hastings' policy, impair an association's ability to express only the shared views that brought them together. *Jaycees, supra*, 468 U.S. at 623. It is hardly "individious" discrimination for an association to exclude voting members and leaders who threaten to dilute its message. This principle cuts across all viewpoints and protects all groups from infiltration. Here, CLS has opened its doors as widely as possible, crafting restrictions narrowly to preserve its core identity and message as a Christian organization.

D. The First Amendment Bars Courts From Becoming Entangled In The Relationship Between A Religious Association And Its Leaders.

Although this case does not expressly implicate the Establishment Clause, First Amendment principles

foreclose state involvement in the selection of members or leaders of a religious association. This Court has long recognized that a religious organization can require conformity to its moral standards as a condition of membership. *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872). The government cannot dictate either membership criteria or religious doctrine. Hastings enters forbidden constitutional territory by imposing its nondiscrimination policy on CLS and becoming improperly entangled in the selection of those who will disseminate its religious message.

First Amendment exemptions are appropriate to preserve the "identity, expression, and intimacy" of "both those who seek protection under anti-discrimination laws, as well as those who seek exemption." Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws, supra*, 76 U. Det. Mercy L. Rev. at 191. This is particularly true for the actions of a religious group within the context of its own religious community--no matter how much the government might disagree with their beliefs. Shelley K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 Stan. L. Rev. 1201, 1219 (1989). Religious organizations must establish religious criteria to select their members and leaders. Otherwise, the association could be hijacked by non-adherents who would distort its identity and message. It could even cease to *be* religious.

The legal protections for a religious organization's employment policies are analogous to the issues in this case. A religious organization can exclude non-adherents from key employment positions where they could distort the organization's message. Ira C. Lupu,

Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, supra, 67 B.U. L. Rev. 391. Because of the unique constitutional protection for religion, the Civil Rights Act of 1964 accommodates religious employers by exempting them from the prohibition of religious discrimination. 42 U.S.C. § 2000e-1; Julie Manning Magid and Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. Pa. J. Lab. & Emp. L. 191, 195 (2005). This Court rejected Establishment and Equal Protection Clause challenges to that exemption, recognizing that government should not interfere with "the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 335-336 (1987).

"A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Hsu, supra*, 85 F.3d at 864 (emphasis added). Similarly, it is not preferential treatment to exempt CLS it from a policy that prevents it from preserving its identity. Hastings Law School would simply be allowing CLS to advance religion--its very purpose--just as Congress did when it enacted a religious exemption to the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1.

Finally, it is inadequate to argue that the risks of non-Christian leadership are mere speculation. Unlike *Hurley*, a broad cross-section of students is excluded from certain positions because they do not affirm the religious beliefs of CLS. The exclusion is not a specific group that intends to communicate a contrary message. *Hsu, supra*, 85 F.3d at 856. But as in *Hsu*, no one really knows. It is equally speculative to

presume that non-believers would not infiltrate the group and muffle its message. *Id.* at 861. CLS should not be required to assume the risk.

III. THE LAW SCHOOL'S REFUSAL TO RECOGNIZE CLS VIOLATES ITS OWN POLICY AND THREATENS THE RIGHTS OF ALL STUDENTS.

Hastings College of the Law is standing on legal quicksand. The application of its nondiscrimination policy to CLS is tantamount to the very religious discrimination the policy prohibits. It is ironic and paradoxical to promote diversity, tolerance, and inclusiveness by excluding opposing voices. Tolerance morphs into tyranny. Diversity is replaced by a phony "unity" when opposing viewpoints are muzzled.

A. Ironically, The Policy Weakens Constitutional Protection For Everyone--Including The Students The Policy Claims To Protect.

The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale, supra*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976); *Gay Lib. v. Univ. of Missouri, supra*, 558 F.2d at 856. Justice Black said it well in connection with the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the *First Amendment* must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, supra, 408 U.S. at 187-188

A ruling against CLS will not advance the cause of any group seeking enhanced constitutional protection. The status of various minority groups--including racial and religious minorities--has improved dramatically only because the Constitution guarantees free expression for all Americans and facilitates the advocacy of new ideas. David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 232 (2003). No group can demand for itself what it would deny to others. Otherwise, the constitutional foundation will crumble and all Americans will suffer.

More specifically, expressive association is critical to preserving freedom for all Americans. Association is an important corollary to free speech. *Jaycees, supra,* 468 U.S. at 622. It preserves political diversity and shields minority views from majority suppression. *Dale, supra*, 530 U.S. at 647-648. Moreover, public disapproval of an expressive association's tenets does not justify intrusion into its internal affairs, such as compelled acceptance of a member who would compromise the organization's message. *Id.* at 648, 661.

