No. 08-1371

IN THE

Supreme Court of the United States

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

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF RESPONDENTS

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Lambda Legal Defense and Education Fund, Inc. and Gay & Lesbian Advocates & Defenders respectfully submit this brief as *amici curiae* in support of Respondents Leo P. Martinez, *et al*.[1]

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that 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 *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amici curiae* have permission of all parties to file.

STATEMENT OF INTEREST

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and those with HIV through impact litigation, education, and public policy work. Lambda Legal is the largest and oldest such organization in the country and has appeared as counsel in hundreds of cases involving sexual orientation discrimination issues, including *Lawrence v. Texas*, 539 U.S. 558 (2003), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Romer v. Evans*, 517 U.S. 620 (1996), which figure prominently in the briefing of this case.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD appeared as counsel in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), also discussed in the briefing to this Court.

Amici respectfully submit this brief because they are deeply concerned about the ongoing problem of discrimination against lesbians and gay men. Unfortunately, as the present litigation illustrates, gay students continue to be subject to exclusion and prejudice in many areas of campus life, and this discrimination can have a devastating mental and emotional impact on the gay members of a university community. In addition, the positions taken by

Petitioner Christian Legal Society Chapter of University of California, Hastings College of the Law ("Petitioner" or "CLS") threaten to effect a fundamental shift in this Court's jurisprudence on private organizations' entitlement to government subsidies, and potentially call into question government nondiscrimination policies of all stripes.

INTRODUCTION AND SUMMARY

Amici agree with the arguments of Respondents and Respondent-Intervenor that the policy of the University of California, Hastings College of the Law ("Hastings") regarding registered student organizations ("RSO") is permissible, and that Petitioner's claims must fail. As Respondents explain, Petitioner's claims are unavailing whether the Court considers the Hastings RSO policy as stipulated to by the parties and relied upon by the courts below (what has been termed an "all comers" or "open membership" policy) or the more limited nondiscrimination policy that Petitioner would have this Court address, contrary to its earlier stipulation. This *amicus* brief focuses primarily on the contention advanced in Petitioner's brief that CLS "has no policy excluding anyone on the basis of the person's sexual 'orientation,'" but rather "excludes . . . on the basis of a conjunction of conduct and the *belief* that the conduct is not wrong." Brief for Petitioner ("Pet. Br.") 35-36, 39 (emphasis in original). As will be discussed, this contention need not be addressed by the Court in resolving this case, but if it is addressed, it should be rejected. CLS's membership policy unequivocally discriminates on the basis of sexual orientation.

The question whether CLS discriminates on the basis of sexual orientation is not properly before this Court. The parties have stipulated that Hastings applied an "all comers" or "open membership" policy to RSOs, which requires RSOs to allow any student to participate, become a member, or seek leadership positions in the organization, regardless of the student's status or beliefs. Because Petitioner admits that it violates this policy, the Court need not address whether CLS's membership policy discriminates on the basis of sexual orientation specifically.

However, if the Court addresses the issue, it should recognize that Petitioner's membership policy does discriminate on the basis of sexual orientation. The constitution CLS submitted to Hastings omitted any prohibition against sexual orientation discrimination even though it included other prohibitions against discrimination, Pet. App. 101a, and CLS sought "an exemption from the religion *and sexual orientation* portions of the [Hastings] Nondiscrimination Compliance Code." J.A. 281 (emphasis added). Moreover, in its pleadings before the district court, CLS alleged that when it submitted its constitution to Hastings it "maintained that it would still consider religion *and sexual orientation* in the selection of officers and members." J.A. 72 (emphasis added). The district court found these to be "binding . . . judicial admissions." J.A. 460. Petitioner's present contention that its membership policy does not discriminate based on sexual orientation but only on same-sex sexual conduct—or on a nebulous "conjunction of conduct and [ ] *belief*," Pet. Br. 36 (emphasis in original)—is thus untenable. This Court and others have recognized that discrimination based on same-sex sexual conduct *is* discrimination based on sexual

orientation. Petitioner's argument to the contrary offends common sense no less than judicial precedent.

