No. 08-1371

In The
Supreme Court of the United States

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

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON THE MERITS OF *AMICI CURIAE* PACIFIC JUSTICE INSTITUTE AND CHRISTIAN SERVICE CHARITIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

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STATEMENT OF INTEREST[1]

Pacific Justice Institute ("PJI") is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest. PJI has participated in litigation involving significant constitutional issues in both federal and state courts and has been involved in cases in this Court as an *amicus*, including the Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow,* 542 U.S. 1 (2004) ("*Newdow*"), and the Kentucky and Texas Ten Commandments cases, *McCreary County v. ACLU of Kentucky,* 545 U.S. 844 (2005) ("*McCreary*") and *Van Orden v. Perry*, 545 U.S. 677 (2005) ("*Van Orden*"). In addition, PJI is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

Christian Service Charities ("CSC") is a nonprofit, religious charitable association. Its Mission is to facilitate the inclusion of "*Christian Charities you know and trust*" in charitable giving opportunities.

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[1] This brief is filed upon written consent of the legal counsel for Petitioner and Intervenor, which have been lodged with the Clerk of this Court. On December 29, 2009, Respondent's legal counsel filed a global Rule 37 consent for all prospective *amici*. Pursuant to Rule 37, *amici curiae* Pacific Justice Institute and Christian Service Charities, and their counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authored this brief in whole or in part and that no person other than undersigned counsel drafted the brief. No person or entity, other than *amici*, made any monetary contribution to the preparation or submission of this brief.

CSC carefully screens Christian charities seeking membership to ensure that they meet CSC's standards. One of the ways that CSC ensures the integrity of its charities as distinctively faith-based ministries is by requiring that all member charities have a Christian statement of faith that applies at least to their board members.

CSC represents approximately seventy-seven Christian service charities, including some of the largest and most prominent faith-based service providers in the country. Among other things, CSC represents faith-based charities in the Combined Federal Campaign ("CFC"), a program through which federal employees contribute their own money to charities of their choosing. CSC is one of the largest federations in the CFC in terms of overall giving by federal employees. By aligning with CSC, faith-based charities are linked with other faith-based charities around the country, which increases their visibility and fundraising in the CFC and in other charitable giving opportunities. CSC emphasizes that it is filing the instant brief on its own behalf and not on behalf of any of its member charities.

INTRODUCTION

This case presents the opportunity for the Court to provide a bright-line approach for lower courts to protect the rights of religious associations from government action such as that by Hastings Law

School ("Hastings Law"). The Court has previously acknowledged the significant effects of this kind of government constraint on expression and association:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it *does not desire*.

Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("*Roberts*") (emphasis added).

Petitioner, Christian Legal Society ("CLS"), requires that its voting members and officers' **conduct** comport with Biblical standards and that members and officers not only agree with but also:

> . . . exemplify the highest standards of morality set forth in Scripture, abstaining from acts of the sinful nature, including Galatians 5:19-21; Exodus 20; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10.

Pet. App. 99a-108a.[2] Contrary to Intervenor Hastings Outlaw's assertion, CLS' Statement of Faith does not discriminate based on sexual **orientation**.[3]

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[2] All references to "Pet. App." shall refer to the Appendix to the Petition for Writ of *Certiorari*.

[3] CLS' policy focuses on conduct not orientation: "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS

(Continued on following page)

Contrary to its stated goal of promoting "*the expression of a variety of viewpoints*," Hastings Law School's Nondiscrimination Policy for Registered Student Organizations ("RSO") actually stifles viewpoint expression. The policy requires compulsory association and commands compulsory modification of CLS' Constitution and Statement of Faith by forcing it to accept in its leadership (Art. V) and voting membership (Art. IV) those who disagree with its Mission and Purpose (Art. II) and its Statement of Faith (Art. III). In purpose and effect Hastings Law School demands that CLS not only ignore but also abandon its ***religious*** viewpoint and core values and cease to engage in religious exercise. Pet. App. 8a-9a, 82a-88a.[4]

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membership." This policy applies to "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." This policy applies to heterosexual as well as homosexual conduct. J.A. 146.