This principle applies on campus and cuts across a wide range of viewpoints. A public university may not squelch student speech or association based on the views a group expresses. *Healy v. James, supra*, 408 U.S. at 187-188. Restriction is appropriate only where advocacy is likely to incite or produce imminent lawless action. *Brandenburg v. Ohio, supra,* 395 U.S. at 447; *Gay Lib. v. Univ. of Missouri, supra*, 558 F.2d at 855 n. 13.

Here, Hastings is applying its nondiscrimination policy in a discriminatory, unequal manner. "[E]xemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" *Hsu, supra*, 85 F.3d at 859. The Hastings policy impedes the ability of CLS to communicate the beliefs it was formed to express, because it can only obtain official recognition by jeopardizing its ability to exist as a distinctly Christian group.

B. Hastings' Application Of The Nondiscrimination Policy Defeats Its Own Purpose.

Antidiscrimination laws and policies attempt to build a fairer society. But the means used to achieve that worthy goal may threaten civil liberties. David E. Bernstein, *Defending the First Amendment From Antidiscrimination, supra*, 82 N.C. L. Rev. at 228. Punishing expression because it offends certain designated groups can lead to serious injustice, as demonstrated by the theft and destruction of college campus newspapers to squelch offensive stories or ads. Such practices provide "a scary glimpse at the

potential future of antidiscrimination policies that will be pursued at all levels of American government if civil liberties protections are not maintained." *Id*. at 241. If Americans want to preserve their constitutional liberties, they need to "develop thicker skin" and tolerate a variety of expression. *Id*. at 245. Instead, there is a growing trend to provide legal remedies under the rubric of discrimination, "perversely encouraging more people to be hypersensitive and easily outraged." *Id*. at 245. If Americans pursue equality by sacrificing civil liberties, they will eventually have neither liberty nor equality. *Id*. at 246.

CLS exercises a trilogy of rights--free speech, association, and religion--in limiting its voting members and leaders to students who support the group's religious tenets. By opening its meetings and events to all students, CLS affirms equality to the fullest extent possible without compromising its identity. If Hastings requires more, CLS risks the loss of its core identity as a Christian organization. That is a perverse, discriminatory result for a policy designed to eradicate discrimination.

C. Student Fees May Fund A Wide Variety Of Private Student Speech Without Violating The First Amendment.

Registered student groups at Hastings are funded by mandatory student fees. There are bound to be ideological conflicts among student organizations. Republican students might not want to finance a student group of Democrats. Jewish students could object to funding a Hindu group. Everyone will be

offended at some point, but offense is inevitable in order to guard the First Amendment.

This Court has held that a public university may charge students an activity fee to finance a broad range of extracurricular expression if the program is viewpoint neutral in the allocation of its funding. *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000). If Hastings funds all students groups *except* CLS--which can only preserve its religious identity by limiting voting members and leaders--that is exactly the type of impermissible viewpoint discrimination this Court rejected in *Rosenberger, supra,* 515 U.S. 819 (university could not refuse to fund a student newspaper espousing a religious viewpoint).

D. Hastings Should Grant Equal Access To All Student Organizations, Just As The Law Schools In *Rumsfeld* Had To Grant Equal Access to Military Recruiters.

This Court has held that law schools can be required to grant military recruiters access to their campuses as a condition of receiving federal funds, even though the schools disagree with certain military policies. *Rumsfeld, supra*, 547 U.S. at 58. Hastings argues that CLS, similarly, can be required to follow the school's nondiscrimination policy as a condition of receiving benefits as a registered student group. But mere access to a law school campus is not analogous to holding a voting membership or leadership position in an expressive association. The presence of military recruiters on campus does not threaten the composition of the law school or any message it proclaims. The recruiters are not seeking to become

part of the law school. They are outsiders who enter the campus for a limited time and purpose. *Id*. at 69. Their mere presence does not violate the school's rights regardless of the school's disagreement with their message. *Id*. at 70.

The situation at Hastings is quite different. As the Second Circuit observed in *Hsu*, merely allowing non-Christians to attend the meetings of a high school Bible Club would not alter the Club's speech. *Hsu, supra*, 85 F.3d at 858 n. 17. But when the Club sets criteria for the students who will lead Christian prayers and devotions, these leadership provisions safeguard the spiritual content of the Club's message. *Id*. at 858. CLS meetings and events are open to all Hastings students. Like the military recruiters, the mere presence of non-believers does not alter the CLS message. But their exclusion as voting members or leaders is necessary to preserve the integrity of the CLS religious message.

CONCLUSION

CLS engages in a highly limited form of "discrimination" for the sole purpose of preserving its core religious identity. Restricting its leaders and voting members to students committed to the group's religious tenets is the only way this association can create and maintain a "voice" that will faithfully represent the shared beliefs for which it was formed. By denying CLS access to the forum available to all other student groups, Hastings engages in the very religious discrimination its nondiscrimination policy was enacted to prevent. Applying that policy to CLS will ultimately harm all of the university's students by suppressing protected speech and eliminating CLS's

unique contribution to the school's "marketplace of ideas."

Respectfully Submitted,

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