08-1371

IN THE

Supreme Court of the United States

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

—v.—

LEO P. MARTINEZ, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a regional affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae.* In this case, Petitioner claims that its freedom of association has been infringed by Respondents' policy of refusing to provide official recognition and public funding to student clubs that discriminate. As organizations that have long been dedicated to preserving First Amendment rights and opposing discrimination, the ACLU and the ACLU of Northern California have a strong interest in the proper resolution of this controversy. We submit this brief in support of Respondents for reasons stated more fully below.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

universities. NEA has long opposed discrimination on the basis of sexual orientation, particularly in our Nation's schools, colleges, and universities. NEA policy provides that, "Discrimination and stereotyping based on sexual orientation must be eliminated." To this end, NEA believes that institutions of public education should not be compelled to subsidize student organizations that engage in invidious discrimination.

STATEMENT OF THE CASE

Petitioner, the Christian Legal Society Chapter at the University of California, Hastings College of the Law ("CLS"), is a student organization at the University of California, Hastings College of the Law ("Hastings"). Hastings allows non-commercial student organizations that agree to abide by its policies to register with the school as "registered student organizations," which are eligible for limited funding and certain other benefits, including the use of Hastings's name, preferential access to classroom space for meetings, and access to Hastings's student activity fair. There were approximately 60 registered student organizations during the time at issue in this case, representing a broad array of views and interests, including three religious groups. *See* Joint Appendix ("JA") 215-16.

From 1994 through 2004, Hastings recognized the predecessor student group to CLS, the Hastings Christian Fellowship. JA 222-23. During that time,

the group agreed to comply with Hastings's nondiscrimination policy, which provides that registered student organizations "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." JA 220. The parties stipulated below that Hastings has interpreted this policy as requiring registered student organizations to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA 221.

During the 2004-05 academic year, however, Petitioner affiliated itself with the national CLS, and subsequently decided to restrict its membership and officer positions to only those students who sign its "Statement of Faith." JA 226-27. This precludes students who do not share all of CLS's religious beliefs, or who engage in "unrepentant homosexual conduct," from serving as members or officers. JA 226.

Because Petitioner's new exclusionary membership bylaws were inconsistent with Hastings's policy, it was denied registered student organization status in September 2004. JA 228. Hastings, however, offered Petitioner the opportunity to meet on campus, use campus facilities, and use bulletin boards and other means of communicating with students. JA 232-33. And in fact, CLS has continued to exist as an unofficial student

organization at Hastings, holding regular meetings and other events on campus. JA 230.

Nonetheless, CLS filed suit in 2004, claiming that Hastings's nondiscrimination policy impermissibly infringed its freedom of speech, association and religion, under the First Amendment.

The district court rejected Petitioner's arguments, holding that Hastings's policy was neither viewpoint discriminatory nor an impermissible burden on its freedom of association, and that Hastings had a compelling interest in refusing to subsidize and grant official recognition to those student organizations that would not abide by its nondiscrimination policy. *Christian Legal Society v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006)

The Ninth Circuit affirmed the district court's decision in an unpublished summary decision, citing *Truth v. Kent School District*, 542 F.3d 634, 649-50 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009). This Court granted *certiorari*.

SUMMARY OF ARGUMENT

This case presents the question whether a public university may constitutionally apply an even-handed policy that requires all student organizations that wish to be eligible for university funding and certain other benefits to refrain from discriminatory conduct. Petitioner argues that it and other religious organizations are entitled to avail themselves of the

benefits of recognition as official student organizations at Hastings including access to funding, without following this rule. The courts below correctly held that the Constitution does not require a public educational institution, like Hastings, to fund and lend its name to discriminatory acts.

It would be an odd constitutional rule that prohibited public educational institutions from discriminating but required them to subsidize discrimination by student groups using the university's name. Exclusionary student clubs have a long history in this country and the impact of their exclusionary policies often extends well beyond graduation. Hastings, like other public universities, has a compelling interest in not promoting such discrimination, including discrimination based on religion and sexual orientation. A contrary result would have far-reaching consequences for the enforcement of civil rights laws generally.