Given this reality, Hastings acted well within its authority in denying Petitioner's application for RSO status. *Amici* are not challenging Petitioner's right to express its beliefs or establish its own membership policies. Hastings has not forced Petitioner to accept members it does not want or to express views contrary to its core beliefs. Nor does this case involve disfavored treatment of religious viewpoints or limitations on what religious groups can say in the "public square." Pet. Br. 58. The question presented by this litigation is whether a state school is *required* to provide funding and other benefits to a student group that violates the school's generally applicable policy. Under this Court's jurisprudence, the answer to that question is clear. A public school may permissibly decide not to subsidize groups that discriminate.

ARGUMENT

I. THE ISSUE WHETHER CLS DISCRIMINATES BASED ON SEXUAL ORIENTATION IS NOT BEFORE THE COURT.

As will be discussed, there can be little doubt that CLS's membership policy, as codified in a CLS national board resolution prohibiting membership by those who engage in unrepentant "homosexual conduct," J.A. 146, discriminates against gay students. However, in resolving the pending case, the Court need not address CLS's argument that this policy does not constitute discrimination against gay students based on their sexual orientation.

It is undisputed that Hastings maintains what has been referred to as an "all comers" policy with respect to RSOs. The parties have stipulated that "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." J.A. 221 (Joint Stip. ¶ 18). While Petitioner now seeks to cast doubt upon this description of the Hastings policy, *see* Pet. Br. 14-15, 41-42, 47-49, the courts below relied upon the parties' stipulation on this fact issue.[2] Petitioner may not now change its position on the Hastings policy in this Court. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 226 (2000) (declining to consider argument that university funding policy is not viewpoint-neutral because the parties had previously stipulated to the contrary); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

It follows that CLS's arguments about the precise bases on which it seeks to discriminate are immaterial. CLS does not dispute that it refuses to accept "all comers." *See* Pet. Br. 5 (members must "affirm their commitment to the group's core beliefs").

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[2] *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 319 F. App'x 645, 645-46 (9th Cir. 2009) (Pet. App. 2a-3a) ("The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable."); *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *2 (N.D. Cal. May 19, 2006) (Pet. App. 9a) (recognizing Hastings' open membership policy).

Instead, CLS argues that it and similarly situated groups have "a constitutionally protected right to . . . exclud[e] those who do not share their essential purposes and beliefs." Pet. Br. 2, 27-29. CLS's membership criteria manifestly violate the requirement that, to become an RSO, an organization may not exclude any student based on the student's beliefs. It is thus irrelevant whether CLS discriminates based on sexual orientation as well.

Accordingly, whether CLS's policy discriminates against gay students based on sexual orientation is not before the Court. For the reasons set forth below, to the extent the Court nevertheless is inclined to address the issue, it should recognize that CLS's membership policy unequivocally does discriminate on the basis of sexual orientation.

II. CLS'S MEMBERSHIP POLICY DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION.

CLS's membership criteria are governed by a national resolution prohibiting, among other things, "unrepentant participation in or advocacy of a sexually immoral lifestyle," including "homosexual conduct." J.A. 146. Rather than acknowledge that this policy discriminates on the basis of sexual orientation and attempt to defend that discrimination, CLS contends that it "has no policy excluding anyone on the basis of the person's sexual 'orientation,'" but rather "excludes them on the basis of a conjunction of [sexual] conduct and the *belief* that the conduct is not wrong." Pet. Br. 35-36, 39 (emphasis in original). CLS relies on a false distinction. Its policy does discriminate on the basis of sexual orientation.

CLS's condemnation of "unrepentant" "homosexual conduct" is stated in a policy that also includes references to religious faith.[3] While CLS certainly is entitled to its private religious beliefs, here it seeks to mandate an entitlement to a *government benefit* based in part on the untenable claim that it does not engage in sexual orientation discrimination. Whatever the other issues in this case, that claim cannot, and should not, be credited.

