

No. 06-15956
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

MARY KAY KANE, ET AL.
Appellees.

and

HASTINGS OUTLAW,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court
Northern District of California
No. CV-04-04484-JSW
Hon. Jeffrey S. White

Brief of *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Northern California, Anti-Defamation League, Bay Area Lawyers for Individual Freedom, Equal Justice Society, Equality California, Lambda Legal Defense and Education Fund, Inc., and Lawyers' Committee for Civil Rights of the San Francisco Bay Area

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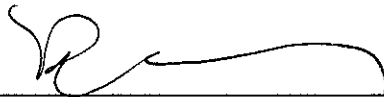
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* the American Civil Liberties Union, the American Civil Liberties Union of Northern California, the Anti-Defamation League, Bay Area Lawyers for Individual Freedom, Equal Justice Society, Equality California, Lambda Legal Defense and Education Fund, Inc., and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area state that they are non-profit organizations, have no parent corporations and do not issue any stock.

DATED: January 19, 2007

Respectfully submitted,

By  _____

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INTEREST OF AMICI

Amici curiae are various national and California organizations interested in preserving the strength and viability of our civil rights protections and in eliminating discrimination based on, *inter alia*, sexual orientation and religion. Because this case involves the balancing of claims of religious liberty and free speech against claims of freedom from discrimination, its proper resolution is a matter of significant concern to *amici*.¹

¹ For a detailed statement of interest of the individual *amici curiae*, see Appendix.

SUMMARY OF ARGUMENT

This appeal presents the question whether a public entity may constitutionally apply an even-handed policy that requires all organizations that wish to receive certain government benefits not to discriminate on the basis of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” The Christian Legal Society (“CLS”) argues that it and other religious organizations are entitled to avail themselves of the benefits of recognition as official student organizations at the University of California, Hastings College of Law (“Hastings”) without following this rule. The district court correctly held that the Constitution does not require Hastings to alter its requirements.

Amici submit this brief to make two distinct but related points. First, Hastings has an important – indeed, a compelling – interest in ensuring that all students are able to benefit from the membership and leadership opportunities created by the recognition of official student organizations. Second, granting the exemption sought by CLS to allow religious entities to discriminate whenever their beliefs support differential treatment could have damaging consequences that reach beyond this case.

ARGUMENT

I. HASTINGS HAS A COMPELLING INTEREST IN ENSURING THAT THE BENEFITS OF PARTICIPATION IN OFFICIAL STUDENT GROUPS ARE AVAILABLE TO ALL STUDENTS.

Amici agree with Hastings and Intervenor-Defendant-Appellee Hastings Outlaw that the policy challenged by CLS here is neither viewpoint discriminatory nor an impermissible burden on the associational rights of CLS members. As such, the district court properly found that Hastings policy was constitutional because it served important and substantial government interests unrelated to the suppression of ideas. *Christian Legal Soc’y v. Kane*, 2006 WL 997217, *8 (N.D. Cal. April 17, 2006) (citing *United States v. O’Brien*, 391 U.S. 367 (1968)).²

In this brief, *amici* focus on the proposition that, even if the nondiscrimination policy imposes some cognizable burden on CLS’s associational rights (which it does not), the challenged policy must be upheld because it is “justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The purpose of university nondiscrimination policies like the one

² Under *O’Brien*, “a government regulation [that has an incidental burden on expressive activity] is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *O’Brien*, 391 U.S. at 377.

at Hastings is to provide opportunities to all students to participate in the full range of student activities offered on campus and supported by the university, regardless of their race, sex, age, religion, or sexual orientation, among other protected characteristics. Regardless of whether the Constitution requires proof of a “substantial,” “important,” or “compelling” interest, Hastings’ policy meets this standard.

At the outset, *amici* recognize that very serious constitutional questions would be presented by laws attempting to regulate directly the leadership or membership of a church, or barring *any* ability of a group of people to disassociate. But this case is different. CLS is a student organization, seeking the benefits of official recognition from a public university. It is not a church seeking to regulate its leadership or membership. Nor has Hastings in any way prevented the student members of CLS from meeting together on campus and advocating their beliefs, or from restricting their meetings to those students who share their beliefs. *Kane*, 2006 WL 997217 at *17 (“CLS was not prohibited from meeting on campus. In fact, CLS was permitted to use campus facilities to meet and its members were permitted to communicate amongst themselves and with other students. As a non-registered group, CLS still had access to bulletin boards and chalk boards on campus to make announcements.”) (citations omitted).