ARGUMENT

I. HASTINGS HAS A COMPELLING INTEREST IN ENSURING THAT STUDENT ORGANIZATIONS THAT ENGAGE IN DISCRIMINATORY CONDUCT DO NOT RECEIVE THE BENEFIT OF THE SCHOOL'S NAME AND FINANCIAL SUPPORT.

At the outset, it is important to clarify what is and is not at stake in this case. The issue here is not whether the government is required to fund speech with which it disagrees. Student groups at Hastings, including CLS, are entitled to meet and say what they wish, as official student groups, and are not denied recognition or the opportunity to meet because of their ideology, even if that ideology conflicts with official school positions. Contrary to Petitioner's assertions, therefore, this is not a case about traditional speech rights in a public forum. CLS may advocate for whatever it wants as an official student club, and it is undisputed that Hastings could not deny CLS official recognition or student activity funding based on disagreement with its views. *Cf. Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Nor is this a case about whether CLS members are allowed to associate – or disassociate – as they wish, while continuing to meet on campus and recruit members.

They can, and Hastings will allow CLS to use campus facilities for its meetings.

CLS, however, claims more than the right to speak and meet on campus. It claims that it is entitled under the First Amendment to an exemption from Hastings's non-discrimination policy and thus to receive university funding on the same basis as other student groups that, unlike CLS, do not exclude student members from participation because of their religion and sexual orientation.[2] Thus, the issue here is whether Hastings is required to fund and lend its name to discriminatory *conduct* by campus groups that are otherwise free to pursue their own agenda. This Court's cases have never suggested that such complicity is required, and there

[2] While CLS previously stipulated that Hastings's policy required all student organizations to make their membership open to all students, *see* JA 221, it belatedly now characterizes Hastings's policy as a more traditional non-discrimination policy, which prohibits Hastings and any "Hastings-sponsored programs and activities" from excluding students on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. Pet. Br. at 9. Under either policy, however, the exemption sought by CLS would require Hastings to fund and lend its resources to discrimination based on religion and sexual orientation. Accordingly, *amici* here address whether Hastings has a sufficient interest to justify its denial of that exemption.

are compelling reasons why the government should not be required to do so.[3]

Indeed, if CLS were to prevail on its novel theory that its free-association and free-speech rights to exclude others in turn require the government to subsidize its discrimination, Hastings and other public universities would have no choice but to subsidize racially discriminatory groups, student groups that restrict membership based on gender, or groups that bar students with disabilities, so long as these groups articulate some way in which their ideology or expression theoretically might be impaired by requiring them to comply with a non-discrimination rule. In light of the pernicious history of discrimination in education and related opportunities, public universities like Hastings have a compelling interest in not lending their

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[3] *A fortiori*, the state interests in this case are sufficient to satisfy the *O'Brien* test applied by the lower courts on the ground that the challenged regulation addresses conduct, not expression. As this Court explained in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." While expressive conduct may not be banned because of its message or viewpoint, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 390 (1992).

sponsorship and resources, including funding, to groups that exclude other members of the university community.

A. Exclusion From Educational Opportunities Is Among The Most Pernicious Forms Of Discrimination.

Because of the central role that access to education plays in personal and professional development, eliminating discrimination in education has long been recognized as a government interest of the utmost importance. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (holding that Mississippi could not give textbooks to students attending racially segregated private schools because "discriminatory treatment exerts a pervasive influence on the entire educational process"); *see also, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education."). Indeed, this Court recently reaffirmed that "ensuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective," and that "nowhere is the importance of such openness more acute than in the context of higher education." *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) (internal citations and quotations omitted).