[4] The First Amendment protects against government action that penalizes or disfavors certain subjects or ***viewpoints*** (as in this case CLS' ***religious*** viewpoint and beliefs). *See*, *e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("*Playboy*"). This First Amendment principle applies with equal force in the free association context to prohibit the application of university regulations against student associations based on the university's disagreement with the student association's ***viewpoint***. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995) ("*Rosenberger*") (***religious*** editorial viewpoints).

As *Amici* argue in Part I of this brief, this Court should extend proper First Amendment protections to religious associations by clarifying that their associational freedoms cannot be impinged by non-discrimination policies like the one enforced by Hastings Law. Additionally, as argued in Part II, the Court should clarify and strengthen the right of association that protects groups like CLS by extending the protections of that right apart from the confusing categories of intimate and expressive association.

Amicus CSC is greatly concerned with the implications of the lower court decisions in this case, as well as the Second Circuit's decision in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2003) ("*Wyman*") on which the district court relied. If this Court were to adopt the Ninth and Second Circuits' reasoning, then religious charities (such as CSC and its member charities) would be at risk of being prohibited from participating in the CFC system because CSC and their member charities require their leadership to sign and agree to abide by Christian statements of faith. The federal regulations governing the CFC include 5 CFR § 950.110, which provides:

> Discrimination for or against any individual or group on account of race, color, religion, sex, national origin, age, handicap, or political affiliation is prohibited in all aspects of the management and the execution of the CFC. Nothing herein denies eligibility to any organization, which is otherwise eligible

> under this part to participate in the CFC, merely because such organization is organized by, on behalf of, or to serve persons of a particular race, color, religion, sex, national origin, age, or handicap.

The CFC has so far interpreted this regulation to permit faith-based charities that limit board membership and/or employment to persons who share the charity's faith commitments to participate in the CFC. But a decision by this Court in favor of Hastings Law could place CSC's seventy-seven member charities at risk of exclusion from the CFC.

As will be discussed in greater detail below, *Wyman* applied a Connecticut regulation to exclude the Boy Scouts from participating in the state's charitable contribution campaign because of the Boy Scouts' exclusion of homosexuals from membership and employment positions. *Id*. at 92-98. CSC is concerned that if this Court were to adopt the reasoning of the Ninth and Second Circuits 5 CFR § 950.110 will be applied in the same manner in the federal context thereby preventing it and its member charities from participating in the CFC system.

As a final point, it is important to note that the district court in this case applied *Wyman* to find that Hastings Law's "*nondiscrimination*" policy was reasonable and viewpoint neutral, and, therefore, constitutional as applied to exclude CLS from becoming an RSO at Hastings Law. Pet. App. 33a-34a.

ARGUMENT

I. IN ORDER TO PREVENT CONTINUED INJURIES TO RELIGIOUS ASSOCIATIONS AND RELIGIOUS CHARITIES' RIGHT TO FREEDOM OF ASSOCIATION, THE COURT SHOULD ISSUE A STRONG DECISION CLARIFYING THEIR ASSOCIATIONAL RIGHTS

In the decision below, the Ninth Circuit issued a 3-page unpublished, memorandum decision that rests entirely on the conclusion that: "[Hastings Law's] *conditions on recognition are . . . viewpoint neutral and reasonable*." Pet. App. 2a-3a. The Ninth Circuit cited its 2008 decision in *Truth v. Kent School District*, 542 F.3d 634, 649-50 (9th Cir. 2008) ("*Truth*"). *Truth* arose in the context of public school district rather than a university or college setting and related to a high school Bible club (known as Truth). *Id*. at 637. In upholding the constitutionality of the school district's denial of recognition of Truth because it limited non-voting, "general members" to those who shared the group's Christian beliefs and who agreed to abide by Christian standards of conduct, the Ninth Circuit applied the reasonable, viewpoint neutral test:

> [The District] is not denying Truth access based solely on its religious viewpoint, but rather on its refusal to comply with the District's non-discrimination policy. The District was therefore not engaging in viewpoint discrimination; the "perspective of the speaker" was not the "rationale" for

> denying Truth access to the limited public forum.

Id. at 650.

Despite its factual distinctions, the Ninth Circuit extended *Truth* to control the case at Bar. This analysis ignores the fundamental First Amendment right of association and conflicts with the strict scrutiny test applied by this Court in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("*Dale*") and the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) ("*Walker*"). The Court should resolve this split by clarifying that *Dale* and *Walker* are controlling and should adopt and apply the strict scrutiny test of *Dale* and *Walker* for religious associations and religious charities within the First Amendment's Freedom of Association jurisprudence.

