CA No. 06-15956
DC No. C 04 4484 JSW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

MARY KAY KANE ET AL.,

Defendants-Appellees,

and

HASTINGS OUTLAW,

Defendant-Intervenor-Appellee.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. Jeffrey S. White, Presiding)

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

Appellees agree with Appellant's Jurisdictional Statement. *See* Brief of Appellant ("AB") 2.

ISSUE PRESENTED FOR REVIEW

Whether a public university law school may be compelled to recognize and fund a religious student organization that discriminates on the basis of religion and sexual orientation in the selection of its members and officers and to exempt such an organization from its Nondiscrimination Policy, which prohibits registered student organizations from discriminating on such grounds.

STATEMENT OF THE CASE

Appellees agree with Appellant's Statement of the Case. *See* AB 3-4.

STATEMENT OF FACTS[1]

A. Hastings' Registration Of Student Groups And The Policy On Nondiscrimination.

Hastings Appellees are individually named members of the administration and Board of Directors of Hastings College of the Law ("Hastings"), a public law school in San Francisco and part of the University of California. ER 336 ¶¶2-5. Like many universities, Hastings permits students to

[1]The parties' cross-motions for summary judgment were largely based on an extensive Joint Stipulation of Facts. ER 335-425. Thus, the factual record on which the District Court's ruling was based is undisputed.

"register" student organizations with its Office of Student Services. ER 337 ¶¶6-8. Student organizations must be registered to gain access to various benefits at Hastings, including use of the Hastings name and logos, the use of certain means of communicating with Hastings students, access to particular law school facilities, and eligibility to apply for limited funds. ER 337-39 ¶¶9-10. Hastings maintains this registration system to provide Hastings students with opportunities to pursue academic and social interests outside the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience. ER 518 ¶4.

Only student groups that agree to abide by the Policies and Regulations Applying to College Activities, Organizations and Students ("Policies and Regulations") are eligible for registration. ER 339 ¶12, 368-78.[2] This includes the Policy on Nondiscrimination ("Nondiscrimination Policy" or "Policy"), which was adopted in 1990 and amended to its current form in 2002. ER 340 ¶16, 374. The Policy provides, *inter alia*, that Hastings'

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[2]To be a registered student group, the group must be a "non-commercial organization whose membership is limited to Hastings students." ER 371. At registration and at the beginning of each academic year, student organizations must file their constitution and bylaws with the Director of Student Services. ER 371, 519 ¶6. Registered student organizations "are required to comply with college policies and campus regulations or they will be subject to revocation of registration, loss of privileges, or other sanctions for violation of such policies or regulations." ER 372.

programs and activities "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." ER 340 ¶15, 374. Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs. ER 340 ¶17, 341 ¶18. Hastings has concluded that this is the most efficient way of ensuring that those groups to which it provides benefits are furthering the general purposes of Hastings' registration system and that the educational and social opportunities these groups provide are available to all students. ER 518 ¶5. The Policy thereby encourages tolerance, cooperation, and learning among students of different backgrounds and viewpoints. *Id.*

Since the Policy was adopted, no student organization at Hastings—other than Appellant Christian Legal Society ("CLS")—has ever sought to be exempted from complying with it. ER 340 ¶16. No other student organization has a membership policy like CLS's, which explicitly prevents Hastings students from joining on the basis of their religion, sexual orientation or any other protected status.[3] Hastings has never received a complaint that any

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[3]The bylaws of one student group (La Raza Law Students Association) registered in the 2004-2005 academic year contained an explicit antidiscrimination policy (ER 307), but also contained a separate provision that could be interpreted as requiring a "Raza background" for voting membership. *See* ER 307-08. Hastings' Director of Student Services had (continued . . .)

registered student organization discriminates on the basis of religion or sexual orientation. ER 341 ¶19.

CLS repeatedly asserts that "Hastings routinely recognizes student groups that limit membership or leadership on the basis of belief." AB 54; *see also id.* at 14-15, 54-55, 57-59. However, that contention is flatly contradicted by the record. *All* of the groups CLS refers to have expressly adopted the Nondiscrimination Policy and opened their membership to "any" or "all" Hastings students. ER 519 ¶7.[4] While some of those groups' bylaws refer to the groups' interests or objectives, Hastings has always interpreted those references as informational only, not as authorizing those organizations to deny membership to any Hastings student interested in joining. ER 519 ¶8. Hastings is unaware of any student organization—other than CLS—that has ever attempted to restrict its membership based on students' beliefs or disagreement with an organization's stated objectives. *Id.*

(. . . continued)
not understood La Raza's bylaws to impose such a requirement and, after the issue was raised (*see* ER 434-38), confirmed that any Hastings student may become a voting member of La Raza. ER 519-20, 523, 760-61.

[4]*See* ER 278 ("Any person may become a [Students Raising Consciousness at Hastings] member by attending two meetings"); ER 282 (membership rules of the Vietnamese American Law Society "shall not violate the Nondiscrimination Compliance Code at Hastings"); ER 296 ("Membership rules [of Hastings Democratic Caucus] shall not violate the Nondiscrimination Compliance Code of Hastings"); ER 324-26 (membership in Outlaw is open to any full-time student at Hastings who attends one meeting, and Outlaw will comply with Hastings' Policies and Regulations); *see also* ER 271-72, 293, 301.

B. For Ten Years Prior To 2004-2005, CLS And HCF Did Not Bar Gay And Lesbian Students Or Non-Christians From Their Membership Or Leadership Positions.

CLS is a student organization comprised of students at Hastings. ER 336 ¶1. CLS is affiliated with the national Christian Legal Society ("CLS-National"), an association of Christian lawyers, law students, law professors, and judges that maintains attorney and law student chapters across the country. ER 343 ¶31.

For ten years, from 1994-1995 through 2003-2004, a student group known as Hastings Christian Legal Society ("HCLS") or Hastings Christian Fellowship ("HCF") was a registered student organization at Hastings. ER 341-42 ¶22.[5] From 1994-1995 through the 2001-2002 academic year, these groups used an old version of bylaws sent to student chapters throughout the years by CLS-National, and provided that the group would comply with

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[5]In its verified pleadings and pre-filing correspondence, CLS expressly alleged that it was identical to or affiliated with these predecessor Christian student groups; indeed, in its complaint, it referred to itself as "Plaintiff Hastings Christian Fellowship" and "a/k/a HCF." ER 72 ¶1.1, 73-74 ¶¶2.1, 3.3; *see also* ER 404 (letter from CLS's counsel asserting that Hastings' chapter of CLS "has been affiliated with the national Christian Legal Society since at least 1989"). While CLS acknowledges that these groups "used the national Christian Legal Society's form constitution and even its name" (AB 34), and that the three student leaders of HCF became officers of CLS (ER 343 ¶30), it now seeks to disavow any affiliation with them and asserts that their history has "no bearing" on the issues. AB 34. That contention is disingenuous given CLS's concessions in its own verified pleadings and its failure to object to the inclusion of extensive information regarding those predecessor groups in the parties' joint stipulation of facts. ER 341-43.

Hastings' Policies and Regulations. ER 342 ¶23, 382-87. In the 2002-2003 and 2003-2004 academic years, the group used a different set of bylaws that provided that all students were welcome to become members. ER 342 ¶15, 391 ("MEMBERSHIP. . . . HCF welcomes all students of the University of California, Hastings College of Law").[6]

These groups did not bar gay and lesbian or non-Christian students from membership or leadership positions. ER 342 ¶25, 348 ¶57, 391, 525-26 ¶¶2-3, 529 ¶3. In practice, any Hastings student could become a member of the organization, regardless of their sexual orientation or religion. *See id.*; AB 34. Indeed, during the 2003-2004 school year—the year immediately before CLS filed this litigation—HCF welcomed an openly lesbian student as a regular participant in its meetings, including participation in group prayers and Bible studies, and at least two other participants held beliefs inconsistent with what CLS considers to be "orthodox" Christianity. ER 342-43 ¶¶27-28, 446-50, 529 ¶4. Dina Haddad, an HCF member who the following year became CLS's Vice President, did not regard the lesbian

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[6]Although earlier HCLS bylaws contained a version of the CLS Statement of Faith discussed below (ER 383), in practice few HCLS members, and *no* members of HCF, actually signed that statement (and thereby became members of CLS-National). ER 343 ¶29. As a result, CLS's contention below that the openly lesbian student referred to below "was not a member" of HCF but merely a "participant" or "attendee" (ER 663:12-19) is mistaken: at the time, the group drew no such distinction, and indeed had no official "members."

student's participation as inconsistent in any way with the group's tenets and faith; to the contrary, she testified, "It was a joy to have her." ER 447:25-448:3. Likewise, at oral argument, CLS's counsel expressly *conceded* that the participation of that student in HCF did not burden its message in any way:

> But the point is not that that student changed the contents of the organization's expression by her participation. She did not. She simply exchanged views. They learned from each other as students in any club should. They respect one another. But *the contents and expression of CLS at Hastings was not changed in any way nor could it have been.* (ER 663:24-664:4 (emphasis added))[7]

C. In 2004-2005, CLS Changes Its Bylaws And Refuses To Comply With Hastings' Nondiscrimination Policy.

At the close of the 2003-2004 academic year, three students—Isaac Fong (President), Dina Haddad (Vice President), and Julie Chan (Treasurer)—assumed leadership of HCF. ER 343 ¶30. They were not elected to these positions, but, rather, assumed them informally. *Id.* During the summer of 2004, they decided to formally affiliate the group with CLS-National. *Id.* ¶31. They made this decision without consulting other members or putting the decision to a vote. ER 346 ¶46.

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[7]Despite that admission and the undisputed factual record, CLS now insists in its brief that these three students' participation constituted an "intrusion by those with adverse religious beliefs" that jeopardized its "message." AB 31. Such unsupported argument of counsel is not evidence and is entitled to no weight.