As the Supreme Court has recently explained, “[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, ‘a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.’” *Clingman v. Beaver*, 125 S. Ct. 2029, 2035 (2005) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Here, there is no significant burden on CLS’s ability to express itself, and Hastings’ policy is a viewpoint-neutral conduct regulation. Notably, no one is saying that the student members of CLS cannot meet to achieve their ends, only that if they wish to be officially recognized and obtain the benefits of recognition, they may not discriminate.³ Hastings’ compelling interest in ensuring that those student groups that avail themselves of official recognition and imprimatur of the state comply with the viewpoint-neutral rules it has promulgated is more than sufficient to satisfy the requirements of the Constitution. *See, e.g., Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-92 (2d Cir. 2003) (holding that Connecticut could require all participants in the state charitable campaign fund not to discriminate based on sexual orientation, and that requiring all participants not to do so did not violate the Boy Scouts’ right of expressive association or free speech); *Evans v.*

³ For this reason, CLS’s claim that ethical rules protecting judicial membership in religious organizations that choose their leaders using religious criteria compels the conclusion that “students’ membership in a similar religious organization must be protected,” CLS Br. at 67, is misplaced. Nothing in this case suggests that Hastings’ rules prevent anyone from joining CLS.

City of Berkeley, 40 Cal. Rptr. 3d 205, 211-13 (2006) (holding that the City of Berkeley was entitled to deny a subsidy to the Sea Scouts after they refused to comply with Berkeley’s nondiscrimination ordinance).

A. Eradicating Discrimination Based on Religion and Sexual Orientation Serves Compelling Government Interests.

The overriding purpose of civil rights legislation is to make it possible for those protected by the laws to participate in the “almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Romer v. Evans*, 517 U.S. 620, 631 (1996). Stated more broadly, civil rights laws protect basic human dignity. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Consistent with this purpose, the Supreme Court has declared that a state’s “commitment to eliminating discrimination” is a “goal . . . [that] plainly serves compelling interests of the highest order.” *Roberts*, 468 U.S. at 624. *Accord E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) (“[T]he government has a compelling interest in eradicating discrimination in all forms.”). The government’s interest in ensuring that all people have access to full participation in civic life is particularly strong with respect to religious and sexual orientation-based discrimination, in light of the long history of exclusion on these grounds.⁴

⁴ The government can have a “compelling interest” in eradicating discrimination based on a

As reported by the United States Commission on Civil Rights, the pursuit of religious tolerance has been a long-fought battle: “Discrimination based on religious belief or practice, although more subtle than in the past, continues in housing, employment, and memberships in private clubs” U.S. Comm’n on Civil Rights, *Religion in the Constitution: A Delicate Balance*, Clearinghouse Publication No. 80 (1983), at 17. Consistent with these findings, it is well-established that the government has a compelling interest in prohibiting discrimination based on religion. *See, e.g., Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (“New York has the constitutional authority to prohibit, and a substantial, indeed compelling, interest in prohibiting . . . religious discrimination in obtaining public accommodations.”); *Meltebeke v. Bureau of Labor & Indus.*, 120 Or. App. 273, 279 (1993) (“The state has an overriding interest in preventing religious discrimination.”); *Koire v. Metro Car Wash*, 707 P.2d 195, 198 n.8 (Cal. 1985) (approving the appellate court’s determination that the government has a “compelling interest in eradicating

particular characteristic even if the government’s own discrimination based on that characteristic does not necessarily trigger strict scrutiny under the U.S. Constitution. *See, e.g., Roberts*, 468 U.S. 609 (1984) (holding that Minnesota’s interest in preventing sex-based discrimination is “compelling” even though sex-based classifications are not subject to strict scrutiny); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987) (prohibiting sexual orientation discrimination is a compelling interest); *Department of Fair Employment & Hous. v. Superior Ct.*, 121 Cal. Rptr. 2d 615, 620 (Cal. Ct. App. 2002) (prohibiting marital status discrimination serves a compelling government interest).

discrimination in all forms, including discrimination based on religious creed”) (internal quotations omitted).

Similarly, the gay and lesbian community has faced a long history of discrimination. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State . . . [it] is an invitation to subject homosexual persons to discrimination.”); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (“[Colorado’s Amendment 2] raise[s] the inevitable inference that . . . [it was] born of animosity We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) (“[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”). The government’s compelling interests in abolishing sexual orientation discrimination include “the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.” *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987). Thus, as recognized by the Supreme Court, regulations banning sexual orientation discrimination “are well within the State’s usual power to enact [if] a legislature

has reason to believe . . . that [the] group is the target of discrimination.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995).

CLS, however, argues that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which held that New Jersey could not apply its Law Against Discrimination to the Boy Scouts’ leadership, suggests that Hastings may not have a compelling interest in eradicating sexual orientation discrimination. *Dale* is distinguishable because the burden on the Boy Scouts’ associational rights in that case is quite different from the burden on CLS’s rights. Here, no one is saying that the group of students involved with CLS must admit as members those whom they do not wish to admit, only that they must be open to all students if they wish the government’s imprimatur and the benefits of recognition. *Dale*, in contrast, was about whether the government could require the Boy Scouts to admit an openly gay scoutmaster by enforcing the state public accommodations law prohibiting private organizations from discriminating on the basis of sexual orientation. *Dale*, 530 U.S. at 659. *Dale* thus has no bearing on whether or not Hastings has a compelling interest in restricting the benefits of official recognition to those student organizations that are open to all students, and does not disrupt the Supreme Court’s observation in *Hurley* that sexual orientation nondiscrimination laws are within the state’s authority to enact. *Hurley*, 515 U.S. at 572.