The exclusion of minorities, women, and others from officially recognized and quasi-private student organizations has, for decades, served as a powerful vehicle for perpetuating such discrimination at colleges and universities across the country. For example, until the 1950s and 1960s, racially discriminatory fraternities operated to exclude African-American students not just from the fraternities themselves, but from campus life at many universities. *See, e.g.*, Allen B. Ballard, *The Education of Black Folk: The Afro-American Struggle for Knowledge in White America,* 4, 29 (1973) (describing life as one of the first two Black students at Kenyon College and noting that "racially discriminatory fraternities and athletics were the actual center of life on most campuses" in the 1940s and 50s). Similar restrictions also limited the opportunities of Jewish students to participate fully in university life. *See, e.g.*, Dan Oren, *Joining the Club: A History of Jews at Yale,* 24-26, 80-82, 87 (1st ed. 1985), and *id.* 74-75 (noting example of a private club at Yale that excluded Jewish members, but "served as the chief center for aesthetic criticism on the campus of the 1930s . . . . Therefore, Jews who had hoped to share in the intellectual social life of the campus often found themselves left high and dry."). Not surprisingly, then, students who belonged to historically disfavored groups were less likely to be integrated into the intellectual and social heart of the university at those schools with an entrenched exclusionary system of fraternities and

social societies. *See, e.g.*, Harold Wade Jr., *Black Men of Amherst* 97-98 (1976).

Even after many universities prohibited discrimination by official student organizations, ostensibly private student clubs that actually functioned as integral parts of the universities continued to exclude certain students on discriminatory grounds. For example, Princeton University's prestigious "eating clubs" were not required to admit women until 1990, after the New Jersey Supreme Court found that the university and the quasi-private clubs "have an integral relationship of mutual benefit." *Frank v. Ivy Club*, 576 A.2d 241, 260 (N.J. 1990).

This type of discrimination in the context of higher education is particularly pernicious because participation in student organizations is a significant way that students obtain meaningful leadership opportunities, personal and professional contacts, and other important benefits. Thus, exclusion from student organizations can substantially harm students, denying them access to class information, study-group opportunities, professional contacts, and alumni associations. *See* Daniel L. Schwartz, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 Cal. L. Rev. 2117, 2119-20 (1987); Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 Mich. J. Gender & L. 27, 72 (1994) (hereinafter

"Frank, *The Key*") ("Prestigious [college student organizations] provide entry into business and government opportunities upon graduation."); *see also Board of Regents v. Southworth*, 529 U.S. 217, 222-24, 229-32 (2000) (recognizing the importance of student organizations on public university campuses). [4]

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[4] Historically, the social club structure at universities has often mirrored the social club structure outside the university setting, where the exclusion of women, religious minorities and people of color from such clubs has often led to their exclusion from employment and other positions of authority. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("[T]he State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services.") (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984)); *see also* Michael M. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321, 329 n. 23 (1983) (hereinafter "Burns, *The Exclusion of Women*") ("[I]neligibility for club membership has been cited in some cases as a reason for not promoting women to executive positions."); N.C. Belth, *Discrimination and the Power Structure* in *Barriers: Patterns of Discrimination Against Jews,* 10-11 (N. C. Belth ed., 1958) (citing the following example of a justification for refusing to employ Jewish executives: "'[O]ur plant managers maintain a certain status in their communities. They must join the country club and the leading city club. Today, that's where the big deals are discussed and made. They must be socially acceptable to the banking and business leaders of the town.'"); *see also* Burns, *The Exclusion of Women*, 18 Harv. C.R.-C.L. L. Rev. at 323 ("The final door to professional advancement [for women and minorities] remains closed because they are denied

It is in this historical and sociological context that Hastings's interest in enforcing its nondiscrimination policy must be understood: The university's policy serves to remediate and prevent pervasive discrimination against historically disadvantaged groups by ensuring that university resources support groups that offer an opportunity to participate in campus life to all students.

B. The Government Has A Compelling Interest In Declining To Subsidize Private Discriminatory Conduct.

The overriding purpose of non-discrimination legislation is to make it possible for those protected by the laws to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Stated more broadly, civil rights laws protect basic human

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membership in the most prestigious 'social' clubs, either explicitly in club bylaws or implicitly by custom and practice."); Frank, *The Key*, 2 Mich. J. Gender & L. at 38 ("When people are barred from these organizations, they are also barred from cultivating business opportunities, and from influencing policy through informal contact with policymakers. Being in the 'right' club can be crucial to one's career."); Belth, *Discrimination and the Power Structure* at 10-11 (discussing a sociological study finding that, to a very high degree, "basic decisions affecting the community – its business, its politics, its very life – are reached at informal social gatherings, private clubs and after-business-hours associations").

dignity. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Consistent with this purpose, this Court has declared that a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). *Accord E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