CLS-National required CLS to adopt a specific set of bylaws to become a formal student chapter. ER 343-44 ¶¶32-33, 395-99. The bylaws for the 2004-2005 academic year required all members and officers to agree to and affirm a "Statement of Faith," which states:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> > One God, eternally existent in three persons, Father, Son and Holy Spirit.
> >
> > God the Father Almighty, Maker of heaven and earth.
> >
> > The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> >
> > The presence and power of the Holy Spirit in the work of regeneration.
> >
> > The Bible as the inspired Word of God. (ER 20-21, 344 ¶33)

CLS interprets this Statement of Faith as barring gay and lesbian and non-orthodox Christian students from becoming members or officers of the group. ER 75 ¶3.8, 344 ¶¶34-35, 404 ("A person who engages in homosexual conduct . . . would not be permitted to become a member or serve as [a CLS] officer").[8] The CLS bylaws expressly exclude "religion" and "sexual

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[8]The District Court rejected CLS's contention, which it repeats here (AB 68-70), that "it does not discriminate on the basis of sexual orientation, but merely excludes students who engage in or advocate homosexual conduct," describing that as "a distinction without a difference." ER 734 n.2 (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003), and *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005)). CLS has no response.

orientation" from the list of protected characteristics on which it states CLS will not discriminate. *See* ER 396. The officers' decision to adopt the new bylaws and affiliate with CLS-National caused a number of HCF members to cease attending and one officer to resign. ER 346 ¶47, 528-29 ¶5. No gay and lesbian or non-Christian students were seeking to become members or officers in CLS at that time, and none have done so since. ER 347 ¶¶50, 54, 452:2-5.

When CLS submitted these bylaws to Hastings at the beginning of the 2004-2005 academic year, Hastings requested that CLS change them to conform with the Nondiscrimination Policy, and specifically to affirm that CLS would not discriminate on the basis of religion or sexual orientation. ER 345 ¶¶38-40, 401. Hastings informed CLS that to be a recognized student organization, CLS "must open its membership to all students irrespective of their religious beliefs or sexual orientation, as it has in the past." ER 345 ¶41, 411. When CLS refused, Hastings informed CLS that it could not become a registered student group, but that it nevertheless could use Hastings' facilities for meetings and activities. *Id.*[9] CLS filed suit shortly thereafter (ER 346 ¶43), alleging in part that "[b]y enacting and enforcing the

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[9]CLS never took advantage of that offer, but instead elected to meet off campus. ER 348 ¶58. Among the few concrete consequences of CLS's refusal to comply with the Policy was Hastings' withdrawal of $250.00 in funds previously set aside for two students' travel to the CLS-National conference. ER 344-46 ¶¶37, 42.

Policy on Nondiscrimination forbidding [CLS] to discriminate on the basis of religion and sexual orientation," Hastings had violated its constitutional rights. ER 80 ¶¶5.2, 6.2, 7.2, 81 ¶9.2; *see also* ER 78 ¶4.2, 79 ¶4.9 (asserting that CLS "would still consider religion and sexual orientation in the selection of officers and members," and objecting to Policy's requirement that CLS open membership and leadership positions to all students regardless of religion or sexual orientation).[10]

D. CLS's Activities During The 2004-2005 And 2005-2006 Academic Years.

CLS's activities during the 2004-2005 academic year largely consisted of weekly Bible study meetings and a handful of social activities regularly attended by some nine to fifteen students. ER 346 ¶44, 347 ¶48. Other than CLS's three officers, only one other student signed the Statement of Faith and became an official "member" of CLS. *Id.* ¶48. These meetings were run as they had been during the prior year: CLS's officers led the group in Bible studies, and the meetings opened and closed with prayers. ER 347 ¶¶49, 51. CLS made no distinction between "members" of CLS who had signed the Statement of Faith and "attendees" who had not (and who could ostensibly

[10]Based on these allegations and the undisputed facts, the District Court was plainly correct in finding that CLS "admittedly discriminates in the selection of its members and officers on the basis of religion and sexual orientation." ER 724. CLS has waived its appeal from the District Court's order denying its motion to alter or amend judgment, which challenged that finding. *See* p.15, *infra*.

be homosexual and/or non-orthodox Christian students): either could lead the group in prayer or otherwise participate. *Id.*[11] All of CLS's activities and meetings continued to be open to gay and lesbian and/or non-Christian students (although none, to CLS's knowledge, attended), and CLS officers testified they "would more than love to have [such] people come in." ER 452:2-9. Other than its officers, CLS did not identify to the public who was or was not a "member" or authorize any member or officer to speak for it. ER 478-79. Aside from requiring that members or officers sign the Statement of Faith, CLS did not have any procedure for ensuring that its members or officers are not gay or non-Christian or engaging in conduct it views as inconsistent with that Statement. ER 457:12-458:5.

CLS's President did not intend to submit the officers' positions for the coming year to a vote by the membership. ER 471:25-473:13. After the issue was raised in the litigation, however, CLS held a vote among its few "members," and leadership passed to three new students. ER 349 ¶63. In response to requests by CLS to use its facilities, Hastings again confirmed that CLS may have access to its rooms and public spaces for meetings and events and may use chalkboards and billboards to post announcements. ER 348 ¶61, 422.

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[11] Although any attendee or member was welcome to lead the group in prayer, only its officers led Bible studies. ER 347 ¶¶49, 51, 451:10-18.

SUMMARY OF ARGUMENT

CLS, a religious student organization, takes the position on this appeal that it may compel a public university law school to fund its activities and allow it to use the school's name and facilities, even though the group admittedly discriminates in its membership and leadership policies on the basis of both religion and sexual orientation. Put differently, CLS asserts a constitutional entitlement to an exemption from the law school's Policy on Nondiscrimination, which otherwise applies to all registered student organizations.

Nothing in the Constitution entitles CLS or any other discriminatory organization to an exemption from broad, generally applicable antidiscrimination laws such as Hastings' Nondiscrimination Policy. To the contrary, allowing such a "religious exception" to antidiscrimination laws would be inconsistent with settled law and would set a dangerous precedent that would seriously jeopardize the viability of federal and state laws of long standing that prohibit discrimination in a variety of settings.

In a lengthy and well-reasoned opinion, the District Court correctly concluded that CLS's two primary arguments, based on free speech and freedom of expressive association, lack merit. Hastings' Nondiscrimination Policy does not violate CLS's right to free speech, for two alternative reasons. *First*, "on its face, Hastings' Nondiscrimination Policy targets conduct, *i.e.* discrimination, not speech." ER 733. That is "because it affects what

CLS must *do* if it wants to become a registered student organization—not engage in discrimination—not what CLS may or may not *say* regarding its beliefs on non-orthodox Christianity or homosexuality." *Id.* As such, the Policy is subject to the *O'Brien* intermediate scrutiny standard (*United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)), which governs a law regulating conduct that has an incidental effect on speech. The Policy readily meets that standard: (1) it is within the constitutional power of the government; (2) it furthers an important government interest in preventing discrimination; (3) the government interest is unrelated to the suppression of free expression; and (4) any incidental restriction on CLS's alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See* Part I(A), *infra*. *Second*, even if Hastings' Policy were construed as regulating speech directly, it passes muster as a reasonable and viewpoint-neutral condition on access to a limited public forum. *See* Part I(B), *infra*.

CLS's expressive association argument also fails. As the District Court correctly concluded, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), governs where a private group is being forced to accept unwanted members whose presence significantly affects the group's ability to advocate its message, not the very different situation presented here—where Hastings has imposed reasonable, viewpoint-neutral conditions on participation in a limited public forum and access to government benefits such as funding and use of the law school's name and other facilities. *See* Part II(A), *infra*. Even

assuming *Dale* applied here, the District Court correctly concluded that the Nondiscrimination Policy does not significantly affect CLS's ability to advocate its viewpoints, and in any event is justified by compelling state interests. *See* Part II(B), *infra*.

CLS devotes very little attention in its opening brief to its remaining claims, and appropriately so. Hastings' Policy is a neutral law of general applicability that in no sense "targets" religion, and therefore does not violate CLS's right to free exercise of religion. *See* Part III, *infra*. Nor does it violate CLS's right to equal protection, because (contrary to CLS's unsupported contention) Hastings has not treated CLS differently than other similarly situated student groups, and CLS never presented any evidence of discriminatory intent. *See* Part IV, *infra*.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). Where, as here, the parties agree that there are no genuine issues of material fact (*see* AB 29), the Court's task is to determine whether the District Court correctly applied the relevant substantive law. *Id.* The District Court's decision may be affirmed on any ground supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 811 (9th Cir. 2004).

A district court's decision to deny a motion to alter or amend judgment is reviewed for an abuse of discretion. *Carter v. United States*, 973 F.2d 1479, 1488 (9th Cir. 1992). However, by failing to present any separate argument or authority on that issue, CLS has waived its appeal from the District Court's order denying its motion to alter or amend the judgment. FED. R. APP. P. 28(a)(9); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001).[12] CLS consequently is bound by the lower court's finding that it "admittedly discriminates in the selection of its members and officers on the basis of religion and sexual orientation." ER 724.

ARGUMENT

I.

HASTINGS' POLICY THAT REGISTERED STUDENT GROUPS BE OPEN TO ALL INTERESTED STUDENTS DOES NOT VIOLATE CLS'S FREEDOM OF SPEECH.

Hastings' decision to deny CLS the privilege of becoming a registered student organization due to its refusal to comply with the Nondiscrimination Policy does not violate CLS's freedom of speech, for two independent reasons. *First*, the Policy regulates conduct rather than speech, and any incidental effects the Policy may have on CLS's speech do not offend the First Amendment under the *O'Brien* standard. *Second*, the Policy is a reasonable,

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[12]CLS's brief reference to that ruling in a footnote, without any argument or citation to authority (*see* AB 68 n.4), is insufficient to preserve the point.

viewpoint-neutral rule that Hastings may properly require student organizations to abide by in order to participate in the limited public forum Hastings has created.