Hastings’ determination that denying support to those groups that

discriminate on the basis of religion and sexual orientation furthers the ability of its students to participate equally in university life is thus fully consistent with the government's broader compelling interests in eliminating barriers to participation in civic life for gay people and for those of diverse religious faiths.

B. Discrimination in Educational Opportunities Is Among the Most Pernicious Type of Discrimination, and Hastings Has a Compelling Interest in Leveling the Playing Field for Its Students.

Because of the central role that access to education plays in personal and professional development, eliminating discrimination in education has long been recognized as a government interest of the utmost importance. *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (holding that Mississippi could not give textbooks to students attending racially segregated private schools because “discriminatory treatment exerts a pervasive influence on the entire educational process”); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (while parents may have a First Amendment right to send their children to schools that promote the belief that racial segregation is desirable, “it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle”); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education.”). Indeed, the Supreme Court has recently reaffirmed that “ensuring that public institutions are open and available to all segments of

American society . . . represents a paramount government objective,” and that “nowhere is the importance of such openness more acute than in the context of higher education.” *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003).

When a public university attempts to ensure that the benefits associated with official recognition are granted only to those organizations that make the full benefits of membership and leadership available to all students, it furthers a compelling interest in ensuring equal access to the pedagogical and practical benefits that flow from participation in student organizations that is unrelated to the suppression of ideas. *See, e.g., Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“[T]he State’s compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services.”) (citing *Roberts*, 468 U.S. at 626); *see also Board of Regents v. Southworth*, 529 U.S. 217, 222-24, 229-32 (2000) (recognizing the importance of student organizations on public university campuses). As discussed in Hastings’ brief, CLS seeks to thwart this compelling interest by securing the right to exclude students of other faiths or who are openly gay. *See* Brief of Appellees, at 8-10.

Hastings recognizes that participation in student organizations provide students with invaluable benefits, including opportunities to explore areas of interest and to develop leadership skills and personal and professional contacts.

See id. at 2-3 (citing ER 518 ¶¶ 4 -5). This is among the reasons it has created the forum of recognized student organizations and that it provides material support to recognized organizations. *Id.* Hastings' interest in attempting to ensure equal access to these opportunities for all its students is particularly strong because university clubs have been shown to be vitally important for social, intellectual and future professional development, but have a long history of invidious discrimination.⁵ Hastings thus has a substantial and compelling interest in ensuring that its resources are not used to propagate such harm.

The widespread racial, religious and gender discrimination practiced at many American universities and colleges from their founding until quite recently was reflected in and perpetuated by restrictions on participation in both officially recognized and quasi-private student organizations. For example, until the 1950s and 1960s, racially discriminatory fraternities operated to exclude African-American students not just from the fraternities themselves, but from campus life at many universities. *See* Allen Ballard, *The Education of Black Folk* 4, 29 (1973)

⁵ While *amici* note that Hastings has not barred the student members of CLS from meeting informally and excluding others, this does not diminish Hastings' interest – by refusing to lend formal support and benefits to those organizations that are not open to all students, Hastings ensures that those organizations within its control and support are open to everyone. It also advances Hastings' laudable goals of supporting a diverse student body. *Cf. Grutter*, 539 U.S. at 329 (“Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission . . .”).

(describing life as one of the first two Black students at Kenyon College and noting that “racially discriminatory fraternities and athletics were the actual center of life on most campuses” in the 1940s and 50s). Similar restrictions also limited the opportunities of Jewish students to participate fully in university life. See Dan Oren, *Joining the Club: A History of Jews at Yale* 28, 81-82, 174 (2d ed. 2000) (noting example of a private club at Yale, “where students and professors would drink tea together, and make ‘polite conversation’, served as the chief center for aesthetic criticism on the campus of the 1930s Therefore, Jews who had hoped to share in the intellectual social life of the campus often found themselves high and dry.”). Research has also found that sex-segregated student organizations harm female students by denying them access to class information, study-group opportunities, professional contacts, and access to alumni associations. See Daniel Schwarz, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 Cal. L. Rev. 2117, 2119-20 (1987); Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 Mich. J. Gender & L. 27, 72 (1994) (hereinafter “Frank, *The Key*”) (“Prestigious [college student organizations] provide entry into business and government opportunities upon graduation.”).⁶

⁶ The benefits of participation in student organizations are similar to those gained from other professional clubs. See, e.g., Michael M. Burns, *The Exclusion of Women from Influential Men’s Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321, 323