A. Petitioner's Attempt To Distinguish Between Same-Sex Sexual Conduct And Sexual Orientation Is Untenable.

This Court already has rejected Petitioner's attempted distinction between sexual conduct and sexual orientation. In invalidating a Texas law that

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[3] *See* J.A. 146:

> 5. The Holy Scripture declares that the "acts of the sinful nature" of which the repentant believer is forgiven and from which he or she is to be cleansed include 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. Exodus 20:14; Matthew 15:19; Romans 1:27; I Corinthians 6:9-10.
>
> 6. 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 membership.

See also, *e.g.*, J.A. 67-68 (CLS "interprets its Statement of Faith to require that officers adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to become a member or serve as a[ ] [CLS] officer.").

criminalized certain same-sex sexual conduct in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court left no doubt that such laws impermissibly discriminate against gay people as a class:

> The laws involved . . . here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences . . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.

Id. at 567. The Court recognized that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination, both in the public and in the private spheres." *Id*. at 575 (emphasis added). Upholding such laws, the Court concluded, "demeans the lives of homosexual persons." *Id*.

Justice O'Connor elaborated on this point in her concurring opinion:

> While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."

Id. at 583 (O'Connor, J., concurring in the judgment) (quoting *Romer v. Evans*, 517 U.S. 620, 641 (1996)

(Scalia, J., dissenting) (internal quotation marks omitted)).[4]

The Court reached a similar conclusion in *Romer v. Evans*, where it struck down an amendment to Colorado's Constitution that deprived "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" of protection under state nondiscrimination laws. 517 U.S. at 624. The Court found the amendment to be "a status-based enactment," "born of animosity toward the class of persons affected," with not even a rational relation to a legitimate government purpose. *Id.* at 634, 635. The lower Court in Romer reached the same conclusion:

> Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships. Each characteristic provides a potentially different way of

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[4] *See also Romer*, 517 U.S. at 642 (Scalia, J., dissenting) ("where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct"); Nicole R. Hart, Note, *The Progress and Pitfalls of Lawrence v. Texas*, 52 Buff. L. Rev. 1417, 1441 (2004) ("[A] coherent definition of homosexuality must recognize that conduct and status are inextricably intertwined because the choice to perform certain sexual acts is a fundamental criterion for determining who might be regarded as homosexual.") (citation, quotation marks and brackets omitted); Brief *Amici Curiae* of the American Psychological Association, et al. at 6, *In re Marriage Cases*, No. S147999 (Cal. Sept. 26, 2007) ("Sexual orientation refers to an enduring pattern of or disposition to experience sexual, affectional, or romantic attractions primarily to men, to women, or to both sexes. It also refers to an individual's sense of personal and social identity based on those attractions, behaviors expressing them, and membership in a community of others who share them."), *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/Amer_Psychological_Assn_Amicus_Curiae_Brief.pdf.

> identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.

Evans v. Romer, 882 P.2d 1335, 1349-50 (Colo. 1994); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 873 (7th Cir. 2006) (Wood, J., dissenting) (rejecting proposed "distinction between discrimination on the basis of sexual *orientation* and discrimination on the basis of sexual *conduct*") (emphasis in original).

Courts have recognized the inseparability of sexual conduct and sexual orientation in other contexts as well. For example, for purposes of seeking political asylum in the United States, persecution of same-sex sexual *conduct* is recognized as tantamount to persecution on the basis of sexual *orientation*. *See, e.g., Karouni v. Gonzales*, 399 F.3d 1163, 1172-73 (9th Cir. 2005) (collecting authorities and rejecting argument that "the future persecution Karouni fears would not be on account of his status as a homosexual, but rather on account of him committing future homosexual acts," because there is "no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts"); *Maldonado v. Att'y Gen.*, 188 F. App'x 101, 104 (3d Cir. 2006) (rejecting argument that persecution of gay individual was on account of same-sex conduct rather than sexual orientation and stating that "[t]his is a distinction without a difference").