A. Hastings' Nondiscrimination Policy Passes Constitutional Muster Under *O'Brien*.

The District Court correctly found that because Hastings' Nondiscrimination Policy regulates conduct, not speech, the intermediate scrutiny standard set forth in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), governs CLS's claim that the Policy violates its freedom of speech. ER 730-38. CLS does not seriously contest either premise.[13]

1. The Nondiscrimination Policy Is Directed At Conduct, Not Speech.

States may constitutionally regulate conduct even if such regulation has an incidental effect on speech. *See, e.g.*, *O'Brien*, 391 U.S. at 376-77. "Where 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." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). As the Supreme Court recently explained in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, —U.S.—, 126 S. Ct. 1297 (2006),

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[13]CLS contends that the District Court erred in applying the *O'Brien* standard, but only with respect to its expressive association claim, not its separate free speech claim. AB 27-29. CLS misapprehends the standard governing its expressive association claim. *See* Part II(A), *infra*.

anti-discrimination laws such as Hastings' Policy are directed at conduct, even if they may have an incidental effect on speech:

> Congress . . . can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. (*Id.* at 1308 (citing *R.A.V.*, 505 U.S. at 389))

Where, as here, a law or regulation is directed at conduct rather than speech, *O'Brien* applies. 126 S. Ct. at 1310-11 (applying *O'Brien* to free speech challenge to Solomon Amendment's condition that institutions of higher education provide equal access to military recruiters in order to receive federal funding); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000) (applying *O'Brien* to material support provision of Antiterrorism and Effective Death Penalty Act of 1996, rejecting contention that strict scrutiny should apply); *see also Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (any burden placed by nondiscrimination law on landlord who objected on religious grounds to renting to unmarried couples "falls on his conduct and not his beliefs").

As the District Court observed, "Courts have consistently held that regulations prohibiting discrimination, similar to Hastings' Nondiscrimination Policy, regulate conduct, not speech." ER 730 (citations omitted). Thus, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held that Massachusetts' public accommodations act,

which prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, [and] sexual orientation," among other grounds, "does not, on its face, target speech or discriminate on basis of its content, the focal point of its prohibition being rather on *the act of discriminating against individuals* . . . on the proscribed grounds." *Id.* at 572 (emphasis added); *see also, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623-24 (1984) (Minnesota Human Rights Act, which bars denial of access to public accommodations, "does not distinguish between prohibited and permitted activity on the basis of viewpoint"; Act "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services"); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (New York statutes that bar discrimination on the basis of, *inter alia*, race or religion, "are plainly aimed at conduct, *i.e.*, discrimination, not speech" (citations omitted)); *see also Evans v. City of Berkeley*, 38 Cal. 4th 1, 11 (2006) (city's requirement that an organization comply with a nondiscrimination policy did not require organization "to espouse nor to denounce any particular viewpoint"), *cert. denied*, 127 S. Ct. 434 (2006).

Here, Hastings' Policy, like the Solomon Amendment, "neither limits what [students] may say nor requires them to say anything." *Rumsfeld*, 126 S. Ct. at 1307. Instead, it "affects what [student organizations] must *do*—[not discriminate in their membership and leadership decisions]—not what

they may or may not *say*." *Id.* As such, CLS's claim that Hastings' application of the Policy violates its right to freedom of speech is subject to the *O'Brien* standard. "Intermediate scrutiny applies where, as here, 'a regulation . . . serves purposes unrelated to the content of expression.'" *Humanitarian Law Project*, 205 F.3d at 1135 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

2. Hastings' Policy Satisfies The *O'Brien* Standard.

Under *O'Brien*, a regulation is "sufficiently justified" if: (1) "it is within the constitutional power of the Government"; (2) "it furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "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. Each of those factors is readily satisfied here.

a. The Policy Is Within The State's Constitutional Power.

First, it is undeniably within Hastings' constitutional power to prohibit discrimination on the bases of, *inter alia*, religion and sexual orientation. State laws that prohibit discrimination on the basis of sexual orientation "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley*, 515 U.S.

at 572; *see also Healy v. James*, 408 U.S. 169, 189, 192 (1972) (colleges have the power to promulgate and enforce reasonable campus rules).

b. The Nondiscrimination Policy Furthers An Important Or Substantial Governmental Interest.

The second prong of the *O'Brien* test, which requires that the Nondiscrimination Policy further an important or substantial governmental interest, likewise is easily satisfied. States have a compelling interest in prohibiting discrimination, including discrimination on the basis of religion and sexual orientation. *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (public accommodations laws, such as the Unruh Act, "plainly serv[e] compelling state interests of the highest order" (quoting *Roberts*, 468 U.S. at 624)).[14] A state's interest in eradicating discrimination is particularly critical

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[14]*See also, e.g.*, *Jews for Jesus*, 968 F.2d at 295 (the State has a compelling interest in prohibiting racial and religious discrimination in public accommodations); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 3, 32-38 (D.C. 1987) (eradication of sexual orientation discrimination is a compelling governmental interest); *Pines v. Tomson*, 160 Cal. App. 3d 370, 391-92 (1984) ("As a general proposition, government has a compelling interest in eradicating discrimination in all forms. While the application of the anti-discrimination laws over First Amendment objections has chiefly occurred in the context of racial or sexual discrimination, California has chosen to broadly interdict discrimination on the basis of religion on the same terms and for the same reasons as discrimination on other invidious bases" (citations and internal quotation marks omitted)); *cf. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178-80 (9th Cir. 2006) (discussing the detrimental consequences of discrimination against and harassment of homosexual students in secondary schools), *cert. filed*, No. 06-595, 75 U.S.L.W. 3248 (Oct. 26, 2006).

in institutions of higher education. *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003). That compelling interest is expressly embodied in a variety of state statutory prohibitions. For example, the California Education Code prohibits discrimination on the basis of sexual orientation and religion "in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." CAL. EDUC. CODE §66270; CAL. PENAL CODE §§422.55(a), 422.6(a).

c. Hastings' Interest In Prohibiting Discriminatory Conduct Is Unrelated To The Suppression Of Free Speech.

Third, Hastings' interest in prohibiting discrimination is unrelated to the suppression of free speech. Hastings' Policy therefore readily satisfies the third prong of the *O'Brien* test. *Roberts*, 468 U.S. at 624 (the State's objective of eliminating discrimination and assuring its citizens equal access to publicly available goods and services is "unrelated to the suppression of expression"); *Jews for Jesus*, 968 F.2d at 295 (same); *Pines v. Tomson*, 160 Cal. App. 3d 370, 392 (1984) ("California's interest in eradicating discrimination on the basis of race or sex is unquestionably 'compelling' and is 'unrelated to the suppression of ideas'" (citation omitted)).

As the District Court observed, that unremarkable conclusion is reinforced by the undisputed factual record in the case. ER 736. Before the instant dispute arose, Hastings had an unbroken ten-year record of

recognizing predecessor Christian student organizations. *See* pp.5-7, *supra*. Moreover, contrary to CLS's contention that the Policy would prevent it from "affirm[ing] its religious viewpoint regarding homosexual conduct" (AB 60), there is literally nothing in the record to indicate that Hastings' interest in prohibiting discrimination is related to CLS's views on homosexuality (or any other subject), or would restrain it in any way from expressing those views. *See* pp.33-34, *infra*.

d. The Incidental Restriction On CLS's Alleged First Amendment Freedom Is No Greater Than Is Essential To The Furtherance Of Hastings' Interest.

Fourth, the Nondiscrimination Policy satisfies the fourth prong of the *O'Brien* test because "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 126 S. Ct. at 1311 (citation omitted). That requirement is easily met here, because the substantial interest in preventing discrimination obviously would be achieved less effectively if the Policy did not exist. *See Jews for Jesus*, 968 F.2d at 296 (statutory prohibitions against discrimination are no broader than necessary to further the legitimate goal of eradicating discrimination); *Pines*, 160 Cal. App. 3d at 392 (injunction against party's discriminatory business practices was no broader than necessary to further compelling interest in eradicating religious discrimination). "The most effective tool the state has for combating discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are

narrowly tailored and there is no less restrictive alternative." *Swanner*, 874 P.2d at 280-84 (rejecting challenge to state nondiscrimination law by landlord who objected on religious grounds to renting to unmarried couples, finding that law was narrowly tailored to advance the compelling state interest in preventing discrimination on the basis of marital status).

CLS argues that "the least restrictive means of pursuing diversity on campus and protecting religious minorities is to exempt religious organizations from the policy's prohibition of religion and sexual orientation discrimination." AB 70. But even if that more stringent test applied, that argument ignores the true objectives of the Policy: preventing discrimination against students on the basis of sexual orientation and religion, and opening educational opportunities up to all students. By definition, those substantial government interests would be achieved "less effectively"—indeed, they would be greatly undermined—if groups such as CLS that objected to the Policy were exempted from complying with it. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development" (citations and internal quotation marks omitted)).

B. Hastings May Impose Reasonable, Viewpoint-Neutral Rules For Registration And Participation In The College's Limited Public Forum.

Even if Hastings' Nondiscrimination Policy were construed as a direct regulation of speech in a forum rather than a neutral policy having at most an incidental effect on speech, it does not violate CLS's free speech rights. When faced with a claim that a government regulation of a forum violates a litigant's right to freedom of speech, a court determines the nature of the forum and assesses whether the defendant's justification for the regulation satisfies the requisite standard. *E.g.*, *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964-65 (9th Cir. 1999). The District Court correctly determined that Hastings has, in accordance with the First Amendment, imposed reasonable, viewpoint-neutral rules governing the limited public forum it has created.