In this case, the district court followed the reasoning in *Wyman*. Pet. App. 33a-34a. The *Wyman* court concluded that it was a constitutionally reasonable, viewpoint neutral regulation to exclude the Boy Scouts from participating in the state's charitable contribution campaign because of the Boy Scouts' exclusion of homosexuals from membership and employment positions. *Id*. at 92-98.

Wyman is both legally flawed and factually distinguishable from the context of religious associations. First, unlike the Boy Scouts in *Wyman*, CLS, CSC, and CSC member charities are religious associations with free exercise protections (and corresponding establishment clause restraints on Hastings

Law). Furthermore, in *Wyman* Connecticut's statutory scheme had a provision exempting religious associations. Conn.Gen.Stat. § 46a-81p. No such provision is contained in Hastings Law's policy, thus under *Wyman* CLS and *Amici* would be treated in the same manner as the Boy Scouts (i.e., as though they are not religious associations). However, neither CLS nor CSC nor its member charities are arguing for a right to exclude anyone on the basis of **orientation** but rather on agreement with their religious views and standards of conduct consistent with those views. Moreover, they are evenly applied regardless of **orientation** and are based on conduct, not orientation.

Second, *Wyman* addressed the Boy Scouts' exclusion of persons based on their sexual orientation. Neither CLS nor CSC or its member charities discriminate on the basis of sexual orientation, but limit their members, leaders, and/or employees to those who agree with their religious beliefs and who seek to conduct themselves consistent with those religious beliefs. More importantly, the Boy Scouts are not a religious association, whereas CLS and CSC and its member charities are defined by their religious beliefs.

Third, *Wyman* permitted an unconstitutional condition to be placed upon the Boy Scouts requiring the organization to sacrifice constitutionally protected rights in order to participate in the state's charitable contribution campaign. Hastings Law has similarly conditioned its recognition of CLS as an RSO upon CLS sacrificing its religious beliefs by altering its

Statement of Faith standards for those who speak for, lead, and elect the association's leaders. The same result would be reached if *Wyman* were applied to *Amici* CSC and its member charities.

Amici believe that *Wyman* is inconsistent with this Court's decisions in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1997) ("*Regan*") and *Rust v. Sullivan*, 500 U.S. 173 (1991) ("*Rust*"), which held the government may place certain conditions on government grants or subsidies without being unconstitutional. Although it applied *Wyman*, the district court in this case did not explain what grants or subsidies Hastings Law was providing to CLS to bring the case within the reasoning of *Regan* and *Rust*. Pet. App. 33a-34a, 42a. *Wyman* similarly treated a charitable campaign, where employees give their own money voluntarily, as a "subsidy."[5] This is the main problem with *Wyman*, as it treats every forum as though it were a subsidy because government always does something to create or facilitate a forum.

Fourth, *Wyman* improperly conflated the unconstitutional conditions doctrine with the *Regan* and *Rust* subsidy cases. *Regan* and *Rust* are the exceptions to the doctrine of unconstitutional conditions

[5] In the case at Bar, the district court's adherence to *Wyman* is also particularly misplaced because an earlier decided Second Circuit case held that a public school could not apply a nondiscrimination rule to those positions in a religious student association that would affect its message. *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996).

not the doctrine itself. In this regard, this Court in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 59 (2006) ("*FAIR*") emphasized that government may not do indirectly (by denying benefits) what it cannot do directly. Even assuming, *arguendo*, the contributions in *Wyman* were subsidies (even though no such finding was made), *Wyman* did not explain why government may require an organization to waive a constitutional right altogether in order to receive such a "*subsidy*."

Although it applied *Wyman*, the district court in this case did not explain what grants or subsidies Hastings Law was providing to CLS to bring the case within the reasoning of *Regan* and *Rust*. Pet. App. 33a-34a, 42a. This is a key problem with *Wyman*: its reasoning treats every forum as though it were a subsidy because government always does something to create or facilitate a forum. Moreover, *Amici* CSC is concerned about *Wyman* in this context because CSC and its member charities are involved with the CFC system, and, under *Wyman*, the funds disbursed through the CFC system might be held to be "*subsidies*," even though the funds distributed to CSC's member charities are not government money but the money of federal employees that they give of their own voluntary choice.