These precedents comport with prevailing law in other contexts where conduct also is closely correlated with status. For example, this Court has

determined that "discrimination on the basis of racial affiliation and association is a form of racial discrimination" even though it may be couched in terms of prohibitions of specific conduct that "appl[y] to all races." *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (holding that university prohibition of interracial relationships—*i.e.*, conduct—constitutes racial discrimination); *accord Loving v. Virginia*, 388 U.S. 1 (1967) (striking down law prohibiting interracial marriage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down law prohibiting interracial cohabitation).

Federal employment law also makes clear that, as a statutory matter, such status-conduct distinctions are untenable where conduct is inherently linked to status. If a woman is judged adversely because of a view that she does not act, talk, or dress in a stereotypically feminine way, that is evidence of sex discrimination, not just discrimination based on conduct. *PriceWaterhouse v. Hopkins*, 490 U.S. 228, 234-36, 251 (1989) (plurality opinion); *see also id*. at 258-61 (White, J., concurring in the judgment); *id*. at 261, 272-73 (O'Connor, J., concurring in the judgment). Federal statutes likewise define sex discrimination to include not only discrimination based simply on a person's gender, but also discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10; *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("The Pregnancy Discrimination Act has now made clear, that for all Title VII purposes, discrimination based on a woman's preg-

nancy is, on its face, discrimination because of her sex.").[5]

Federal regulations similarly define national origin discrimination broadly to include not only denial of equal employment opportunities based on place of origin, but also discrimination "because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1. The EEOC has expressed "particular concern" over denials of equal employment opportunities based on conduct

> grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group . . . .

Id.

Federal law likewise prohibits not only discrimination based on religious affiliation, but also discrimination based on "all aspects of religious observance and practice." 42 U.S.C. § 2000e(j). Indeed, religious

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[5] The Court has held, of course, that the statutory provisions discussed above are not necessarily coterminous with constitutional limitations on government conduct. *See, e.g*., *Geduldig v. Aiello*, 417 U.S. 484, 494-97 (1974) (ruling that pregnancy discrimination did not constitute sex discrimination for purposes of the Equal Protection Clause). These statutory provisions nevertheless demonstrate that, where certain conduct is closely correlated with status, the law often treats discrimination based on conduct as tantamount to discrimination based on status.

affiliations are inextricably linked to faith-specific conduct in the form of rituals, ceremonial dress, and other observances. A group obviously would not succeed in arguing that it does not discriminate against Muslims, but merely excludes those who pray toward Mecca five times a day; that it does not discriminate against Jews, but merely excludes individuals who wear yarmulkes; or that it does not discriminate against Christians, but only excludes those who partake in communion. Yet this is precisely the kind of Orwellian distinction Petitioner would have the Court draw. *See generally Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[6]

Petitioner's own explanation of its membership policy confirms the point. One would be hard pressed to find a better definition of sexual orientation—or for that matter religious affiliation—than Petitioner's proffered "conjunction of conduct and . . . *belief*." Pet. Br. 36 (emphasis in original). Both religion and sexual orientation are defined in part by specific forms of conduct which simultaneously express and define the practitioner's identity and beliefs. *See, e.g.*, Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *in* Sexual Orientation and Human Rights in American Religious Discourse 234 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) ("Both religion and sexuality

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[6] *See also Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (upholding military ban on wearing yarmulkes while on duty only because "the military is, by necessity, a specialized society separate from civilian society" and "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment") (internal quotations omitted).

are central aspects of personal identity; opinions and practices with regard to sexuality and religion are not easily changed; both sexuality and religion involve opinion as well as conduct; both involve choice and something deeper than choice; both have public and private dimensions.").