Not surprisingly, then, researchers have found that students who belonged to historically disfavored groups were more likely to be integrated into the intellectual and social heart of the university at those schools that did not have an entrenched exclusionary system of fraternities and private societies. *See, e.g.,* Howard Wade, *Black Men of Amherst* 97 (1976).⁷ Hastings' interest in enforcing its nondiscrimination policy must be understood in this historical context, which shows that university efforts to ensure the fullest possible opportunity to participate

(1983) (hereinafter "Burns, *The Exclusion of Women*") ("The final door to professional advancement [for women and minorities] remains closed because they are denied membership in the most prestigious 'social' clubs, either explicitly in club bylaws or implicitly by custom and practice."); Frank, *The Key*, 2 Mich. J. Gender & L. at 38 ("When people are barred from these organizations, they are also barred from cultivating business opportunities, and from influencing policy through informal contact with policymakers. Being in the 'right' club can be crucial to one's career."); N. C. Belth, *Discrimination and the Power Structure in Barriers: Patterns of Discrimination Against Jews* 10-11 (N. C. Belth ed., 1958) (discussing a sociological study finding that, to a very high degree, basic decisions affecting the community – its business, its politics, its very life – are reached at informal social gatherings, private clubs, and after-business-hours associations). In fact, ineligibility for membership in such clubs was historically offered as a justification for excluding women, religious minorities and people of color from positions of authority. *See, e.g.,* Burns, *The Exclusion of Women*, 18 Harv. C.R.-C.L. L. Rev. at 329 ("[I]neligibility for club membership has been cited in some cases as a reason for not promoting women to executive positions."); Belth, *Discrimination and the Power Structure* 10-11 (citing the following example of a justification for refusing to employ Jewish executives: "[O]ur plant managers maintain a certain status in their communities. They must join the country club and the leading club. Today, that's where the big deals are discussed and made. They must be socially acceptable to the banking and business leaders of the town.").

⁷ These deep-rooted racial, religious and sex-based exclusions were not abandoned quickly or easily – long after many universities prohibited discrimination by official student organizations, ostensibly private student clubs that actually functioned as integral parts of the university system continued to exclude certain students. Thus, Princeton University's prestigious "eating clubs" were required to admit women in 1990, after the New Jersey Supreme Court found that the university and the quasi-private clubs "have an integral relationship of mutual benefit." *Frank v. Ivy Club*, 576 A.2d 241, 260 (N.J. 1990).

in campus life help provide *all* students with a chance to benefit from these important opportunities.

C. The Nondiscrimination Policy Directly Advances the Purpose of the Forum, to Ensure That All Students Have the Opportunity to Benefit from Participation in Official Student Organizations.

As discussed above, Hastings encourages the creation of officially recognized student organizations to foster widespread student participation in a variety of different organizations and to allow students an opportunity to develop their interests and important leadership skills. CLS, however, claims that “forcing” it “to abandon its religious qualifications for officers and voting members as a condition of accessing this marketplace undermines Hastings’ alleged purpose for registered student organizations in the first place,” Brief of Appellants at 60. In arguing that the forum is intended only to foster a diversity of viewpoints, CLS ignores these other important purposes of the forum. By ensuring that official student organizations grant all students an opportunity to participate as members and leaders, enforcement of the nondiscrimination policy is directly related to the purposes of the forum.

Similarly, CLS’s assertion that the enforcement of this nondiscrimination policy “can *only* be understood as intended to induce CLS to alter its membership standards . . . in order to maintain recognition,” *id.* at 22 (quoting *Christian Legal Society v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006) (emphasis added)), ignores

the significant difference between the purpose of Hastings' policy and its possible consequences. In *Walker*, the Seventh Circuit found that Southern Illinois University had offered no purpose for its nondiscrimination policy other than to interfere with the group's ability to express itself. *Id.* at 863. The court held such a purpose was impermissible, and had no occasion to consider whether the policy furthered a compelling government interest. Here, in contrast, the purpose of Hastings' policy has nothing to do with the suppression of expression, and everything to do with satisfying its compelling government interest in ensuring that when it lends it name and resources to student organizations, all students are entitled to participate. This goal is unrelated to the suppression of expression. *See, e.g., Roberts*, 468 U.S. at 624 (holding that the goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression").

Notably, CLS is perfectly free to express itself as it sees fit – Hastings' policy does not prevent official organizations from saying or advocating for what they wish – but if it wishes to obtain the benefits of recognition, it may be required to comply with the policy Hastings has established in order to prevent discrimination. *Cf. Grove City Coll. v. Bell*, 465 U.S. 555, 575-576 (1984) (rejecting argument by a private college that conditioning federal funds on its compliance with the nondiscrimination requirements of Title IX of the Education

Amendments of 1972 violated the First Amendment). Similarly, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S.Ct. 1297, 1307 (2006), the Supreme Court recently held that the government did not violate a private law school's free expression rights when it conditioned receipt of government funds on the right of the military to recruit on campus, despite the school's disagreement with military recruiting policies. The Court explained that:

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. . . . It affects what law schools must *do*-afford equal access to military recruiters-not what they may or may not *say*.