Fifth, *Wyman* held that either unconstitutional conditions or forum doctrine principles control, and then went on to indicate that it does not matter which is applied as both have the same test of reasonableness and viewpoint neutrality. *Wyman*, 335 F.3d

at 92. Interestingly, in holding that forum doctrine would apply viewpoint neutrality and reasonableness to the exclusion of the Scouts, *Wyman* does not cite an example where another court has applied forum analysis to a non-speech claim. Forum doctrine is a free speech doctrine and every case in which the Supreme Court has applied it has been to a speech claim. *Wyman* began a trend of applying the forum doctrine to expressive association claims by some courts, including the lower courts in this case. Pet. App. 33a-34a. Casting aside the proper protection of constitutional rights in this manner could have unexpected results. So, for example, under *Wyman* government could exclude African-Americans from meeting space in a public building and claim that only a "reasonable and viewpoint neutral" standard should apply instead of strict scrutiny under the Equal Protection Clause.

Finally, in the context of Christian charities, *Wyman* is distinguishable from *Regan* and *Rust* subsidy cases where the government promotes its own message and, therefore, can select between authorized viewpoints. *Wyman*'s reference to *Regan* and *Rust* cases as establishing a rule of viewpoint **neutrality** and reasonableness is mistaken, as those cases expressly permit **viewpoint** discrimination. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) ("*Southworth*"), this Court held that *Regan* and *Rust* are inapplicable in the university setting where the university was not the speaker but rather the speech

originated "*from the initiative of the students*." As in *Southworth*, CLS and *Amici* CSC's association and speech activities do not constitute government speech.

Another example of how courts and states continue to deny appropriate First Amendment protections to religious charities that raises concerns similar to those in *Wyman* is *Association of Faith-Based Organizations v. Bablitch*, 454 F.Supp.2d 812 (W.D.Wis. 2006) ("*AFBO*"). In *AFBO*, section 30.05(11) of the Wisconsin Administrative Code ("WAC") was interpreted and applied by Wisconsin state officials to render a religious charity ineligible for participation if its governing board or staff are required to agree with the religious beliefs of the organization. *Id*. at 813.

Wisconsin's State Employees Combined Campaign ("SECC") is designed to facilitate voluntary contributions by state employees to state approved charitable organizations via payroll deductions. *Id*. at 812. In 2005, SECC officials denied the CLS' request to participate in the program because CLS required its board members and employees to agree to a statement of faith and affirm their Christian faith. *Id*. at 814. The officials relied on § 30.05(11) of the Wisconsin Administrative Code ("WAC"), which provided:

> The charitable organization shall have a policy and procedure of nondiscrimination in regard to race, color, religion, national origin,

> handicap, age, or sex applicable to persons served by the charitable organization, applicable charitable organization staff employment, and applicable to membership on the charitable organizations governing board.

Id.

In *AFBO,* the district court correctly held that the application to CLS and other AFBO members of WAC § 30.05(11) was unconstitutional because it was unreasonable, but nevertheless applied the wrong analysis. Specifically, the district court applied the non-public forum standard (i.e., reasonable, viewpoint neutral limitation on access to a non-public forum). The problem with this approach is that it skirts an appropriate consideration of the right of association raised by these type of cases. Contrary to the standard applied by the district court in *AFBO*, *Dale* and *Walker* would require that WAC § 30.05(11) serve "*compelling state interests unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of association freedoms*." *Dale,* 530 U.S. at 648; *Walker,* 453 F.3d at 861-62.

Amici believe that the district court's application of the non-public forum standard in *AFBO* reflects a growing inconsistency in enforcement of association rights throughout the nation. In applying this standard, *AFBO* followed the reasoning of the Second Circuit's decision in *Wyman*.

Wyman and *AFBO* illustrate the danger posed to religious associations and religious charities by government intrusion into their beliefs, memberships, and leadership positions.[6] If this Court were to find that religious charities (such as *Amicus* CSC) and religious student associations (such as Petitioner CLS) were required to admit persons to membership and/or leadership positions who did not agree with or who were antagonistic towards their statements of faith, then these religious associations would effectively be excluded from any type of activity involving local, state, or federal governmental entities (e.g., park use for rallies (and after event cleaning); streets for parades (government processes permits, keeps schedules of parades, provides security, etc.); tax exemptions; and charitable campaigns).