1. Hastings Has Created A Limited Public Forum.

The Constitution does not guarantee that all forms of speech protected by the First Amendment may be heard on government property. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1202 (9th Cir. 2006). The government may limit access to a forum, and the standards by which limitations on its access are evaluated depend heavily on the nature of the forum involved. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

Generally speaking, there are three kinds of fora that may be created on government property: public fora, designated public fora, and nonpublic fora. *DiLoreto*, 196 F.3d at 964-65. "A traditional public forum, such as a public park or sidewalk, is a place 'that has traditionally been available for public expression.'" *Id.* at 964. In contrast, "[w]hen the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum." *Id.* Regulation of expressive activity in either a traditional or a designated public forum is generally subject to strict scrutiny. *Id.* at 964-65. "All remaining property is classified as nonpublic fora." *Id.* at 965; *see also Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003) (same); *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003) (same). This includes "limited public fora," which are a "type of nonpublic forum that the government intentionally has opened to *certain groups* or to certain topics." *DiLoreto*, 196 F.3d at 965 (emphasis added).

The courts repeatedly have recognized that where, as here, a college or secondary school makes benefits available to certain registered groups comprised of its enrolled students, it creates a "limited public forum." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829-30 (1995) (student activity fund available to registered student groups at university constituted a "limited public forum"); *see also, e.g., United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003) (plurality opinion) (same); *Bd.*

of Regents v. Southworth, 529 U.S. 217, 229-30, 234 (2000) (same); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999) (university's system for funding registered student groups with mandatory fees "created a limited public forum"); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548-49 (11th Cir. 1997) (same).

As it did below, CLS again ignores this controlling body of authority, asserting that Hastings opened a "designated public forum for use by student organizations." AB 51. CLS is wrong.[15] "Generally, school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for *indiscriminate* use by the *general public*." *DiLoreto*, 196 F.3d at 966 (emphases added; citation and internal quotation marks omitted). The undisputed record establishes that Hastings has *not* opened its facilities to such use. As the District Court found,

> There is no evidence before the Court, and CLS does not contend, that Hastings has *indiscriminately* opened up its campus and allowed registration, and the attendant benefits, to the public generally. Nor is there evidence that any group of students may register. (ER 738)

Rather, it is undisputed that Hastings has restricted use of the forum to non-commercial groups comprised solely of Hastings students who affirm their

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[15]As the District Court observed, in this Circuit, the terms "designated public forum" and "limited public forum" have distinct meanings. ER 738 n.3 (citing *Hopper*, 241 F.3d at 1074-75). CLS ignores the distinction, which is critical here.

willingness to abide by reasonable campus rules including the Nondiscrimination Policy. ER 339 ¶12, 340-41 ¶¶14, 17, 371.[16] CLS does not "fall[] within the parameters of Hastings' forum," as it erroneously maintains (AB 53-54), because it expressly *refused* to comply with the Policy.

"'The necessities of confining a [limited public] forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.'" *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) (quoting *Rosenberger*, 515 U.S. at 829). Accordingly, "[i]n limited public fora, a *lenient reasonableness standard* applies to determine the validity of governmental regulations." *Id.* at 814 (emphasis added). "Under this reasonableness test, the State can restrict access to a limited public forum so long as (1) the restriction does not discriminate according to the viewpoint of the speaker, and (2) the restriction is reasonable." *Id.*; *see also Hills*, 329

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[16]CLS's contention that Hastings created a designated public forum because it has, in recent years, registered approximately sixty student organizations representing a diverse array of topics and viewpoints (AB 51-52) is a red herring: the nature of the forum does not depend on the number of participants allowed access. *See Rounds*, 166 F.3d at 1039 (university created a limited public forum where "eighty organizations representing a wide range of political and ideological views received funding"); *see also Faith Ctr. Church*, 462 F.3d at 1204-05 (the broad purpose of the County library meeting room policy "is not dispositive of an intent to create a public forum by designation," and the policy's requirement that potential users of the room submit an application that must be reviewed and approved in advance demonstrates the County's intention not to open the room for indiscriminate use).

F.3d at 1049 (same); *DiLoreto*, 196 F.3d at 964-65 (same).[17] The Nondiscrimination Policy readily satisfies the twin requirements of viewpoint-neutrality and reasonableness.

2. The Nondiscrimination Policy Is Viewpoint Neutral.

Viewpoint discrimination arises when the government targets "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829, 831. However, Hastings' Nondiscrimination Policy does not target or prohibit any particular viewpoint or make any distinction between religious and non-religious speech, viewpoints or groups; instead, it applies equally to all student groups, religious and non-religious alike, regardless of the content or

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[17]CLS argues that its exclusion from the forum is subject to strict scrutiny. AB 53. However, *Rosenberger* articulated the very same reasonableness test that this Court applies: "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." 515 U.S. at 829 (citations omitted).

CLS misreads *Widmar v. Vincent*, 454 U.S. 263 (1981), which it contends is "controlling" on this point. AB 53. *Widmar* held that strict scrutiny, "the standard of review appropriate to content-based exclusions," would apply only to "discriminatory exclusion from a public forum *based on the religious content of a group's intended speech*." 454 U.S. at 269-70 (emphasis added). Here, in contrast, Hastings' Policy is content and viewpoint-neutral. *See* pp.28-34, *infra*. Strict scrutiny therefore does not apply. Likewise, *Healy v. James*, 408 U.S. 169 (1972)—which long predated *Rosenberger* and the other cases cited in text—held only that once the student group "had filed an application in conformity with the requirements," the burden was on the university to justify its decision of rejection. *Id.* at 184. CLS never filed such an application because of its refusal to comply with the Policy.

viewpoint of their speech. As one prominent constitutional scholar has explained,

> By any traditional First Amendment definition of content neutrality, . . . antidiscrimination rules are content-neutral. They do not treat expressive associations differently based on what the associations say. They are not justified by the content of the expressive associations' speech but by whether the associations let prospective members participate without regard to their race, religion, sex, and the like. Associations are covered whether they express racist views or antiracist views, religious views or atheist views, pro-gay-rights views or anti-gay-rights views. (Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1930 (2006) (footnotes omitted))

All of the cases relied upon by CLS (AB 55-56, 58), in contrast, involved policies that expressly discriminated against religious viewpoints. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), for example, the Court held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393; *see also, e.g.*, *Rosenberger*, 515 U.S. at 829, 832 (university's denial of funding to student newspaper because of its Christian editorial viewpoints where the school funded other viewpoints was discriminatory); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint"). Here, in contrast, the Policy prohibits *all* student groups from discriminating against other

students based on their membership in protected groups, *regardless* of the content or viewpoint of their speech.

As the District Court concluded, like numerous other federal and state nondiscrimination laws that similarly prohibit invidious discrimination, the Nondiscrimination Policy is viewpoint neutral. *See, e.g.*, *Roberts*, 468 U.S. at 615, 623 (Minnesota Human Rights Act "does not distinguish between prohibited and permitted activity on the basis of viewpoint"); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549 (Unruh Act barring discrimination in public accommodations "makes no distinctions on the basis of the organization's viewpoint"); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 93-95 (2d Cir. 2003) (Connecticut's Gay Rights Law "prohibits discriminatory membership and employment policies not because of the viewpoints such policies express, but because of the immediate harms—like the denial of concrete economic and social benefits—such discrimination causes homosexuals"); *see also Evans v. City of Berkeley*, 38 Cal. 4th 1, 14 (2006) ("[city], in requiring assurances that its subsidy and property will be used without discrimination on the basis of religion or sexual orientation, does not demand adherence to the *viewpoint* that motivated the nondiscrimination provision" (citations omitted)). Thus, if CLS's argument were to be accepted, it would require the invalidation of numerous such laws, including hate crime legislation, on the ground that they are not "viewpoint neutral." But that is plainly not the law. *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (Title VII, which prohibits discrimination

against an employee "because of such individual's race, color, religion, sex, or national origin," is a "permissible content-neutral regulation of conduct").[18]

Not only is the Policy viewpoint neutral on its face, it is undisputed that it has been both interpreted and applied in the same fashion. Hastings interprets the Nondiscrimination Policy as requiring *all* student groups to allow *all* students to become members and officers. ER 340-41 ¶¶17-18. As CLS concedes, "the policy applies to all [registered student] groups." AB 57. Further, no registered student organization (other than CLS) has ever sought an exemption from the Policy (ER 340 ¶16), or has ever excluded an interested student on the basis of a protected category listed in the Policy. ER 341 ¶19, 519 ¶7. Thus, CLS's repeated allegation that the Policy is not viewpoint neutral because Hastings permits *other* student groups "to discriminate on the basis of shared personal beliefs,"[19] while at the same time

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[18] *Wisconsin* also forecloses CLS's contention that it should be exempted from the Policy because its supposed *motive* for discriminating is religious. In *Wisconsin*, the Court upheld a state statute that enhanced penalties for certain hate crimes, expressly rejecting the defendant's argument that the statute violated his free speech rights "because it punishes the defendant's discriminatory motive, or reason, for acting." 508 U.S. at 487. As the unanimous Court pointed out, motive plays the same role under the statute "as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge." *Id.* (citations omitted). Here, likewise, Hastings' Policy "is aimed at conduct unprotected by the First Amendment." *Id.*

[19] CLS offers a hypothetical to illustrate its claim that Hastings' Policy is viewpoint discriminatory, arguing that the Policy "allows a vegetarian club (continued . . .)

prohibiting CLS from doing so (AB 57), cannot be squared with the undisputed record.[20]

CLS's further contention that the Policy is not viewpoint neutral because "[w]hile the [P]olicy applies to all groups, it prevents only the religious groups from registering, because only religious groups need to apply religious qualifications for membership and leadership to protect their expressive purpose" likewise lacks merit. AB 57. A law of general application that prohibits certain *conduct* (in this instance, discrimination based on sexual orientation or religion) is not discriminatory merely because it may disproportionately affect a group holding a particular viewpoint. *E.g.*, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) ("[T]he fact that

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(. . . continued)
to require that officers and members not eat meat, but prohibits an Orthodox Jewish group [from] requiring its officers and members to abstain from pork for religious reasons." AB 17-18, 58 (same). To the contrary, it is undisputed that *no* student organization may bar a student from membership on the basis of his or her status or beliefs. ER 341 ¶18.