When a public university seeks to ensure that the advantages associated with official recognition, including financial subsidy, are granted to those organizations that do not deny the full benefits of membership and leadership on the basis of race, sex, religion, or sexual orientation, for example, it furthers a compelling interest in preventing government resources from being used to perpetuate inequality. In spite of this compelling interest – borne out of the long and pervasive history of discrimination in the higher education context – CLS argues that Hastings's policy is unconstitutional because it may affect the group's ability to associate. But if CLS were correct, Hastings would be required to fund any otherwise qualified student organization that discriminated on the basis of race, religion, gender, or sexual orientation so long as the group could plausibly claim that its exclusionary policies were related to its core purposes. While CLS claims that its discriminatory membership rules reflect its core religious beliefs, the exemption it seeks would

presumably also apply to student organizations formed to promote a philosophy of racial supremacy.[5] Thus, because Hastings does not grant official recognition to *any* groups that discriminate, regardless of the reasons they exclude other students, the challenged policy is not targeted at religion, *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), nor does it place a unique burden on religion, *cf. Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990). Rather, it is a neutral policy targeted against discrimination that applies equally to all student groups that discriminate.[6]

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[5] Indeed, under Petitioner's reasoning, it is difficult to see how *any* university policies that impinge upon freedom of association could be upheld. If CLS's argument were correct, the fact that a hypothetical university policy restricting membership in official student organizations to students might impose a burden on the associational rights of students who wished to meet with non-students, such as religious leaders, would be sufficient to require the university to alter its reasonable rules. This is plainly not required. *See Healy v. James*, 408 U.S. 169, 189 (1972) (noting that universities may require student organizations to comply with "reasonable campus rules").

[6] This is thus unlike *Rosenberger v. Rector and Visitors of the University of Virginia.*, 515 U.S. 819, 844-45 (1995), which addressed governmental support of expression, rather than conduct, and held that the government could not create a limited public forum for the purpose of facilitating students' expression of ideas and then deny support or participation in that forum on the basis of students' expressed viewpoints.

It is well-settled that the government has a compelling interest in refusing to subsidize private discriminatory conduct, and indeed, in some circumstances, a constitutional obligation to do so. Accepting CLS's argument would overturn long-standing precedent, and significantly alter the balance this Court has previously struck between the important rights of expression, association, religious freedom, and equality. [7]

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[7] Such a result would be particularly incongruous here, where the university's policy is carefully targeted at avoiding government support of discrimination in educational opportunities, and has nothing to do with the suppression of expression. Indeed, Hastings went out of its way to ensure that CLS had the opportunity to meet and express itself as a non-registered organization: After CLS announced its refusal to comply with the non-discrimination policy, the record shows that Hastings specifically offered to allow CLS to meet on campus, use campus facilities, and communicate with students. JA 294, 300; *see also Christian Legal Soc'y v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *17 (N.D. Cal. May 19, 2006) ("CLS was not prohibited from meeting on campus. (Joint Stip, ¶¶ 9, 10, 62.) In fact, CLS was permitted to use campus facilities to meet and its members were permitted to communicate amongst themselves and with other students. (Id., ¶¶ 10, 58.) As a non-registered group, CLS still had access to bulletin boards and chalk boards on campus to make announcements."). While CLS complains that "Hastings [has] made clear to the students that this privilege . . . may be revoked at any time," Pet. Br. at 25, this is beside the point as Hastings similarly reserves the right to modify any element of the forum of official recognition to which CLS seeks admission.

In *Norwood*, the Court considered and rejected a central argument advanced by CLS and its *amici*: that a private group engaging in constitutionally protected activities has the right to compel public support notwithstanding its discriminatory behavior. *Norwood* involved a challenge to a Mississippi program that loaned textbooks to private schools, including schools that engaged in racial discrimination. The parents of private school pupils argued that their constitutionally protected right to send their children to those schools would be undermined if the state, which provided textbooks to non-discriminatory private schools, did not also provide textbooks for private, discriminatory schools. Firmly rejecting that argument, the Court held that a state is forbidden from granting aid even in the form of textbook loans "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). The Court emphasized that the right of discriminatory institutions to exist under other constitutional protections does not carry with it the right to a claim on the "state largesse, on an equal basis or otherwise." *Id.* at 462. Far from suggesting that freedom of association requires government support, *Norwood* holds that such support is, at least in some circumstances, constitutionally *prohibited*.[8]