This Court is confronted with a split between the Second and Ninth Circuits (*Wyman* and *Truth*), on the one hand, and the Seventh Circuit (*Walker*) on the other, as to whether or not strict scrutiny should be

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[6] Other state charitable campaigns have also excluded faith-based charities on the ground that they limited employment and board membership to Christians: *AFBO v. Granholm*, No. 06-00790 (W.D. Mich.) (Michigan settled by amending regulations to protect rights of faith-based charities in staffing); *AFBO v. Anderson*, No. 08-00111 (S.D. Iowa) (Iowa settled, amending regulations to permit charities to hire those who shared their religious beliefs and eliminating ban on organizations that advocate for a "religious viewpoint"); *AFBO v. Lewis*, No. 06-200 (N.D. Fla.) (Florida settled by amending regulations to clarify right of religious charities to employ and be lead by those who shared their beliefs).

applied to protect religious associations and religious charities. The Court should resolve this split by expressly disapproving *Truth* and *Wyman* and making clear that *Dale* and *Walker* are controlling. Accordingly, *Amici* respectfully request the Court to adopt and apply the strict scrutiny test of *Dale* and *Walker* relative to religious associations and religious charities within the First Amendment's Freedom of Association jurisprudence. The associational rights of the student members of the Christian Legal Society at Hastings Law in the case at Bar have already been irreparably harmed and irretrievably lost. The Court should consider these students and the harm inflicted upon them by Hastings Law when deciding whether or not to require lower courts to apply strict scrutiny rather than the lesser standard applied by the Ninth Circuit in this case and *Truth* and the Second Circuit in *Wyman*.

Hastings Law attempts to distinguish this case from *Walker* by suggesting that CLS' speech and association rights were far less burdened because "*Hastings told CLS that it was welcome to continue to meet on campus and to use other law school facilities*." Opp. to Pet. at 21 n.10. This logic was rejected in *Healy v. James*, 408 U.S. 169 (1972) ("*Healy*"):

> Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis,

> it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. *Such impediments cannot be viewed as insubstantial*.

Id. at 181-82 (emphasis added). In contravention of *Healy*, Hastings Law's refusal to recognize CLS as an RSO deprived it of the following substantial benefits: (a) use of the Law School's name and logo; (b) use of certain bulletin boards in the basement of Snodgrass Hall; (c) eligibility for a Law School organization email address; (d) eligibility to send out mass emails through the Associated Students of the University of California at Hastings; (e) eligibility for a student organization account with fiscal services at the Law School; (f) eligibility to apply for student activity fee funding; (g) eligibility to apply for limited travel funds; (h) ability to place announcements in the Hastings Weekly, a weekly newsletter prepared and distributed by the Office of Student Services; (i) eligibility to apply for permission to use limited office space; (j) eligibility for the use of an organization voice mailbox for telephone messages; (k) listing on the Office of Student Services' website and any hard copy lists, including the Student Guidebook and admissions publications; (l) participation in the annual Student Organizations Faire; and (m) use of

the Student Information Center for distribution of organization materials to the Law School community. Pet. App. 7a.

Importantly, the Court in *Healy* also highlighted that denying official status to student groups inevitably affects the "***give and take of campus debate***." *Healy*, 408 U.S. at 181 (emphasis added). Genuine debate necessitates a genuine openness to different beliefs and groups. This openness is particularly salient in the context of higher education. As this Court noted in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.

Hastings Law School and Hastings Outlaw assert that CLS' faith requirements for membership and leadership positions are discriminatory. But genuine difference is precisely what underlies religious freedom on our country: "*The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to* ***maintain their differences in the face of powerful pressures to conform***." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990) (emphasis added). That such diversity leads to controversy is unsurprising. But

suppressing diversity to smooth or avoid controversy legitimizes the Heckler's Veto and limits expression based upon the reaction of outsiders to groups. *See*, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Cox v. Louisiana*, 379 U.S. 536 (1965).