[20]For that reason, the issue here is presented on a very different record than in the nominally similar litigation brought by CLS against Southern Illinois University. *Cf. Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006) (discussing evidence that "other student groups discriminate in their membership requirements on grounds that are prohibited by [SIU's] policy"). For this reason, among others, CLS is mistaken that *Walker* is "indistinguishable" (AB 21), and this Court should not defer to the Seventh Circuit's split decision in that case, which was decided on a limited record after the district court denied a preliminary injunction. *See Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001) (Court will disagree with another circuit if there are "valid and persuasive reasons" to hold otherwise).

the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"); *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (that an injunction barring access to areas close to international trade conference "predominantly affected protestors with anti-WTO views" did not render it content-based).[21] "The mere fact that a class of persons with a particular viewpoint are more likely to violate the statute does not render the law a viewpoint-based regulation of speech." *Planned Parenthood, Inc. v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1376-77 (D. Or. 1996); *see also* Volokh, 58 STAN. L. REV. at 1931-33.

Finally, CLS's contention that Hastings' exclusion of CLS is viewpoint discriminatory because it purportedly "skews the debate on issues of human sexuality" (AB 59) is meritless. There is not a shred of evidence in the record that Hastings refused to recognize CLS *because* CLS requires its

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[21] *See also, e.g., United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996) (holding Freedom of Access to Clinic Entrances Act content- and viewpoint-neutral despite disproportionate effect on those opposed to abortion, noting "there is no disparate-impact theory in First Amendment law"); *Presbytery of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492, 518, 521-22 (D.N.J. 1995) (rejecting argument that New Jersey Law Against Discrimination prohibiting discrimination based on affectional or sexual orientation discriminated against religious viewpoint that homosexuality is immoral, noting "[a]s long as a statute 'serves purposes unrelated to the content of expression,' it is content-neutral, 'even if it has an incidental effect upon some speakers or messages but not others'"), *aff'd*, 99 F.3d 101 (3d Cir. 1996).

members and leaders "to affirm its religious viewpoint regarding homosexual conduct." AB 60; ER 742 ("there is no evidence in the record to support CLS's argument that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective"). To the contrary, CLS, like every other student group, has always been and remains free to express any views it wishes concerning those (and all other) subjects, including its view that homosexuality is morally wrong and inconsistent with Biblical teachings. As Dean Kane unambiguously testified, "I think that [CLS's members] have a complete right to have whatever view that they want to on human sexuality and a right to express it." ER 511:4-6. That CLS happens to hold different views on that subject than may other student organizations has nothing to do with Hastings' even-handed requirement that *all* such groups comply with its Nondiscrimination Policy.

3. The Nondiscrimination Policy Is Reasonable.

Hastings' Nondiscrimination Policy also meets the second prong of the standard applicable to limited public forums: it is reasonable "'in light of the purpose of the forum and all of the surrounding circumstances.'" *Cogswell*, 347 F.3d at 817 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 789 (1985)). CLS's contrary arguments (AB 60-61) again ignore the undisputed record concerning both the purpose of Hastings' Policy and its application to other student groups.

The "restriction"—the requirement that membership in registered student organizations be open to all interested students, without discrimination on the basis of protected status—is entirely reasonable in light of the purpose of the forum and its surrounding circumstances. Hastings is a public institution, subject to federal and state laws prohibiting discrimination.[22] By recognizing and funding student organizations, it seeks to further students' education and their participation in the law school environment, and to foster students' interests and connection with their fellow students. ER 518 ¶4. Hastings has decided that the best way to effectuate the purpose of this forum is to require that student groups enjoying the benefits of its limited financial and physical resources be open to all interested students. That requirement furthers students' interests and education, including exposure to diverse points of view, while ensuring that public funds—including mandatory activity fees paid by all students—are not used to promote or support invidious discrimination. *Id.* ¶5.[23]

The Supreme Court repeatedly has recognized that a university may require student organizations to comply with reasonable regulations consistent with its educational purpose:

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[22]*See* p.21, *supra*.

[23]Notably, CLS's position would have the paradoxical result of forcing gay and lesbian students, as well as non-orthodox Christian students, to pay mandatory student activity fees to fund registered organizations that would categorically bar those same students from joining as members.

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. (*Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981))

See also id. at 276-77 ("we affirm the continuing validity of cases that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education" (citation omitted) (citing *Healy v. James*, 408 U.S. 169, 188-89 (1972))).

CLS contends that it is unreasonable for Hastings to require student organizations to open up their membership and leadership to all interested Hastings students because, in CLS's view, it is not the best way "to promote a diversity of viewpoints . . . including viewpoints on religion and human sexuality." AB 60. However, even if that were the *only* purpose served by the Policy—and it is not[24]—under the "lenient reasonableness standard" that applies to government regulation of limited public fora (*Cogswell*, 347 F.3d at 814), deference is given to the government's determination as to how to best effectuate the purpose of a limited public forum. Thus, the challenged

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[24]Diversity of viewpoints is only *one* of the goals of Hastings' registration system. Other key goals include ensuring that student groups are abiding by the Nondiscrimination Policy; making available to all students the educational, social and leadership opportunities that student organizations offer; and encouraging tolerance, cooperation, and learning among students of different backgrounds and viewpoints. ER 337 ¶8, 518 ¶¶4, 5.

restriction need not be the most reasonable or the only reasonable limitation on speech in the forum. *Id.* at 817. Hastings' Policy readily satisfies this standard.

II.

REQUIRING CLS TO ABIDE BY THE NONDISCRIMINATION POLICY IN ORDER TO BECOME A REGISTERED STUDENT ORGANIZATION DOES NOT VIOLATE ITS RIGHT OF EXPRESSIVE ASSOCIATION.

The District Court, in a lengthy and thoughtful discussion, held that Hastings' Policy does not violate CLS's First Amendment right of expressive association, on two alternative grounds. ER 744-58. *First*, the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), does not apply where, as here, a private group is not directly forced to admit a member whose presence would impair its message, but rather, is seeking access to a nonpublic forum that is conditioned upon compliance with a reasonable and viewpoint-neutral policy against discrimination. *Second*, even assuming *Dale* applied, Hastings' Policy does not significantly affect CLS's ability to advocate its viewpoints, and the government interest at stake justifies any alleged burden the Policy places on CLS's expressive association. The District Court was correct on both counts.

A. *Dale* Does Not Apply To Reasonable, Viewpoint-Neutral Conditions On Participation In A Limited Public Forum And Access To Government Benefits.

CLS rests much of its argument on the premise that *Dale* applies to this case, but as the District Court correctly determined, it does not. The Court's holding in *Dale* was premised on the recognition that government action may unconstitutionally burden associational freedom when it constitutes an "intrusion into the internal structure or affairs of an association," such as a "regulation that forces the group to accept members it does not desire." *Id.* at 648 (quoting *Roberts*, 468 U.S. at 622). However, as the District Court observed, "CLS is not being forced, as a private entity, to include certain members or officers" (ER 745); rather, the issue in this case is whether Hastings must exempt CLS from reasonable, viewpoint-neutral conditions placed upon rights of access to a limited forum and government benefits. *Dale* did not involve or address that question at all.

Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003), drew this very distinction. In *Wyman*, the court considered a claim by the Boy Scouts against the State of Connecticut for denying its application to participate in a workplace charitable contribution campaign. Like CLS, the Boy Scouts sought to participate in this forum, but objected to complying with the State's condition that participating groups abide by a written policy of nondiscrimination. *Id.* at 84-85. Like CLS, the Boy Scouts barred "known or avowed homosexuals" from membership (and employment). *Id.* at 85. And like

CLS, the Boy Scouts contended that its right of expressive association had been violated. The Second Circuit rejected this argument, on grounds that apply equally here.

As *Wyman* explained, *Dale* does not apply where, as here, a private group is not being directly forced to admit a member whose presence would impair its message, but, rather, is seeking access to a nonpublic forum or government benefit that is conditioned upon compliance with a reasonable and viewpoint-neutral condition of nondiscrimination:

> While *Dale*'s recognition of the Boy Scouts' expressive-associational right to exclude a gay activist from a leadership position sets the stage for the issues in this case, it does not determine their resolution. *Dale* considered New Jersey's attempt *to require* the Boy Scouts to admit a person who, the Supreme Court found, would compromise the Boy Scouts' message. Not surprisingly, the Supreme Court held that such state compulsion "directly and immediately affects . . . associational rights that enjoy First Amendment protection" and imposes a "serious burden" on them. The effect of Connecticut's removal of the [Boy Scouts] from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion. (*Wyman*, 335 F.3d at 91 (citation omitted))

Instead, the court held that the Boy Scouts' claim "lies at the intersection" of two lines of First Amendment cases: those involving nonpublic forums, and the doctrine of unconstitutional conditions. *Id.* at 92. The court found no need to decide which body of authority applies, since under either, the restriction or condition at issue will be upheld so long as it is both viewpoint neutral and reasonable. *Id.* The court held that the state's requirement that organizations agree to abide by the nondiscrimination policy as a condition

of participation in the workplace campaign met both tests: it was viewpoint neutral, both facially and as applied, since it was not intended to penalize the Boy Scouts for its viewpoint, and the Boy Scouts presented no evidence that it was applied selectively (*id.* at 92-97); and it was "a reasonable means of furthering Connecticut's legitimate interest in preventing conduct that discriminates on the basis of sexual orientation." *Id.* at 98.