[8] Indeed, even where government funding has not been involved, this Court has ruled that while parents may have a protected First Amendment right to send their children to

Similarly, in *Grove City College v. Bell*, 465 U.S. 555 (1984), the Court rejected the argument by a private college and four of its students challenging the denial of federal financial assistance to students at the college because of the college's refusal to execute an assurance of compliance with Title IX's prohibition on sex discrimination in any educational program receiving federal financial assistance. This Court held that Grove City's argument that "conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students . . . warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575 (citing *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981)). Because the college could terminate its participation in the federal program and retain the right to discriminate, and the students could choose to decline federal financial assistance, "[r]equiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the . . . program infringes no First Amendment rights of the College or its

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schools that promote the belief that racial segregation is desirable, "it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 bars private schools from denying admission to non-white students).

students." *Id.* at 575-76. *Cf. Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006) ("The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds . . . . It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*.").

The fact that CLS is a religious organization does not alter this balance or outweigh the government's compelling interest in distancing itself from discriminatory educational practices. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), private religious schools with racially exclusive admissions policies challenged an IRS ruling denying them tax exempt status because of their discriminatory practices. Although the schools' discriminatory policies were grounded in religious beliefs – which they have a firmly established constitutional right to maintain – this Court held that denial of tax exempt status did not violate their free exercise rights, citing the government's compelling interest in non-discrimination in education. *Id.* at 603. The Court did not deny that withholding tax exempt status would have a "substantial impact" on the private schools, but found that the state's interest in non-discrimination in education "substantially outweighs whatever

burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 603-04.

Thus, while Petitioner claims that Hastings cannot have a legitimate interest in requiring a religious group to admit non-believers or unrepentant gay and lesbian members, Pet. Br. at 44, this argument is a red herring. As discussed above, Hastings's interest is not in requiring CLS to associate with non-believers (CLS is free to do so as an unofficial student organization); it is in ensuring that government funding and recognition does not go to discriminatory groups. Public universities have a compelling interest in ensuring that students have access to publicly subsidized educational opportunities regardless of their race, religion, age, or sexual orientation, or any other characteristic that historically has been the basis of invidious discrimination.

Relatedly, the fact that Petitioner's discriminatory membership rules may reflect their religious views does not mean that the university's non-discrimination policy is itself viewpoint-based. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (holding that an injunction prohibiting abortion protesters from picketing outside a clinic was not viewpoint discriminatory because "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"); *Boy Scouts of America v. Wyman*, 335 F.3d 80, 93-94 (2d Cir. 2003) (holding

that, while "all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that desire to express through their membership or employment policies viewpoints that favor discrimination against protected groups," if the purpose of the law is not to "impose a differential adverse impact upon a viewpoint," application of the non-discrimination law to exclude a discriminatory group from a nonpublic forum does not violate the First Amendment).

Petitioner's reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is equally misplaced. *Dale* does not suggest that Hastings lacks a compelling interest in refusing to subsidize and support private discrimination. Rather, *Dale* held that New Jersey could not apply its non-discrimination law to require the Boy Scouts, meeting on private property, to admit an openly gay scout leader. Here, by contrast, the question is not whether the government has a sufficiently compelling interest to require the group of students involved with CLS to associate privately with those whom they do not wish to admit (to which *amici* would answer: no), or to force them off campus entirely if they exercise their right to disassociate (again: no). The question is whether Hastings has sufficient interest in restricting its imprimatur and the benefits of recognition, including funding, to student groups that do not discriminate. As discussed above, the answer to that question is yes

under this Court's existing precedents, and nothing in *Dale* alters that balancing.[9]

"Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 470. Just as the parents in *Norwood* had no claim to public resources to advance segregationist schooling, CLS has no claim to force Hastings to provide sponsorship and funding. Hastings's determination that denying official recognition and funding to groups that discriminate on the basis of religion and sexual orientation furthers a compelling interest is fully consistent with the government's long-standing interest in avoiding public financing of private discrimination. A ruling for CLS would imperil the government's ability to distance itself from