Amici note that these problems are amplified by the threat of legal action that would exist whenever religious charities solicited funds from government-sponsored charitable campaigns. If religious associations and charities have to go to court every time they decide to interact with state, local, or federal governments, then it will not be long before these associations find it economically infeasible to engage in such interaction. If the approach taken in *Wyman* and *AFBO* prevails, then religious associations and charities could be precluded from an entire segment of donors and state and federal employees may lose the opportunity to support the Christian charities they have loyally supported in their employee charitable campaigns.

The scope of this problem is boundless and could be applied to every church, synagogue, and mosque in the country to prevent their access to every non-public or limited public forum on the basis that their membership, leadership, and/or employment criteria discriminates on the basis of religion or sexual conduct. The very essence of these religious associations is their specific set of core values as expressed in their religious practices and statements of faith. In turn, these associations assemble their membership

and leadership teams based on their religious practices and statements of faith. Forcing these religious associations to accept members and leaders who disagree with or, worse, who are antagonistic or hostile towards the values expressed in their religious statements of faith would destroy those associations:

> [F]orcing [a religious association] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to *cease to exist*.

Walker, 453 F.3d at 863 (emphasis added).

As the case at Bar illustrates, the prediction in *Walker* is not hyperbole. Specifically, Intervenor Hastings Outlaw claims that: (1) its members must be able to become officers and voting members of any group on campus, including CLS; and (2) its members do not want their student activity fees supporting an organization they find offensive, such as CLS. Hastings Outlaw's Reply Br. re Mot. to Intervene, at 1, 2, 6; J.A. 98, 100 n.1.[7] If this Court affirms the opinion below, Hastings Outlaw's members could seek to become members of CLS' association and leadership team, and, consequently, would have the ability to attempt to change CLS' Statement of Faith. *Id*. This strategy of altering a religious association's statement of faith would be facilitated through **state action** (i.e., through Hastings Law's policies).

[7] All references to "J.A." shall refer to the Joint Appendix.

Hastings Law's ironically named nondiscrimination policy places CLS in this vulnerable position and transgresses the First Amendment:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.

Roberts, 468 U.S. at 623. Under the strict scrutiny analysis applied in *Walker*, Hastings Law's denial to recognize CLS as an RSO constitutes a violation of CLS' Freedom of Association. *Id*.; *Walker*, 453 F.3d at 863.

II. IN ORDER TO CREATE UNIFORMITY IN THE FIRST AMENDMENT'S FREEDOM OF ASSOCIATION JURISPRUDENCE, THE COURT SHOULD CLARIFY OR DISAPPROVE THE CATEGORIES OF INTIMATE AND EXPRESSIVE ASSOCIATION CREATED IN *ROBERTS v. UNITED STATES JAYCEES*

In *Roberts,* a case addressing the application of Minnesota's public accommodations statute to a non-religious association, the Court, through Justice Brennan, announced two categories of association: intimate association and expressive association. *Roberts*, 468 U.S. at 618-29. Although the parties here appear to agree that CLS can be characterized as an expressive association, this Court should consider whether the *Roberts* categories themselves

hinder a proper constitutional analysis of the issues raised in this case.

In *Roberts*, the Court announced for the first time:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain *intimate* human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and *the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties*.

Id. at 617-18 (emphasis added). In defining freedom of ***intimate*** association, the Court contended that:

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical

> buffers between the individual and the power of the state.

Id. at 618-19. The Court then focused on relationships that are exclusively related to family: marriage, childbirth, the raising and education of children, cohabitation with one's relatives. *Id*. at 619. The Court concluded that an intimate association is "*an intrinsic element of personal liberty*" and listed factors "*that may be relevant*" for courts to consider in determining whether an association is of this type:

> We need not mark the potentially significant points on this terrain with any precision. We note only that factors that *may be relevant* include size, purpose, policies, selectivity, congeniality, and *other characteristics* that, in a particular case, may be pertinent.

Id. at 620 (emphasis added). This approach contracts rather than expands the sphere of constitutional protection by constraining the category of intimate association to exclude almost any group whose associational freedoms would be challenged by state regulation. For example, courts in applying the intimate association definition have refused to include: *religious* groups. *See*, *e.g*., *Salvation Army v. Department of Community Affairs of State of N.J.*, 919 F.2d 183 (3d Cir. 1990):

> Most religious groups do not exhibit the distinctive attributes the Court has identified [in Roberts] as helpful in determining whether the freedom of association is implicated . . . While the relationship between

> persons who choose to associate for religious purposes may ultimately be recognized as the kind of self-defining relationship the Court identifies as a crucial aspect of individual liberty . . . *the Supreme Court has not as yet taken this step*.