Id. (emphasis in original).

Amici do not dispute that a consequence of enforcing the policy may be to require CLS to conform with the nondiscrimination policy if it wishes to receive the benefits of official recognition. This does not, however, render Hastings' policy unconstitutional. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (holding that an injunction prohibiting abortion protesters from picketing outside a clinic was not viewpoint discriminatory because "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"); *Wyman*, 335 F.3d at 92-93 (holding that, while "all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that

desire to express through their membership or employment policies viewpoints that favor discrimination against protected groups,” if the purpose of the law is not to “impose a differential adverse impact upon a viewpoint,” application of the nondiscrimination law to exclude a discriminatory group from a nonpublic forum does not violate the First Amendment).⁸

II. RELIGIOUS STUDENT GROUPS LIKE CLS DO NOT HAVE A CONSTITUTIONAL RIGHT TO AN EXEMPTION FROM A UNIFORMLY APPLIED NONDISCRIMINATION POLICY.

CLS wrongly claims that a less restrictive and equally effective alternative would be to grant it and all other religious student organizations an exemption “from the Nondiscrimination Policy’s prohibitions on religion and sexual orientation discrimination.” Brief of Appellants at 71. CLS’s argument, if accepted, would dramatically undermine Hastings’ ability to adopt uniform policies governing student organizations. *See Healy v. James*, 408 U.S. 169, 189 (1972) (noting that universities may require student organizations to comply with “reasonable campus rules”). Moreover, under CLS’s reasoning, any student organization that claimed an ideological opposition to including women, African

⁸ As the Supreme Court noted in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992), “[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *See also Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that the First Amendment did not bar enforcement of Title VII against a law firm that allegedly excluded women from partnership).

Americans, gays and lesbians, or people with disabilities, for example, would be entitled to force a public university to grant it official recognition notwithstanding university policies to the contrary. Granting an exemption thus would directly undermine the compelling interest in ensuring that government resources are used to provide equal educational opportunities.

Under CLS's reasoning, for example, neutral university policies adopted to protect the safety and welfare of all students could be at risk. For example, if a public university seeking to address the problem of underage drinking passed a regulation prohibiting any official student organization from allowing alcohol at their meetings, the use of sacramental wine, whether by Christian students taking communion or Jewish students observing Shabbat or Passover, would violate such a ban. And yet even though the university policy in no way prohibited a campus *church* or *synagogue* from providing alcohol during services and would not impede students from attending services, CLS's reasoning here would require granting religious student clubs the right to have alcohol during official club meetings despite the fact that the regulations served legitimate interests and the students were free to practice their religious beliefs outside the structure of official university recognition. Similarly, if CLS's argument was accepted, the fact that a hypothetical university policy restricting membership in official student organizations to students might impose some burden on the associational rights of

students who wished to meet with non-students, such as religious leaders, would be sufficient to require the university to alter its reasonable rules. This is plainly not required under *Healy*.

CLS claims that Hastings may not assert a compelling interest in applying its nondiscrimination policy against them in this case because “[t]he obvious relevance of religious convictions to the mission of religious organizations, like CLS, means their officer and member decisions are not properly considered discrimination at all.” Brief of Appellants at 18-19. However, a university’s interest in non-discrimination is not merely an interest in ensuring that student organizations do not discriminate when discrimination is irrelevant to the group’s ideology; such protection would be empty. Instead, universities have a compelling interest in ensuring that students have access to educational opportunities regardless of their race, religion, age, or sexual orientation, or any other characteristic that historically has been the basis of invidious discrimination.

According to CLS,

Nondiscrimination laws prohibit discrimination because the prohibited characteristic is legally irrelevant to the protected individuals’ ability to, for instance, own a home . . . , or be a capable employee. Thus, the Nondiscrimination Policy should be applied to prohibit discrimination when the protected characteristics are irrelevant to a students’ [sic] ability to serve as an officer or member The relevance of religious belief to the mission of religious groups, like CLS, changes the nature of religious leadership and membership decisions altogether, and means that decisions based on religious criteria are not properly considered “discrimination.”

Id. at 65. This argument leaves unstated who gets to determine whether or not a protected characteristic is “relevant” or “irrelevant.” It is clear from CLS’s briefing, however, that it believes that the discriminating entity should have the exclusive right to make this judgment. *Id.* at 18-19, 65 (relying on the “relevance” of the characteristic to the discriminatory organization). CLS’s reasoning also could not be limited to religious student organizations – on CLS’s own logic, Hastings would also need to recognize white supremacist and other hate groups that claim to have an associational interest in excluding other students based solely on their race or ethnicity.