Petitioner's argument that discrimination based on a particular status does not encompass discrimination based on conduct central to that status could lead to easy evasion of nondiscrimination laws. Those intent on discriminating based on a particular religion could simply exclude individuals who engage in religious practices core to that religion. National origin discrimination could be accomplished by simply barring those who engage in customs common to a particular country. And disability discrimination could be engaged in by those who claim they are opposed only to the "conduct" of using wheelchairs or guide dogs. This Court and others have rejected such illogical and invidious distinctions.

Petitioner's own actions belie its contention in this Court that it does not discriminate based on sexual orientation. The constitution CLS submitted to Hastings included provisions barring discrimination on several bases, but not sexual orientation. Pet. App. 101a. CLS moreover asked Hastings for "an exemption from the . . . *sexual orientation* portions of the [Hastings] Nondiscrimination Compliance Code." J.A. 281 (emphasis added). Most tellingly, in its verified pleadings below, CLS alleged that, in submitting its constitution to Hastings, it "maintained that it would still consider religion *and sexual orientation* in the selection of officers and members," that it objected to Hastings requiring it to "open its membership and officer positions to all students

regardless of . . . *sexual orientation*," and that it objected to the policy "forbidding [CLS] to discriminate on the basis of . . . *sexual orientation*." J.A. 72-74 (emphasis added). The district court found these to be "binding . . . judicial admissions." J.A. 460.

In short, Petitioner did not even attempt to convince Hastings that its membership policy does not discriminate based on sexual orientation, and it has *admitted* that it does consider sexual orientation in selecting its members. Because CLS excludes lesbian and gay students on the basis of conduct that reflects their sexual orientation, it rightfully recognized, as should this Court, that CLS was not in compliance with the nondiscrimination obligations of RSOs.

B. CLS's Exclusion Of "Unrepentant" Individuals Confirms That Its Policy Targets Sexual Orientation.

Any doubt about the scope of Petitioner's membership policy is removed by its exclusion of only "unrepentant" students, J.A. 146, *i.e.*, those who "*belie[ve]* that the[ir] conduct is not wrong." Pet. Br. 35-36 (emphasis in original). According to Petitioner, the CLS policy is intended to exclude "those who do not regard the conduct as wrong or sinful and resolve to cease acting in that manner." Pet. Br. 35. The implication is that, in order to become members of CLS, gay students would have to view expression of their own sexual identities as inherently "wrong or sinful."

It is as much a form of discrimination to require as a condition of membership that students condemn an aspect of themselves central to their identity as it is to exclude them altogether because of that identity.

Excluding gay students from membership unless they reject their own same-sex sexual orientations falls squarely within the types of harms that nondiscrimination policies are intended to prevent.

If a law student group at Hastings had a requirement that members agree that women are unintelligent and should not work outside the home, that would readily be seen as discriminating against female students based on their sex: It requires women, and not men, to reject their own equal worth in order to join. Likewise, a white supremacist group could not seriously say it does not discriminate based on race because it allows non-white members to join if they will simply admit their own inferiority.

The requirement that lesbian and gay students who might wish to join CLS must internalize such self-condemnation likewise discriminates based on sexual orientation. Indeed, the discriminatory nature of such a requirement is borne out by social science research describing the harm suffered by lesbian and gay individuals from societal prejudices against them. The U.S. Surgeon General has stated that "our culture often stigmatizes homosexual behavior, identity and relationships . . . . These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation . . . ." David Satcher, Surgeon General, U.S. Dep't of Health & Human Servs., *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* 4 (July 9, 2001) (internal citations omitted), *available at*

http://www.surgeongeneral.gov/library/sexualhealth/call.pdf.