Id. at 198 (emphasis added). If the category of intimate association is to offer any meaningful constitutional protection, it would seem that it should encompass a religious association (like a local student chapter of CLS with less than 15 members at any given time). And yet this very kind of line-drawing (which seems warranted under the logic of the intimate association doctrine) would prove detrimental to other religious groups like *amici*, who, while lacking some of the characteristics that *Roberts* requires of intimate association, lack few of the values that *Roberts* ascribes to intimate association. *Roberts*, 468 U.S. at 619 (suggesting that intimate associations help define one's identity, foster diversity, and act as "critical buffers between the individual and the power of the state"). Indeed, the kind of charitable giving that *Amicus* CSC facilitates lies at the heart of some of these purposes. *Cf. Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease."); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW

829-30 (2d ed. 1988) ("Solicitation of contributions, wherever it takes place" is an activity that has "historically been recognized as inextricably intertwined with speech or petition" and its regulation "must therefore be assessed with particular sensitivity to the possible constriction of that breathing space which freedom of speech requires in the society contemplated by the first amendment.").

The second category of association announced in *Roberts* was *expressive* association. The Court emphasized the value of *expressive* association to include " *. . . an individual's freedom to speak, to worship, and to petition the government for redress of grievances . . .* " *Id*. at 622. Its characterization of *expressive* association should extend broadly to the constitutional right of association:

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity, and in *shielding dissident expression from suppression of the majority* . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Id. (emphasis added). By identifying the protection of unpopular viewpoints from the "*suppression of the majority,*" *Roberts* gestures toward the kinds of protection that would prevent CLS from having its core values destroyed by Hastings Law.

Unfortunately, *Roberts* weakens the autonomy of associations through its categories of intimate and expressive association. These distinctions provide little useful guidance but instead confuse this area of the law. *See, e.g.,* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 41 (1995) (contending that *Roberts* regarded expressive association "*as instrumental and therefore subject to greater government intrusion*"); GEORGE KATEB, *The Value of Association*, in FREEDOM OF ASSOCIATION, 46 (Amy Gutmann, ed. 1998) ("*Running through Brennan's opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones*."); *Every Nation Campus Ministries at San Diego State University v. Achtenberg*, 597 F.Supp.2d 1075, 1083 (S.D. Cal. 2009) ("*state action that burdens a group's ability to engage in expressive association* [need not] *always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum*." (*quoting Truth v. Kent Sch. Dist*., 542 F.3d 634, 652 (9th Cir. 2008) (Fisher, J., concurring)); *Conti v. City of Fremont*, 919 F.2d 1385, 1388 (9th Cir. 1990) ("*an activity receives no special first amendment protection if it qualifies neither as a form of 'intimate association' nor as a form of 'expressive association,' as those terms were described in Roberts*."); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 139 (2d Cir. 2007) ("The mere fact that the associational interest asserted is recognized by the First Amendment does not necessarily mean that a regulation which burdens that interest must satisfy strict scrutiny.").

As this case illustrates, central to a meaningful right of association is the ability to dissent from majoritarian views in a manner that preserves diversity. That is true whether an association is small or large, and whether it is expressive or inwardly focused on its own practices. The First Amendment freedoms of associations like CLS and *Amici* should be protected without having to fit those groups under the cumbersome labels of "*intimate*" or "*expressive*" association.

CONCLUSION

For the forgoing reasons the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

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5 CFR § 950.110 PROHIBITED DISCRIMINATION.

Discrimination for or against any individual or group on account of race, color, religion, sex, national origin, age, handicap, or political affiliation is prohibited in all aspects of the management and the execution of the CFC. Nothing herein denies eligibility to any organization, which is otherwise eligible under this part to participate in the CFC, merely because such organization is organized by, on behalf of, or to serve persons of a particular race, color, religion, sex, national origin, age, or handicap.

Conn.Gen.Stat., Sec. 46a-81p. Sexual orientation discrimination: Religious organizations.

The provisions of sections 4a-60a and 46a-81a to 46a-81o, inclusive, shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals

to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.