A rule that allowed religious groups like CLS the right to exclude others whenever it “really matters” to them would severely weaken the protections of our civil rights laws. In the past, we have seen religious reasons offered to justify differential treatment on the basis of race,⁹ gender,¹⁰ disability,¹¹ and national

⁹ For example, racial segregation was long justified by religious convictions. *See, e.g., State v. Gibson*, 36 Ind. 389 (1871) (holding that segregation laws derive not from “prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts”) (quoting *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 214 (1867)); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”) (quoting trial court opinion). Indeed, “Christianity, Islam, and Judaism relied on the Old Testament for the justification of slavery.” Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women* 12 Colum. J. Gender & L. 154 (2003); *see also* Forrest G. Wood, *The Arrogance of Faith* 43 (1990) (“[In the] second quarter of the nineteenth century . . . southern whites, largely in response to the attacks by abolitionists, began to invoke scriptures in a systematic defense of slavery.”); David Brion Davis, *Slavery and Human Progress* 86 (1984) (citing Biblical

origin,¹² in addition to sexual orientation and gender identity. While some of these views may no longer be commonly held religious beliefs, there is no doubt that these beliefs were once as sincerely held as those that CLS holds today. Yet courts have never held that these beliefs invariably permit those who hold them to violate nondiscrimination mandates.¹³

justifications for slavery). Religion was also used to negate American Indians' claims to their land, as some Europeans believed that "the absence of Christianity meant there was no legitimate recognition of [their] jurisdiction." Wood, *The Arrogance of Faith* 33.

¹⁰ See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132 (1872) (quoting the state supreme court decision upholding the exclusion of women from practicing law because "'God designed the sexes to occupy different spheres of action, and . . . it belonged to men to make, apply, and execute the laws'"); Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter* 35 Colum. J. Transnat'l L. 271, 273 (1997) (describing ways in which various world "[r]eligions have traditionally promoted, or even required, differentiated roles for women and men").

¹¹ See, e.g., K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I*, in *The New Disability History* 236, 241 (Paul K. Longmore & Lauri Umansky eds., 2001) ("Until the late nineteenth century, disability and its economic effects of unemployment, poverty, and dependence were often regarded as a preordained fate, a divine stigma incurred at birth, or as a result of individual moral flaws and self-destructive habits such as criminality, alcoholism, and sexual promiscuity."); Michele Goodwin, *The Black Woman in the Attic: Law, Metaphor and Madness in Jane Eyre*, 30 Rutgers L. J. 597, 649 (1999) (noting that "the earliest misdiagnoses of mental illness were explained as demonic possessions").

¹² See, e.g., John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925*, 6 (2d ed. 1975) ("Protestant Nativists, charged with the Protestant evangelical fervor of the day, considered the immigrants minions of the Roman despot, dispatched here to subvert American institutions.").

¹³ Contrary to CLS's claims, the fact that Title VII of the Civil Rights Act of 1964 and other employment discrimination statutes provide certain exemptions for religious institutions to permit some employment discrimination on the basis of religion does not suggest that the government's interest in eradicating discrimination cannot be compelling any time discrimination is religiously motivated or that the government is constitutionally required to give its official imprimatur to an organization that discriminates on the basis of sexual orientation or religion. Instead, those exemptions illustrate a policy determination that sectarian organizations should not be subjected to civil penalties when they, for example, demand that those employed to be religious leaders be members of their faith. There is a world of difference between forcing a

The harm in accepting CLS's argument that discrimination is permissible whenever the discriminator feels strongly about it becomes clearer when considering other contexts in which religious defenses have been raised to nondiscrimination laws. For example, a doctor in Kentucky recently argued that, because of his religious beliefs, he could not be required to work with anyone who was gay or lesbian, notwithstanding a city ordinance that prohibited employment discrimination on the basis of sexual orientation. This doctor may well have felt strongly that being gay was *relevant* to whether or not he could work with someone. However, the court correctly held that he was not entitled to violate the laws. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001) (holding that application of the ordinance did not violate the doctor's freedom of association, expression or religion), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002).

Religious beliefs about the appropriate roles of men and women have also conflicted with laws prohibiting sex discrimination. In resolving these conflicts, courts generally have held that religious beliefs may not override guarantees of

religious institution to hire someone in a ministerial position who does not share that institution's beliefs, and denying the benefits of official student organization status to a religious club that wishes to discriminate on the basis of identity. As discussed above, Hastings has not directly forbidden the students of CLS from gathering to discuss their faith or from excluding anyone they wish. Instead, CLS claims an entitlement to all the benefits of official recognition without meeting the viewpoint-neutral requirement that the organization be open to all Hastings students.

equal treatment of men and women. *See, e.g., E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the “heads of the household” violated Title VII); *E.E.O.C. v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (holding that a private school could not pay women less than men to reflect their religious belief that men and women occupy different family roles); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450 (S.D.N.Y. 1987) (school district that granted male bus drivers with less seniority preference over female bus drivers on certain routes because of the religious belief held by Hasidic families that boys should not be in contact with women violated Title VII); *see also E.E.O.C. v. Pacific Press Publ’g Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (upholding Title VII retaliation claim of a woman who, because of religious doctrines that “prohibit lawsuits by members against the church,” was fired for participating in EEOC proceedings alleging sex discrimination).