The American Psychological Association similarly has recognized that "sexual stigma, manifested as prejudice and discrimination directed at non-heterosexual sexual orientations and identities, is a major source of stress for sexual minorities" and "a factor in mental health disparities found in some sexual minorities." Am. Psychol. Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (hereinafter "APA Report") 1 (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

Gay people who feel compelled to conceal their sexual orientation tend to report more frequent mental health concerns than those who are openly gay, and are also at greater risk for physical health problems. *See* Steve W. Cole, *Social Threat, Personal Identity, and Physical Health in Closeted Gay Men*, *in* Sexual Orientation and Mental Health: Examining Identity and Development in Lesbian, Gay, and Bisexual People 245, 245-251 (Allen M. Omoto & Howard S. Kurtzman eds., 2006); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674, 676-85 (2003) (hereinafter "Meyer"). Attempts to alter gay peoples' sexual orientation have been associated with "loss of sexual feeling, depression, suicidality, and anxiety." APA Report at 3. As with other historically stigmatized groups, the impact of social prejudice is especially pronounced among the young, who experience self-hatred when they internalize societal

prejudice against same-sex relationships. *See* Meyer at 680-85.

In contrast, gay people have been found to manifest better mental health when they hold positive feelings about their own sexual orientation, have developed a positive sense of personal identity based on it, and have integrated it into their lives by disclosing it to others. *See* Gregory M. Herek & Linda D. Garnets, *Sexual Orientation and Mental Health*, 3 Ann. Rev. Clin. Psychol. 353, 362 (2007); John E. Pachankis, *The Psychological Implications of Concealing a Stigma: A Cognitive-Affective-Behavioral Model*, 133 Psychol. Bull. 328, 334, 339 (2007). Indeed, a scientific consensus has emerged that there is nothing abnormal or unhealthy about same-sex sexual orientations. The APA has recognized that "[s]ame-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality." APA Report at 2. The American Psychiatric Association and the American Psychological Association accordingly have removed "homosexuality" from their lists of mental disorders. *See Dale*, 530 U.S. at 699 (Stevens, J., dissenting).

Yet it remains a sad fact that discrimination, harassment, and violence directed against lesbians and gay men continue to be extraordinarily prevalent, even within institutions of higher education. *See, e.g.*, Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. Davis L. Rev. 195, 221 (2008) (between 55 and 72% of lesbian and gay college students have reported being victims of violence); Susan R. Rankin, *Campus Climate for Gay, Lesbian, Bisexual and Transgender People: A National Perspective,* The National Gay

and Lesbian Task Force Policy Institute 24, 27 (2003), *available at* http://www.thetaskforce.org/downloads/reports/reports/CampusClimate.pdf (more than one third of college students and nearly one fifth of graduate and professional school students surveyed experienced sexual orientation or gender identity harassment in the previous year, and more than 50% concealed their sexual orientation or gender identity in order to avoid intimidation); Amelia Cramer, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System: Discovering and Addressing Sexual Orientation Bias in Arizona's Justice System*, 11 Am. U. J. Gender Soc. Pol'y & L. 25, 31-32 (2002) (nearly 90% of law students surveyed had heard disparaging remarks about lesbians and gay men and 10% had seen lesbian or gay students discriminated against by professors, staff, or students).

The CLS membership policy must be recognized for what it is. By excluding those who engage in same-sex sexual conduct unrepentantly, it rejects gay people based on their sexual orientation. Such a policy reinforces historical patterns of discrimination against gay people, patterns that have a destructive social and psychological impact on students who internalize the notion that their sexual identities are "wrong or sinful." CLS is entitled to its own private beliefs about sexual orientation, same-sex sexual conduct, and morality, but it is not entitled to government funding for its discrimination against gay and lesbian students who do not repent their sexuality.

C. CLS's Membership Policy Is Discriminatory Even If It Does Not Necessarily Apply To All Gay People Or May Apply To Some Non-Gay People.

The claim that CLS's membership policy facially "applies to heterosexual as well as homosexual conduct," Pet. Br. 7, and that it might theoretically admit some ("repentant") lesbians and gay men, does not alter its discriminatory nature.