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[9] Lower courts have recognized the same distinction between the associational freedom of groups like the Boy Scouts to decide on their membership, on the one hand, and government's continuing ability to restrict its funding to groups that do not discriminate, on the other. *See, e.g.*, *Wyman*, 335 F.3d at 91-92 (holding that Connecticut's requirement that all participants in the state charitable campaign fund agree not to discriminate based on sexual orientation did not violate the Boy Scouts' right of expressive association or free speech); *Evans v. City of Berkeley*, 129 P.3d 394, 400 (Cal. 2006) (holding that the City of Berkeley was entitled to deny a subsidy to the Sea Scouts after they refused to comply with Berkeley's non-discrimination ordinance).

discriminatory conduct and ensure that public funds are not used to perpetuate barriers to full participation in civic life.

C. The Denial Of Funding And Recognition In This Case Was Justified By The Government's Compelling Interest In Not Subsidizing Student Groups That Discriminate On The Basis Of Religion And Sexual Orientation.

The Christian Legal Society at Hastings exists to promote certain religious values. Students at Hastings cannot join CLS unless they endorse those religious values. Likewise, gay and lesbian students at Hastings cannot join CLS unless they endorse the view that homosexuality is sin. CLS is entitled to adopt whatever membership rules it chooses. But having adopted membership rules that exclude fellow students based on religion and sexual orientation, CLS is not entitled to university funding or official recognition in the face of Hastings's determination that public support of such discrimination is damaging to all its students.

As reported by the United States Commission on Civil Rights, the pursuit of religious tolerance has been a long-fought battle: "Discrimination based on religious belief or practice, although more subtle than in the past, continues in housing, employment, and memberships in private clubs . . . ." U.S. Comm'n on Civil Rights, *Religion in the Constitution:*

A Delicate Balance 17 (1983). Consistent with these findings, it is well-established that the government has a compelling interest in prohibiting discrimination based on religion. *See, e.g., Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) ("New York has the constitutional authority to prohibit, and a substantial, indeed compelling, interest in prohibiting . . . religious discrimination in obtaining public accommodations."); *Meltebeke v. Bureau of Labor & Indus.*, 120 Or. App. 273, 279 (Or. Ct. App. 1993) ("The state has an overriding interest in preventing religious discrimination."); *Koire v. Metro Car Wash*, 707 P.2d 195, 198 n.8 (Cal. 1985) (approving the appellate court's determination that the government has a "compelling interest in eradicating discrimination in all forms, including discrimination based on religious creed") (internal quotations omitted).

Similarly, the gay and lesbian community has faced a long history of discrimination. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State . . . [it] is an invitation to subject homosexual persons to discrimination."); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) ("[Colorado's Amendment 2] raise[s] the inevitable inference that . . . [it was] born of animosity . . . . We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); *Tanner v. Or. Health Sci.*

Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice."). The government's compelling interests in abolishing sexual orientation discrimination include "the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all." *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987). Thus, as this Court has observed, regulations banning sexual orientation discrimination "are well within the State's usual power to enact . . . ." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995); *see also Presbytery of New Jersey v. Florio*, 902 F. Supp. 492, 521 (D.N.J. 1995) (finding state interest in eliminating discrimination on the basis of sexual orientation, was "not only substantial but also [could] be characterized as compelling").

In light of the nation's unfortunate history of religious and sexual orientation-based discrimination, the government's interest in ensuring that when it uses its resources, it does so in a way that does not perpetuate such discrimination, is even stronger than its interest in eradicating such discrimination by private actors.