Similarly, during the early years of the HIV epidemic, religious beliefs led many to view HIV and AIDS as divine punishment that called for differential

treatment.¹⁴ As in other contexts, however, courts generally rejected attempts to justify disability discrimination based on religious convictions. *See, e.g., Stepp v. Review Bd. of Ind. Employment Sec. Div.*, 521 N.E.2d 350, 352 (Ind. App. 1988) (holding that a lab worker who refused to perform analysis of specimens that contained HIV warnings because of her religious belief that ““AIDS is God’s plague on man, and performing the tests would go against God’s will”” could be properly dismissed from her job).

And, just forty years ago, a restaurant owner in South Carolina argued that his religious beliefs conflicted with the civil rights law that required him to serve African-American customers in his restaurant. *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968). While the court and others considering similar defenses held that religious objections to desegregation were not sufficient to allow discrimination, those beliefs nonetheless were sincerely held by many. *See, e.g., id.* (“This court refuses to lend credence or support to [the plaintiff’s] position that [he] has a constitutional right to refuse to serve members of the Negro race in his business

¹⁴ *See, e.g.,* Miriam Waltzer, *Acquired Immune Deficiency Syndrome and Infection with Human Immunodeficiency Virus*, 36 Loy. L. Rev. 55, 57 & n.7 (1990) (citing religious leaders who described AIDS as God’s retribution for sinful behavior); Raymond O’Brien, *Discrimination: The Difference with AIDS*, 6 J. Contemp. Health L. & Pol’y 93, 94 n.4 (1990) (43 percent of respondents to a 1987 Gallup poll indicated that AIDS is “divine punishment for moral decline”).

establishments upon the ground that to do so would violate his sacred religious beliefs.”); *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 897 (S.D.S.C. 1978) (“The religious belief involved is plaintiff’s conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof.”), *rev’d in part*, 461 U.S. 574 (1983) (holding that a religious school that excluded unmarried black students because of their beliefs about interracial relationships was appropriately denied a federal tax benefit offered to charitable organizations).

If the appropriate focus is on the intent of the discriminating entity or the “relevance” to that entity’s beliefs, as CLS claims, rather than the consequences of discrimination, courts would have been required to rule in favor of the discriminating entities in these cases, and our civil rights protections would be considerably weakened. CLS’s position thus fundamentally misinterprets the purpose of nondiscrimination laws, which are designed to ensure that all people have an opportunity for inclusion in civic life *regardless* of the reasons that some might have for wanting to exclude them. Just as a female employee is harmed whether she is paid less than her male counterparts because of either a religious or a secular belief that women are intellectually inferior to men, gay and lesbian students interested in participating in a university-sanctioned activity are harmed


whether they are excluded because others believe being gay is religiously immoral, or because of a secular belief that gay people are inferior.

Thus, in assessing the strength of Hastings' interest in denying recognition to those student organizations that exclude other students based on their sexual orientation and religion, the proper focus is on the consequences of differential treatment, not the reasons for the discrimination. In light of the extensive evidence supporting its determination that exclusion from student activities causes significant harms, Hastings' enactment of a nondiscrimination requirement for those student organizations that seek official recognition serves a substantial and compelling interest.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the district court's decision granting summary judgment to Defendant-Appellee Hastings and Intervenor-Appellee Hastings Outlaw should be affirmed.

Dated: January 19, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this Brief of Amici Curiae complies with the type-volume limitations for a brief produced with a proportionally spaced font. The font is 14 point Times New Roman, and the brief contains 6,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: January 19, 2007



Rose A. Saxe

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APPENDIX:
Statements of interest of *amici curiae* organizations

American Civil Liberties Union and ACLU of Northern California

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU of Northern California is one of its statewide affiliates, with over 55,000 members. Since its founding in 1920, the ACLU has frequently advocated in support of First Amendment rights of freedom of speech, freedom of association, and freedom of religion, and rights to be free from discrimination, both as direct counsel and as *amicus curiae*. The ACLU and the ACLU of Northern California have special expertise regarding the intersection of competing civil rights and civil liberties claims based on decades of relevant litigation on behalf of scores of clients. Because this case involves the balancing of claims of religious liberty and free speech against claims of freedom from discrimination, its proper resolution is a matter of significant concern to the ACLU and the ACLU of Northern California, and their members throughout the country.