Precisely the same conclusion follows here. In contrast to *Dale*, where the state sought directly to force a private group to admit as a leader an activist whose very presence the Court deemed antithetical to the group's message, this case, like *Wyman*, involves reasonable, viewpoint-neutral conditions placed upon a private group's right of access to a limited forum and to the government benefits (including funding and use of the law school name) that accompany it. Hastings, like the State of Connecticut, "has not prevented [CLS] from exercising its First Amendment rights; it has instead set up a regulatory scheme to achieve constitutionally valid ends . . . ." *Wyman*, 335 F.3d at 95 n.8; *see also* Volokh, 58 STAN L. REV. at 1926 ("the government may decide not to subsidize such [student] groups: it may limit funding to those groups that discriminate neither in their choice of officers nor in their choice of members or attendees").

The Policy does not directly compel CLS to admit members whose presence may impair its message. Hastings has not sought to force CLS to admit members that offend its precepts, but "has said only that CLS must

content itself with the benefits and support given to non-recognized student organizations, rather than also receiving the additional perks that go along with recognized status." *Walker*, 453 F.3d at 873 (Wood, J., dissenting). If CLS wishes to enjoy the benefits made available by Hastings to recognized student organizations, it must agree to follow the reasonable, viewpoint-neutral rules applicable to all such organizations. It may not, under the guise of protected First Amendment rights, force Hastings to exempt it from those rules, and thereby force it to subsidize discrimination that Hastings would never tolerate in its own employment and other practices.

CLS offers three arguments for this Court to reject *Wyman*; all three fail. *First*, CLS argues that "the underlying premise of *Wyman*—that an indirect burden on associational rights is constitutionally permissible—is counter to well-established Supreme Court precedent." AB 43; *see also id.* at 37-42. This "straw man" argument fails. *Wyman* did not suggest, nor does Hastings contend, that indirect rather than direct interference with associational rights necessarily would be constitutionally permissible. To the contrary, *Wyman* explicitly recognizes that regulations that do not "rise to the level of compulsion" (335 F.3d at 91), but nonetheless burden a group's free association rights, *are* subject to First Amendment limitations: they must be viewpoint neutral and reasonable in light of the forum in which they apply. *Id.* at 92.

Healy, on which CLS relies most heavily for its argument that "indirect" burdens on associational freedom trigger application of *Dale* even in the absence of "forced inclusion" (*see* AB 37-42), supports *Hastings*' position, not CLS's. In *Healy*, a group of students attending Central Connecticut State College sought to establish a chapter of the Students for a Democratic Society ("SDS"), but the state college refused to confer "recognized" status on the aspiring SDS chapter, and even went so far as to disband the group when it met in a coffeeshop on campus. *See Healy*, 408 U.S. at 176 & n.6.[25] Unable to determine from the factual record the true basis for the college's decision to deny SDS recognition, the Court remanded (*id.* at 185), but it gleaned "[f]our possible justifications for nonrecognition," three of which it deemed impermissible, and one of which it held "has merit." *Id.* The three impermissible bases for nonrecognition identified by the Court in *Healy* have nothing in common with this case.[26] It is only the *permissible* basis for nonrecognition identified in *Healy* that applies here:

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[25]In contrast, even as an "unregistered" student organization at Hastings, CLS continues to enjoy access to certain benefits. CLS may reserve Hastings' facilities for meetings and events and use certain bulletin boards and chalkboards to communicate with prospective members and publicize its activities. ER 348, 422, 750. Thus, "*Healy* . . . offers an example of real exclusion from campus; our case presents a counterexample of neutrality toward organizations that do not have formal recognition, but that are otherwise welcome to operate on their own." *Walker*, 453 F.3d at 874 (Wood, J., dissenting).

[26]These are (1) the group's affiliation with a larger organization reputed (continued . . .)

> A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition. (*Id.* at 193)

And *Healy* held that the *O'Brien* test was the appropriate standard to be applied where, as here, students claim that a college's reasonable campus rules affect their associational activities. *Id.* at 189 & n.20. As discussed above, that test is readily satisfied here.

CLS's refusal to "affirm in advance its willingness to adhere to reasonable campus law" is the crux of this case: CLS demands the right to violate a viewpoint-neutral campus rule applicable to all registered student organizations, but it nonetheless demands the perquisites of group recognition. Under *Healy*, Hastings need not specially exempt CLS from valid campus rules. *See id.* at 193-94 ("Assuming the existence of a valid rule . . . we do conclude that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any

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(. . . continued)
to be disruptive and violent (*Healy*, 408 U.S. at 186-87); (2) disagreement with the group's philosophy (*id.* at 187-88); and (3) an asserted, but factually unsupported, belief that the group's prospective campus activities are likely to cause a disruptive influence on campus. *Id.* at 188-91.

valid campus rules with which it disagrees"); *see also Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 445 (3d Cir. 2000) (rejecting freedom of association claim by fraternity stripped of recognized status following drug raid; "*Healy* specifically contemplated a situation . . . where a university acts out of non-ideological motives to directly restrict a group's non-expressive activity, even when those actions would have an indirect effect on expressive activity"); Volokh, 58 STAN. L. REV. at 1936 (groups that are outside the forum's designation "are not entitled to the non-traditional-public-forum property or subsidy that the government has chosen to open only to certain kinds of groups").[27]

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[27]The *Walker* majority attempted to distinguish *Healy* on the ground that it "drew a distinction between rules directed at a student organization's actions and rules directed at its advocacy or philosophy; the former might provide permissible justification for nonrecognition but the latter do not." *Walker*, 453 F.3d at 864. However, Hastings' Policy is *not* a rule "directed at [CLS's] advocacy or philosophy" rather than at CLS's "actions." The Policy is directed at conduct rather than speech, and it applies to *all* student groups seeking official recognition, regardless of their philosophy. *See* Part I(A)(1), *supra*.

Likewise, the other cases CLS cites (*see* AB 37-42) are inapposite. Most involved schools' denial of recognition to student groups based on *viewpoint discrimination*, each instance of which would have been held unconstitutional under both *Healy* and *Wyman*. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (exclusion based on fact that student group was a religious one); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (same); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (same); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (same); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164 (4th Cir. 1976) (exclusion of gay alliance group based in part on concern that "existence of [the group] would tend to attract other homosexuals" to the university).

Second, CLS argues that "the forum at issue in *Wyman* is vastly different than the forum at issue in this case" because the former was a nonpublic forum established for a limited purpose. AB 44. Again, however, CLS ignores controlling authority establishing that where, as here, a college or secondary school makes benefits available to certain registered groups comprised of its enrolled students, it creates a "limited public forum." *See* Part I(B)(1), *supra*. The same two-part test that governs nonpublic forums applies equally to limited public forums: the restrictions must be viewpoint-neutral and reasonable in light of the purpose of the forum.

Third and finally, CLS argues that *Wyman* is inapplicable because it relied on *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and other government speech cases. AB 46. However, the Second Circuit in *Wyman* did not base its decision on the government speech doctrine, but rather found that its case was "at the intersection" of two lines of authority: those involving nonpublic forums, and the doctrine of unconstitutional conditions. *Wyman*, 335 F.3d at 92. The court specifically declined to classify the case before it "under one heading or another." *Id.* Thus *Wyman* is equally persuasive in nonpublic forum cases such as this one.

In any event, the doctrine of unconstitutional conditions that was the basis for *Regan* squarely supports Hastings' position. Under that doctrine, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no

entitlement to that benefit." *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003) (citations and internal quotation marks omitted) (rejecting challenge to statutory requirement that public libraries install filtering software as a condition of receiving federal assistance for Internet access). However, in an unbroken line of cases—none of which CLS mentions—the courts uniformly and repeatedly have held it permissible to condition a public subsidy on compliance with nondiscrimination policies.

For example, in *Grove City College v. Bell*, 465 U.S. 555 (1984), a college and its students argued that conditioning a public tuition subsidy on compliance with a nondiscrimination policy requiring the colleges to agree not to discriminate against students on the basis of protected status, including sex, violated their First Amendment rights, including their right of association. The Court unanimously rejected this argument, which it found warranted "only brief consideration": "Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [subsidy] program infringes no First Amendment rights of the College or its students." *Id.* at 575-76; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (government may condition a subsidy created by tax exempt status on a lack of illegal racial discrimination by fundamentalist Christian schools). Likewise, that CLS has been given a reasonable choice between complying with the Nondiscrimination Policy in

order to receive the full benefits of registration and engaging in discrimination does not constitute an unconstitutional condition.

In *Evans v. City of Berkeley*, 38 Cal. 4th 1 (2006), the California Supreme Court recently reached a similar conclusion. In *Evans*, the city requested the Sea Scouts, a youth group affiliated with the Boy Scouts, to provide written assurance it would not discriminate against homosexuals or atheists wishing to participate in the group's program in order to qualify for continued free use of berths in the city's marina. When the group failed to do so, the city discontinued the subsidy and members of the group sued, claiming, among other things, that the city's action violated their freedom of association. The Court unanimously rejected that claim, holding that "a government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy." *Id.* at 10. The Court pointed out that in conditioning free berths on a group's adoption of a nondiscriminatory membership, the city "has not prohibited or penalized plaintiffs' exercise of speech or associational rights," but had "simply 'refused to fund such activities out of the public fisc . . . .'" *Id.* at 13 (quoting *Rust v. Sullivan*, 500 U.S. 173, 198 (1991)). To the extent the group objected to complying with the city's condition, "the organization was free to terminate its participation in the free berth program and thus avoid the requirements of the nondiscrimination provision; 'a legislature's decision not to subsidize the

exercise of a fundamental right does not infringe the right.'" *Id.* (citations omitted).[28]

B. Even If *Dale* Applies, CLS's Expressive Association Claim Fails.

Even assuming, *arguendo*, that *Dale* applies in this context, CLS's claim still fails. Under *Dale*, CLS must establish each of the following elements of its expressive association claim: (1) the group engages in expressive association; (2) the government action at issue "affects in a significant way the group's ability to advocate public or private viewpoints"; and (3) the government interest at stake fails to justify the burden it imposes on the group's expressive association. 530 U.S. at 648, 659. Hastings does not dispute the first element. ER 753. However, on the undisputed facts, CLS cannot establish either of the other elements.