This Court has repeatedly held that a generally-applicable policy may effectively discriminate against a certain group even if it does not exclude every member of that group. *See, e.g.*, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-200 (1991) (employer's policy prohibiting non-sterile women from performing certain jobs exposing them to high amounts of lead was facially discriminatory even though it did not necessarily apply to all women); *Newport News*, 462 U.S. at 683-84 (employer's health insurance plan that provided fewer benefits to married male employees than to married female employees was discriminatory even though it did not apply to all male employees); *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973) (plurality opinion) (military benefits program that enabled only those women who provided 50% or more of their household income to receive housing and medical benefits for their husbands, while imposing no such reciprocal limitation on men, was discriminatory even though it did not apply to all women); *id*. at 691 (Stewart, J., concurring in the judgment).

Similarly, the Court has held that a policy or practice may discriminate against a targeted group even if it applies to members of other groups as well. *See, e.g., Bob Jones Univ.*, 461 U.S. at 605 (university

policy prohibiting interracial relationships among students was "a form of racial discrimination" even though it did not exclude all members of a particular race, subjected all students to the same conduct restrictions, and excluded some white students as well as some non-white students); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-40 (1977) (employer's policy depriving employees of seniority when they take leaves of absence discriminated against women even though the policy applied to educational leave as well as pregnancy leave); *Dothard v. Rawlinson*, 433 U.S. 321, 324-331 (1977) (facially neutral statute that excluded from employment as corrections officers all persons shorter than five foot two inches and weighing less than 120 pounds resulted in "a significantly discriminatory pattern" of hiring under Title VII because it excluded a large percentage of the female population, even though it also excluded some men).

It has long been recognized that the exclusion of more than a single group does not make a policy permissible. "Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected." *Henderson v. United States*, 339 U.S. 816, 825-26 (1950). *See also Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (same); *Romer*, 517 U.S. at 633 (same).

* * *

CLS has chosen to exclude unrepentant gay students from its ranks based solely on "a conjunction" of those students' same-sex sexual conduct and

their "*belief* that the conduct is not wrong." Pet. Br. 36 (emphasis in original). There can be no doubt that this policy expressly discriminates against gay students. CLS omitted from its constitution any prohibition of sexual orientation discrimination even though it prohibited discrimination on other bases, Pet. App. 101a, requested "an exemption from the . . . sexual orientation portions of the [Hastings] Nondiscrimination Compliance Code," J.A. 281, and admitted in verified pleadings that it considered sexual orientation in admitting members, J.A. 72. CLS's defense that its policy does not exclude based on sexual orientation is logically and legally untenable.

III. A PUBLIC LAW SCHOOL IS NOT REQUIRED TO PROVIDE FUNDING OR OTHER BENEFITS TO A DISCRIMINATORY GROUP SUCH AS CLS.

Given that Petitioner's policy must be viewed as involving discrimination on the basis of sexual orientation (if that issue is even reached, *see* section I, *supra*), there can be little doubt that Hastings acted well within its discretion in refusing RSO status to CLS. As set forth in Respondents' and Respondent-Intervenor's briefs, states have no obligation to subsidize discriminatory conduct, even if that conduct is otherwise protected by the Constitution.[7] And

[7] *See generally* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1922 (2006) ("Groups have the constitutional right to put on events open only to . . . religious believers; they may also put on programs open to all listeners but designed by group officers chosen in discriminatory ways. Yet the government need not subsidize this right, just as the government need not subsidize the rights to abortion, private schooling, or political expression.").

while *amici* do not present a comprehensive treatment of this issue, they respectfully submit a few additional points for the Court's consideration regarding the broader implications of Petitioner's arguments.

In considering these issues, it is first important to recognize what the present case is not. Contrary to Petitioner's protestations, this case is not *Boy Scouts of America v. Dale*, 530 U.S. 640, or *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557. CLS is not being forced to accept members of whom it disapproves, or "to renounce [its] views that homosexual or other disputed sexual conduct is wrong." Pet. Br. 44. Hastings is simply conditioning access to modest public funding and other benefits on compliance with a general nondiscrimination policy applicable to all student groups.