Anti-Defamation League

The Anti-Defamation League (“ADL”) was founded in 1913 to

advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. Today, it is one of the world's leading civil and human rights organizations fighting hatred, bigotry, discrimination, and anti-Semitism.

ADL's history is marked by a commitment to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under the law. As part of its core belief, ADL maintains a deep commitment to the principles of religious liberty that are enshrined in the religion clauses of the First Amendment. However, ADL does not believe that discrimination in any form, especially when forbidden by a facially neutral civil rights law, is acceptable even when based on a sincere, good-faith religious belief. ADL has filed *amicus* briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. These include many of the Supreme Court's landmark cases in the area of civil rights and equal protection.¹⁵

¹⁵ See, e.g., ADL briefs *amicus curiae* filed in *Shelley v. Kraemer* (1948) 334 U.S. 1; *Sweatt v. Painter* (1950) 339 U.S. 629; *Brown v. Board of Educ.* (1954) 347 U.S. 483; *Cardona v. Power* (1966) 384 U.S. 672; *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409; *Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229; *DeFunis v. Odegaard* (1974) 416 U.S. 312; *Runyon v. McCrary* (1976) 427 U.S. 160; *McDonald v. Santa Fe Trail Transp. Co* (1976) 427 U.S. 273; *United Jewish Orgs. Of Williamsburg, Inc. v. Carey* (1977) 430 U.S. 144; *Regents of Univ. of Cal. V. Bakke* (1978) 438 U.S. 265; *United Steelworkers v. Weber* (1979) 443 U.S. 193; *Fullilove v. Klutznick* (1980) 448 U.S. 448; *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP* (1983) 461 U.S. 477; *Palmore v. Sidoti* (1984) 466 U.S. 429; *Firefighters Local Union No. 1784 v. Stotts* (1984) 467 U.S. 561; *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267; *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469; *Metro Broadcasting, Inc. v. FCC* (1990) 497 U.S. 547; *Johnson v. De Grandy* (1994) 512 U.S. 997; *Miller v. Johnson* (1995) 515 U.S. 900.

Bay Area Lawyers for Individual Freedom

Bay Area Lawyers for Individual Freedom (BALiF) is the nation's oldest and largest bar association of Lesbians, Gay Men, Bisexuals, and Transgendered (LBGT) Persons in the Field of Law. Since 1980, BALiF has served the LGBT community by endeavoring to take action on questions of law and justice that affect the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in California and other states; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community.

Equal Justice Society

The Equal Justice Society (EJS) is a San Francisco-based national civil rights organization of scholars, advocates, students and other citizens that seeks to promote equality and enduring social change through law and public policy, public education, research, and alliance building. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Specifically, EJS works to ensure that antidiscrimination law and jurisprudence continues to adequately address racial and societal

inequities. Consistent with that mission, EJS works to confront all manifestations of invidious discrimination and second-class citizenship. Such threats to our collective dignity spring from a common source and endanger us all, no matter the context in which they arise.

Equality California

Equality California (“EQCA”) is California’s leading lesbian, gay, bisexual, and transgender (LGBT) civil rights and advocacy organization, representing thousands of members in California. EQCA is dedicated to protecting Californians from discrimination based on sexual orientation and gender identity through sponsoring and lobbying for non-discrimination legislation, building coalitions, and empowering other organizations and individuals to engage in the political process. EQCA was the official sponsor in the California Legislature of Senate Bill 1441 (2006), which prohibits discrimination on the basis of sexual orientation and gender identity in state operated or funded services, activities and programs. EQCA also supported the passage of Assembly Bill 537 (2000), which prohibits a person from being subjected to discrimination on the basis of sexual orientation or gender identity in any program or activity conducted by any educational institution or postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid. Equality California has a strong interest in ensuring that

courts continue to enforce and uphold statutes prohibiting the use of public funds to subsidize discrimination based on sexual orientation and gender identity.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco. Since its inception, the Lawyers' Committee has maintained a keen interest in removing discriminatory barriers that might exist at educational institutions.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. The largest and oldest organization of its kind, Lambda Legal long has been committed to securing

protections against discrimination (*see, e.g., Romer v. Evans*, 517 U.S. 620 (1996), in which Lambda Legal was co-counsel for plaintiffs), freedom of expression (*see, e.g., Board of Regents v. Southworth*, 529 U.S. 217 (2000) in which Lambda Legal was counsel for amicus Lesbian, Gay, Bisexual and Transgender Campus Center at the University of Wisconsin) and the appropriate balance required by the Constitution when it is asserted that such rights are in tension (*see, e.g., Evans v. Berkeley*, 38 Cal. 4th 1 (2006), in which Lambda Legal was an amicus in support of the City of Berkeley).

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2007, I served 2 copies of the foregoing Brief of Amicus Curiae, by overnight delivery on the counsel identified below:

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