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[28]CLS attempts to distinguish *Evans* on the ground that the Sea Scouts claimed not to discriminate on the basis of sexual orientation or religion, and therefore had no expressive association claim under *Dale*. AB 49. But as the Court pointed out, the Sea Scouts in fact "pointedly reserve[d] the right to discriminate against openly gay and atheistic participants." 38 Cal. 4th at 18, 20. The court squarely held that the city's denial of a continued subsidy because of the Sea Scouts' refusal to provide adequate assurances of future nondiscrimination "did not infringe plaintiffs' associational, speech, or equal protection rights." *Id.* at 22.

1. The Nondiscrimination Policy Does Not Significantly Affect CLS's Ability To Advocate Its Viewpoints.

The requirement that CLS open its membership and leadership to all Hastings students in order to register as a student organization at Hastings does not significantly affect CLS's ability to advocate its viewpoints, and therefore does not violate CLS's freedom of expressive association. There is literally no evidence in the record that the Nondiscrimination Policy has had the slightest adverse effect on CLS's or its predecessor groups' ability to disseminate their message, on their leaders' ability to "inculcate" their values in their members, or on their ability to affect how they are perceived by the larger Hastings community or the outside world.

Dale does not support CLS's position. The issue in *Dale* was whether the Boy Scouts had the right to prevent Dale, "an avowed homosexual and gay rights activist" (530 U.S. at 644), from becoming an assistant scoutmaster. The Supreme Court first decided that the Boy Scouts engaged in expressive association, since its stated general mission was "'[t]o instill values in young people.'" *Id.* at 648-50. Next, the Court undertook to determine "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 650. The Court found that the Boy Scouts viewed homosexual conduct as "not morally straight" (*id.* at 650-53), and that scoutmasters played an important role as role models and adult leaders who

"inculcate [youth members] with the Boy Scouts' values—both expressly and by example." *Id.* at 649-50. Emphasizing Dale's background as "the copresident of a gay and lesbian organization at college [who] remains a gay rights activist," the Court concluded that his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

Thus, *Dale*'s holding was based narrowly on the rationale that the state's attempt to force the Boy Scouts to accept an avowed gay rights activist in a leadership position would have undermined the Boy Scouts' ability to inculcate and promote its views on homosexuality.[29] *Dale* does *not* stand for the proposition that an organization has the right to discriminate against an *entire class of individuals* based solely on their *non-public, private characteristics* such as sexual orientation or religion. To the contrary, the Court

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[29]The lower courts generally read *Dale*'s holding as confined to expressive leadership positions. *See, e.g., Boy Scouts of Am. v. Dist. of Columbia Comm'n on Human Rights*, 809 A.2d 1192, 1201-03 (D.C. 2002) ("we have no doubt that the Court meant something of legal significance by coupling 'avowed homosexual' with—or distinguishing it from—'gay activist' in describing Dale"); *Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759, 767-69 (Ill. App. Ct. 2001) (*Dale* does not apply to "nonexpressive" employment positions where the presence of a homosexual would not derogate from the Boy Scouts' expressive message); *but cf. Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001) (school board conceded that Boy Scouts' right to freedom of expressive association included "the right to exclude homosexuals as members or leaders in the organization").

specifically cautioned that its holding "is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." 530 U.S. at 653.[30] This case falls squarely within that warning.

"Significantly, unlike the Boy Scouts in *Dale*, CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, such that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission." ER 755. The mere admission of an interested gay or non-Christian student as a member of a student organization such as CLS sends no such message, if indeed it sends any "message" at all. The mere fact (if it is even known) of a student's sexual orientation hardly renders that student an "avowed homosexual activist," and CLS members, unlike Boy Scout scoutmasters, play no significant instructional role, either as leaders or

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[30]This reading of *Dale* is reinforced by the Supreme Court's decision in *Hurley*, where the Court emphasized that the parade organizers did not seek to exclude *all* gay, lesbian and bisexual Irish Americans from the Boston St. Patrick's Day Parade, but rather only those who wished to march behind a banner that identified the unit as such ("GLIB"), thereby requiring the parade organizers to alter the expressive content of the parade. *Hurley*, 515 U.S. at 572. As the *Dale* Court observed, "[w]e noted that the parade organizers *did not wish to exclude the GLIB members because of their sexual orientations*, but because they wanted to march behind a GLIB banner." *Dale*, 530 U.S. at 653 (emphasis added).

as role models.[31] CLS's discrimination is not limited to "avowed" gay and lesbian or non-Christian activists. Nor does it concern an inherently "expressive" position within CLS such as scoutmaster. Instead, it applies to *all* gay and lesbian individuals and non-Christians, *all* membership positions, and *all* officer positions in the organization.

CLS did not establish that it encountered any difficulty, let alone significant difficulty, advocating its viewpoint at Hastings as a consequence of the Nondiscrimination Policy. In contrast to the denial of recognition in *Healy*, as a result of which the student organization was entirely barred from meeting on campus or communicating with the student body (408 U.S. at 181-82),[32] here CLS is allowed to reserve Hastings' facilities for meetings and events and use chalkboards and billboards to post announcements about

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[31]Although CLS argues that its officers acts as "role models" to its members and to the larger Hastings community (AB 33), it does not point to any *evidence* that its members view chapter officers as such or that their private conduct is known to members, much less the larger Hastings community. As the District Court observed,

> While CLS's members and officers may be instructed to abide by a code of conduct, CLS does not demonstrate how it portrays what the conduct is or who follows this code to the greater community at Hastings. In other words, it is not clear how anyone at Hastings, other than the individual members and officers, would even be aware that CLS's members and officers are living their private lives in accordance with a certain code of conduct. (ER 755-56)

[32]In *Walker*, likewise, the denial of recognition precluded CLS from using the school's bulletin boards or from reserving rooms for private meetings. 453 F.3d at 858, 864.

the organization and its events. ER 345, 348, 411, 422. CLS also continues to carry on as an unregistered organization at Hastings since being denied recognition: CLS held meetings and activities during the 2004-2005 academic year with an even larger number of regular attendees than the prior year. ER 342, 346-47. Thus, as the District Court found, "The record demonstrates that CLS's efforts at recruiting members and attendees were not hampered by the denial of recognition." ER 749.[33]

CLS resorts to hyperbole, claiming that if it were to comply with the Policy, "the group as it currently identifies itself [will] . . . cease to exist" because its discriminatory membership requirements are essential to its "unique voice." AB 26. But it has offered no *evidence* to establish that these requirements are, in fact, necessary at all, let alone that they would "significantly" burden its ability to advocate public and private viewpoints. *Cf. Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 858 & n.17 (2d Cir. 1996) ("a religious test for membership or attendance" in a Christian high school student group would be "plainly unsupportable" under the Equal Access Act, 20 U.S.C. §§4071-4074, because "[i]t is difficult to understand

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[33]To the extent CLS claims that Hastings *may* deny CLS the use of its facilities and forms of communication in the future (AB 40-41), that situation is not presented in the record before the Court, and therefore CLS's claim is not ripe. ER 750 n.5.

how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech").[34]

In fact, the uncontested evidence established that being required to abide by the Nondiscrimination Policy will *not* significantly affect CLS's expression. It is undisputed that groups known as CLS or HCF operated for over ten years at Hastings *without* explicitly barring students from becoming members or officers on the basis of their religion or sexual orientation, and indeed without requiring members to sign the Statement of Faith. *See* pp.5-7, *supra*. It is also undisputed that at the time that CLS changed its name and its requirements, no one was seeking to join CLS who was gay or non-Christian, and no one is currently seeking to join the group who is gay or non-Christian. *Id.*

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[34] *Hsu* held that a religious test for officer positions could properly be regarded as protected "speech"—but *only* as applied to those specific positions whose duties "consist of leading Christian prayers and devotions and safeguarding the 'spiritual content' of the meetings." 85 F.3d at 858. But the group's exclusion of non-Christians from such leadership positions could be upheld only *if* such exclusion occurred "to guarantee that meetings include the desired worship and observance—*rather than for the sake of exclusion itself*." *Id.* at 859 (emphasis added). Moreover, the court observed that if there were any indication that the exclusion of non-Christians from leadership would "subordinate or stigmatize them . . . , the School might be justified in refusing an exemption from its nondiscrimination policy." *Id.* at 869. In any event, the court's decision was based solely on statutory rather than constitutional grounds. *See id.* at 858 (observing that Supreme Court's freedom of association cases "are analytically distinct from this case, because they involve constitutional rights, not statutory ones").

Nor is there any evidence that the mere presence of a gay or non-Christian student member at a CLS meeting would impair its "message" in any way.[35] While the group claims to view "unrepentant homosexual" conduct as inconsistent with its Statement of Faith, the group never discussed the topic of homosexuality at its meetings, private or public. ER 344, 347. During the year immediately preceding the filing of this litigation, one participant in the group's meetings was known to be a practicing lesbian, and others held beliefs inconsistent with what CLS considers to be orthodox Christianity, all without any apparent ill effects. As CLS's counsel conceded at oral arguments before the District Court, the lesbian student's participation in the group did not and could not alter the group's expression. Moreover, even after this litigation was filed, any attendee or member—regardless of their faith or sexual orientation—was "welcome" to *lead the group in prayer.* ER 347.[36] Under the circumstances, CLS's claim that it is entitled to exclude

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[35]Indeed, the undisputed evidence to the contrary is one of the several grounds on which this case is distinguishable from *Walker*. There, the majority accepted CLS's bare assertion that allowing gay and lesbian students to join would adversely affect its ability to express disapproval of homosexual activity. Whether or not *Walker* was correctly decided, the record here affirmatively disproves CLS's unsupported assertion.