Finally, it is no answer to suggest, as CLS's *amici* do, that the government has a less compelling interest in refusing to subsidize religious and sexual-orientation based discrimination than it does other forms of invidious discrimination. It is well-settled that the government can have a "compelling interest" in eradicating discrimination based on a particular characteristic even if the government's own discrimination based on that characteristic has not been held to trigger strict scrutiny under the U.S. Constitution. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that Minnesota's interest in preventing sex-based discrimination is "compelling" even though sex-based classifications are not subject to strict scrutiny); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (characterizing the government's interest in eradicating sex discrimination as an interest of the "highest order"); *Department of Fair Employment & Hous. v. Superior Ct.*, 121 Cal. Rptr. 2d 615, 620 (Cal. Ct. App. 2002) (eliminating marital status discrimination serves a compelling government interest). *Cf. also Romer*, 517 U.S. at 628-29 (noting that because of the limits of the common law rules protecting access to public accommodations, states have chosen to extend non-discrimination protections to enumerated groups that have not "so far been given the protection of heightened equal protection scrutiny under [this Court's] cases").

II. PETITIONER'S CLAIM TO A RELIGIOUS EXEMPTION FROM A NEUTRAL NON-DISCRIMINATION RULE INVOLVING GOVERNMENT FUNDING AND OFFICIAL RECOGNITION HAS POTENTIALLY FAR-REACHING CONSEQUENCES.

As noted earlier, the argument advanced by CLS in this case has no obvious limiting principle. The proposition that government must provide funding to groups that discriminate – so long as the discrimination is rooted in religious belief – reaches far beyond the facts of this case. In the past, religious beliefs have supported differential treatment on the basis of race,[10] gender,[11] disability,[12] and national origin,[13] in addition to sexual orientation and gender identity. While some of these beliefs may no longer be commonly held, there is no doubt that these beliefs were once as sincerely held as those that CLS holds today.

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[10] For example, racial segregation was long justified by religious convictions. *See, e.g.*, *State v. Gibson*, 36 Ind. 389 (Ind. 1871) (holding that segregation laws derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts'") (quoting *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 214 (Pa. 1867)); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) ("'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for

such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'") (quoting trial court opinion). Indeed, "Christianity, Islam, and Judaism relied on the Old Testament for the justification of slavery." Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 Colum. J. Gender & L. 154 (2003); *see also* Forrest G. Wood, *The Arrogance of Faith* 43 (1990) ("[In the second quarter of the nineteenth century . . . southern whites, largely in response to the attacks by abolitionists, began to invoke the scriptures in a *systematic* defense of slavery."); David Brion Davis, *Slavery and Human Progress* 86 (1984) (citing Biblical justifications for slavery). Religion was also used to negate American Indians' claims to their land, as some Europeans believed that "the absence of Christianity meant there was no legitimate recognition of [their] jurisdiction." Wood, *The Arrogance of Faith* 33.

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

[12] *See, e.g.*, K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I,* in *The New Disability History* 236, 241 (Paul K. Longmore & Lauri Umansky eds., 2001) ("Until the late nineteenth century, disability and its economic effects of unemployment, poverty, and dependence were often regarded as a preordained fate, a divine stigma incurred at birth, or a

For example, religious beliefs about the appropriate roles of men and women have at times conflicted with laws prohibiting sex discrimination. In resolving these conflicts, courts generally have held that religious beliefs may not override the government interest in ensuring equal treatment of men and women. *See, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be "heads of households" could be held liable under equal pay laws); *E.E.O.C. v. Fremont Christian Sch.,* 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the "heads of households" violated Title VII); *E.E.O.C. v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (holding that a private

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result of individual moral flaws and self-destructive habits such as criminality, alcoholism, and sexual promiscuity."); Michele Goodwin, *The Black Woman in the Attic: Law, Metaphor and Madness in Jane Eyre*, 30 Rutgers L. J. 597, 649 (1999) (noting that "the earliest misdiagnoses of mental illness were explained as demonic possessions").

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

school could not pay women less than men to reflect their religious belief that men and women occupy different family roles); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450 (S.D.N.Y. 1987) (public school district that granted male bus drivers with less seniority preference over female bus drivers on certain routes because of the religious belief held by Hasidic families within the district that boys should not be in contact with women violated Title VII). [14]

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[14] Contrary to CLS's claims, the fact that Title VII of the Civil Rights Act of 1964 and other employment discrimination statutes provide certain exemptions for religious institutions to permit some employment discrimination on the basis of religion does not suggest that the government is constitutionally required to subsidize and give its official imprimatur to an organization that discriminates on the basis of sexual orientation or religion. Instead, those exemptions illustrate a policy determination that sectarian organizations should not be subjected to civil penalties when they, for example, demand that those employed to be religious leaders be members of their faith. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337-38 (1987). There is a world of difference between forcing a religious institution to hire someone who does not share that institution's beliefs, and denying public funding and official student organization status to a religious student group club that wishes to discriminate on the basis of identity. As discussed above, Hastings has not forbidden the students of CLS from gathering to discuss their faith or from excluding anyone they wish. Instead, CLS claims an entitlement to all the benefits of official recognition, including government subsidy.