The Court has expressly held that such conditions on public funding do not impermissibly impinge on expressive rights. In *Rumsfeld v. Forum for Academic & Institutional Rights ("FAIR")*, 547 U.S. 47 (2006), the Court upheld a federal law that conditioned federal funding to institutions of higher learning on the institutions' granting military recruiters the same access to their students as recruiters from other organizations. The Court rejected the argument that the law violated schools' First Amendment rights by effectively forcing them to endorse the military's policy toward lesbians and gay men. In doing so, the Court distinguished the case from *Hurley* and *Dale*, ruling that the funding law "neither limits what law schools may say nor requires them to say anything." *Id*. at 60. The Court noted that the law "gives universities a choice: Either allow military recruiters the same access to students

afforded any other recruiter or forego federal funds." *Id*. at 58; *see also Grove City Coll. v. Bell*, 465 U.S. 555, 557-61 (1984) (the government may condition federal education funding on agreement not to discriminate on the basis of sex); *Bob Jones Univ*., 461 U.S. at 605 (the government may deny tax exemption to college that prohibits interracial relationships).

Similarly here, CLS is not being required to accept any particular members or express any particular message. Like every other student group on Hastings' campus, it too has a choice: It can adhere to Hastings' general nondiscrimination policy or forego school funding.

Nor is the present case like *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995), where a university refused to fund the production of a student publication solely because the publication expressed a religious viewpoint. *Id.* at 822, 827. Contrary to Petitioner's contention, Hastings' nondiscrimination policy does not "target[] solely those groups whose beliefs are based on 'religion' or that disapprove of a particular kind of sexual behavior." Pet. Br. 19. Quite the opposite. As Petitioner has stipulated, the Hastings policy applies equally to all student groups, not simply those whose views are religiously motivated, and it prohibits discrimination based on any "status or belief[ ]," not simply sexual orientation. J.A. 221 (Joint Stip. ¶ 18). In short, nothing in the record suggests that the policy was applied to CLS because CLS's viewpoint was religious in nature. The Hastings RSO policy treats religious and secular views identically—it prohibits discrimination whether based on religious viewpoints or secular ones. CLS's contention that the

Hastings policy discriminates on the basis of religious viewpoints, Pet. Br. 20, 42, therefore also is incorrect.

The question presented here is not whether CLS should be allowed to discriminate against students it disfavors. The question instead is whether a public law school is *required* to provide funding and other benefits to such a group notwithstanding the group's exclusionary practices. Far from seeking to be treated equally with other student groups, CLS is seeking a preferential *exemption* from Hastings' general nondiscrimination policies. *See* J.A. 281.

Petitioner's position is particularly audacious in light of the Court's ruling in *Romer v. Evans*, in which the Court held unconstitutional a state constitutional amendment that excluded gay individuals from protection under generally applicable nondiscrimination laws. 517 U.S. at 635-36. Petitioner now asks this Court to rule that states, through their schools, are *required* to fund private groups that discriminate against gay students under supposed exceptions to otherwise applicable nondiscrimination policies. Petitioner would require the state to fund and support activity that the state is forbidden to engage in itself.

The implications of Petitioner's position should not be underestimated. Were the Court to credit CLS's contention that it is entitled to public funds and other benefits despite its discriminatory policies, other groups could circumvent state nondiscrimination policies simply by arguing, as CLS does here, that their viewpoints or religious convictions require them to discriminate. This would turn the Court's jurisprudence on its head, converting well-established protections against government interference in expressive activity into a new governmental *mandate to*

subsidize private expressive activities, even if they are discriminatory. If Petitioner's view of the law regarding access to government funding were correct, cases such as *FAIR*, *Bob Jones University*, and *Grove City College* would all be subject to reconsideration. The Court should decline Petitioner's invitation to make such a sweeping sea-change in its jurisprudence.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Respondents and Respondent-Intervenor, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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