[36]Indeed, because CLS does not publish its membership list, and therefore does not publicly distinguish between chapter members and mere "attendees" at its meetings, it cannot explain how admitting gay and lesbian or non-Christian students—who would otherwise be permitted to attend its meetings in any event—significantly affects its ability to communicate its viewpoint to the public. ER 478-79; *see Dale*, 530 U.S. at 653 (comparing (continued . . .)

all gay and non-Christian students from membership merely "because they lack a personal characteristic or belief, without any showing that they would desire to communicate any particular message" (*Hsu*, 85 F.3d at 856) falls far short of meeting its burden.

CLS also fails to offer any persuasive reason that an across-the-board ban on gay and lesbian students serving as officers is essential to its right of expressive association. In contrast to *Dale*, the group does not actively "inculcate" values relating to homosexual conduct, nor do its student leaders serve as "role models" analogous to that of adult scoutmasters leading Boy Scout troops composed of minors. *See* note 31, *supra*. As to CLS's requirement that its officers be avowed Christians, in the unlikely event that a student who holds "non-orthodox" Christian beliefs, or who was raised in a different faith, joins the group as a member, the group's members retain the power to decide whether to elect such a student an officer. CLS does not

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(. . . continued)
mere acceptance of homosexual members and acceptance of a gay rights activist as an assistant scoutmaster).

Notably, *any* Hastings student is allowed to attend CLS's meetings and activities (ER 344 ¶36), which further undermines CLS's claim that its expression would be impaired by extending membership to any interested students. *See Roberts*, 468 U.S. at 627 ("Moreover, the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best").

need, and is not entitled to, an exemption from the Nondiscrimination Policy that would authorize it automatically to bar all such students from seeking office.

2. The Nondiscrimination Policy Is Justified By Compelling State Interests.

Finally, even if CLS could show that the Nondiscrimination Policy imposes a significant burden on CLS's free association rights, CLS still fails to meet the third element required in *Dale*, because the Policy is justified by "'compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). As discussed above (*see* Part I(A)(2)(a), *supra*), state laws which prohibit discrimination "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . . ." *Hurley*, 515 U.S. at 572. Indeed, California has enacted many such laws prohibiting discrimination on the bases of sexual orientation and religion, to which Hastings is subject.[37]

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[37] *See* CAL. CIV. CODE §51 (Unruh Act prohibiting discrimination "in all business establishments of every kind whatsoever," including schools (*Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1581-82 (N.D. Cal. 1993); *Warfield v. Peninsula Golf & Country Club*, 10 Cal. 4th 594, 608-09 (1995)); CAL. GOV'T CODE §§12940(a), 12955(a) (prohibiting discrimination based on religion or sexual orientation); CAL. EDUC. CODE §87100 (same); CAL. EDUC. CODE §§220, 66270 (prohibiting discrimination on the basis of sex, ethnic group identification, race, national origin, religion, color, mental or (continued . . .)

Hastings, as a state educational institution, has a compelling interest in preventing discrimination on the basis of both religion and sexual orientation. Further, it has a strong pedagogical interest in making educational opportunities, including participation in all student organizations, available to all students, no matter what their faith or sexual orientation. ER 518. The Nondiscrimination Policy, by prohibiting discrimination, is the most narrowly tailored means of achieving these compelling state interests in combating discrimination and providing equal opportunity and treatment to all students without regard to their religion, sexual orientation, or other protected status.

CLS concedes that Hastings may have a compelling interest in prohibiting discrimination on the basis of religion or sexual orientation by *other* student organizations, but contends that it lacks any such interest in prohibiting CLS from engaging in discrimination on the same grounds because those protected characteristics "are highly relevant to an individual's ability to serve as a faithful leader or member of a religious student organization, like CLS." AB 66. Indeed, CLS argues that because of its religious "mission," basing leadership and membership decisions upon a student's sexual orientation and religion should not be considered "discrimination" at all. *Id.*

(. . . continued)
physical disability, or any actual or perceived characteristic as defined in California Penal Code Section 422.55, which includes sexual orientation).

That argument is at odds with the fundamental rationale for all nondiscrimination laws. As discussed above, the state's ability to prohibit discriminatory conduct does not depend on the actor's motive or reason for engaging in such discrimination. *See* note 18, *supra*.

III.

HASTINGS' NONDISCRIMINATION POLICY DOES NOT VIOLATE CLS'S RIGHT TO FREE EXERCISE OF RELIGION.

CLS argues briefly that Hastings' Nondiscrimination Policy violates its right to free exercise of religion because it impermissibly "targets religion." AB 61-63. As the District Court correctly concluded, however, the Policy "prohibits discrimination on the basis of protected categories, including religion and sexual orientation, irrespective of the motivation for such discrimination." ER 759. As such, like numerous similar federal and state antidiscrimination laws, it readily satisfies the applicable test: it is a neutral law of general applicability that is rationally related to promoting legitimate government interests in preventing discrimination.

"[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citation omitted). Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the

law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986).

"A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief.'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (quoting *Church of the Lukumi*, 508 U.S. at 533, 543). In *San Jose Christian College*, this Court affirmed summary judgment for the defendant city on a Christian college's free exercise challenge to a city's denial of its rezoning application. The Court observed that the challenged zoning practice applied "throughout the entire City, and there is not even a hint that College was targeted on the basis of religion for varying treatment in the City's application of the ordinance." 360 F.3d at 1032. On those facts, the Court found the ordinance to be neutral and generally applicable, and the conclusion "unavoidable" that any incidental burden

upon the college's free exercise of religion did not violate the First Amendment. *Id.*

Precisely the same conclusion follows here: the Nondiscrimination Policy applies to "all groups" at Hastings including all registered student organizations, religious and non-religious alike, and "there is not even a hint" that CLS was "targeted" on the basis of religion for varying treatment in Hastings' application of the Policy. To the contrary, the District Court found in dismissing certain of CLS's claims that the Policy is "facially neutral" and does *not* target religious groups, as it would equally bar an atheist student group from discriminating against a religious student interested in joining such a group. ER 63, 68. CLS has not appealed from that ruling.

Moreover, Hastings' Policy does not impose any "substantial" burden on CLS's members' free exercise of religion. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity." *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003) (citation and internal quotation marks omitted). The Policy does not prevent CLS's members from worshiping or conducting themselves in their private lives as they choose; at most, it may require them to associate with gay and lesbian or non-orthodox Christian students interested in joining their organization, which is not a substantial burden on their right to free exercise of religion.

Finally, it is indisputable that a facially neutral antidiscrimination law, such as the Policy, is rationally related to the legitimate public interest in eliminating discrimination. *See, e.g., Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999) ("This court has already held that Title VII has an obvious secular legislative purpose"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) ("Title VII neither regulates religious beliefs, nor burdens religious acts, because of their religious motivation").[38]

IV.

HASTINGS' NONDISCRIMINATION POLICY DOES NOT VIOLATE EQUAL PROTECTION.

Finally, CLS argues cursorily that Hastings has violated equal protection. AB 63-64. That argument is both factually and legally flawed.

In order to establish a violation of the Equal Protection Clause, CLS must establish that it was treated differently from other similarly situated groups. *Dillingham v. INS*, 267 F.3d 996, 1007 (9th Cir. 2001). In addition, it must establish that the defendant acted with the intent or purpose to discriminate against it based upon membership in a protected class or exercise

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[38]CLS also argues briefly that strict scrutiny should apply under the "hybrid rights" exception to rational basis review because it has raised other "colorable" constitutional claims. AB 62-63. However, where summary judgment is entered on the plaintiff's companion claims, the remaining free exercise claim is analyzed under the *Smith* test. *San Jose Christian Coll.*, 360 F.3d at 1032-33.

of a fundamental right. *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). "Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable group can satisfy the intent requirement only if it tends to show that some invidious or discriminatory purpose underlies the policy." *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

CLS's claim fails on both grounds. *First*, as the District Court correctly found, CLS "has not presented any evidence that it has been treated differently from other student groups." ER 762. To the contrary, as discussed above, the record is undisputed that Hastings applies the Policy equally to *all* student groups, and that no group other than CLS has ever attempted to adopt or enforce a discriminatory membership policy. *See* p.3, *supra*. Indeed, if anything, CLS's claim is not that it was treated *differently* from other student groups, but that it was *not*. *Lee*, 250 F.3d at 687 ("the gravamen of plaintiffs' complaint is that defendants *failed* to treat [CLS] differently from others similarly situated").

Second, "CLS has not submitted any evidence of discriminatory intent." ER 762. Its perfunctory argument that such evidence may be "presumed" (AB 63) ignores the requirement that it prove the essential element that defendants' acts or omissions were "motivated by discriminatory animus"

toward it based on its membership in a protected class or exercise of a fundamental right. *Lee*, 250 F.3d at 687. The record is devoid of such evidence.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

DATED: December 22, 2006.

Respectfully,

ETHAN P. SCHULMAN
KATE L. DIDECH
SHAUDY DANAYE-ELMI
HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
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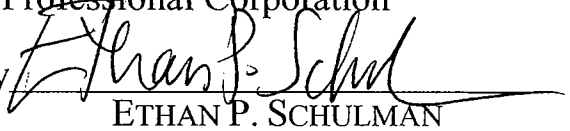
By 
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W03 122206-160410001/PB09/1310016/F

STATEMENT OF RELATED CASES

Counsel for Appellees is not aware of any related cases within the meaning of Circuit Rule 28-2.6.

DATED: December 22, 2006.

ETHAN P. SCHULMAN
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 06-15956.

1. Subject to the accompanying Motion to File Oversize Brief, this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because this brief contains 16,026 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief substantively complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14.5 point Times New Roman.

DATED: December 22, 2006.

ETHAN P. SCHULMAN
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W03 122206-160410001/PB09/1310016/vF

PROOF OF SERVICE VIA MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the document(s) are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business. On December 22, 2006, I served the following document(s) described as: **BRIEF OF APPELLEES** addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on December 22, 2006.

Nicholette N. Prince

W03 160410001/nno/1311633/v1