Similarly, during the early years of the HIV epidemic, religious beliefs led many to view HIV and AIDS as divine punishment.[15] As in other contexts, however, courts generally rejected attempts to justify disability discrimination against people with HIV based on religious convictions. *See, e.g., Stepp v. Review Bd. of Ind. Employment Sec. Div.*, 521 N.E.2d 350, 352 (Ind. Ct. App. 1988) (holding that a lab worker who refused to perform analysis of specimens that contained HIV warnings because of her religious belief that "'AIDS is God's plague on man and performing the tests would go against God's will'" could be properly dismissed from her job).

A doctor in Kentucky recently argued that, because of his religious beliefs, he could not be required to work with anyone who was gay or lesbian, notwithstanding a city ordinance that prohibited employment discrimination on the basis of sexual orientation. The court correctly held that his beliefs did not entitle him to violate the nondiscrimination law. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001) (holding that application of the ordinance did not violate the

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

doctor's freedom of association, expression or religion), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002).

And, just forty years ago, a restaurant owner in South Carolina argued that his religious beliefs conflicted with the civil rights law that required him to serve African-American customers in his restaurant. *Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941, 944-45 (D. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). While the court and others considering similar defenses held that religious objections to desegregation were not sufficient to allow discrimination, those beliefs nonetheless were sincerely held by many. *See, e.g.*, *id.* ("This court refuses to lend credence or support to [the plaintiff's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."); *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 897 (D. S.C. 1978) ("The religious belief involved is plaintiff's conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof."), *rev'd in part*, 461 U.S. 574 (1983) (holding that a religious school that excluded unmarried black students because of religious beliefs about interracial relationships was appropriately denied a federal tax benefit offered to charitable organizations).

CLS's position that religiously motivated discrimination is somehow different than other forms of invidious discrimination, Pet. Br. at 43, fundamentally misinterprets the purpose of non-discrimination laws, which are designed to ensure that all people have an opportunity for inclusion in civic life *regardless* of the reasons that some might have for wanting to exclude them. Just as a female employee is harmed whether she is paid less than her male counterparts because of either a religious or a secular belief that women are inferior to men, gay and lesbian students interested in participating in a university-funded activity are harmed whether they are excluded because others believe being gay is religiously immoral, or because of a secular belief that gay people are inferior.

In assessing the strength of Hastings's interest in denying recognition and funding to those student organizations that exclude other students based on their sexual orientation and religion, the proper focus is therefore on the consequences of differential treatment, not the reasons for the discrimination. In light of the extensive evidence supporting its determination that exclusion from student activities causes significant harms, Hastings's determination that it will not fund or grant official recognition to those student organizations that do not comply with the non-discrimination mandate serves a substantial and compelling interest.

Contrary to CLS's suggestion that a victory for Hastings in this case would "mean, in essence, that when sexual orientation is added to the list of forbidden grounds under nondiscrimination laws, religious and other groups that adhere to traditional moral views could be driven from the public square in the name of enforcing nondiscrimination," Pet. Br. at 58, a victory for CLS could well imperil the government's ability to enforce non-discrimination mandates not just with respect to sexual orientation, but in any clash between religious beliefs and civil rights. Just as in the commercial cases summarized above, where religious or associational beliefs were deemed insufficient to outweigh the government's compelling interest in eradicating the harmful consequences of private discrimination, so too the government has never before been required to subsidize private discrimination simply because such exclusion is consistent with the group's religious or philosophical ideology.

Accordingly, a ruling for CLS would not only upset long-settled law recognizing the government's interest – indeed, at times, its obligation – not to support private discrimination with public funds, but accepting the argument advanced by CLS could considerably weaken our civil rights protections.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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