NO. 08-1371

IN THE

Supreme Court of the United States

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

Petitioner,

v.

LEO P. MARTINEZ, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

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Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum ELDF")[1] files this

[1] Eagle Forum ELDF obtained written consent to file this *amicus* brief from all parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae*, its members, and its

(Footnote cont'd on next page)

brief in support of petitioner, the Christian Legal Society chapter ("CLS") at respondent University of California Hastings College of the Law ("Hastings").

INTEREST OF AMICUS CURIAE

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF"), is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum, an affiliated organization, maintains chapters that face potential impairment of First Amendment rights by state and local governments seeking to silence debate and dissent through regulation.

Eagle Forum ELDF filed *amicus* briefs on the prevailing side in several cases implicated here, including *California Democratic Party v. Jones,* 530 U.S. 567 (2000), *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and *Rumsfeld v. Forum for*

(Footnote cont'd from previous page.)

counsel make a monetary contribution to the preparation or submission of this brief.

Academic & Institutional Rights, Inc. ("FAIR"), 547 U.S. 47 (2006). The President of Eagle Forum ELDF, Phyllis Schlafly, has also written about the issues that culminated in another precedent at issue here: *Board of Regents v. Southworth*, 529 U.S. 217 (2000).

For the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court.

SUMMARY OF ARGUMENT

A government requirement of open membership for a private group is fundamentally incompatible with the basic First Amendment right of freedom of association. Open membership is synonymous with internal conflict, which can obviously detract from productivity. A mob has open membership, with regrettable results. At the other end of the spectrum, the Twelve Apostles comprised a selective private association that was not open to the public. The Constitutional Convention was a private group that succeeded *by rejecting* open attendance. Alexis de Tocqueville commented on how essential private clubs are to freedom: "associations are born to resist enemies of an entirely ideological nature and to share the fight against social excesses. In the United States, [private] associations aim to promote public safety, business, industry, morality, and religion. There is nothing the human will despairs of attaining through the free action of the combined power of individuals." Alexis De Tocqueville, et al.,

"Democracy in American: and Two Essays on America" 120 (Penguin: 2003).

Hastings' refusal to recognize a private student group because it lacked open membership violates the First Amendment. The Seventh Circuit properly struck down a university policy similar to the one upheld by the Ninth Circuit below. *Compare Christian Legal Soc. v. Walker,* 453 F.3d 853 (7th Cir. 2006 ("*CLS v. Walker*") *with Christian Legal Soc. v. Kane,* 319 Fed. Appx. 645 (9th Cir. 2009) ("*CLS v. Kane*").[2] Hastings acted unconstitutionally in insisting that recognized school groups welcome everyone to their membership, and accept as members folks who are diametrically opposed to core values and goals of the other members.

Hastings' policy does not survive the test set forth in *Dale*: (1) whether CLS engages in activities protected by the First Amendment, (2) whether forced inclusion of members would significantly impair CLS's rights under the First Amendment, and (3) whether Hastings' interests in preventing discrimination outweigh CLS's rights under the First

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[2] The Ninth Circuit's two-sentence *CLS v. Kane* decision relies entirely on *Truth v. Kent Sch. Dist.,* 542 F.3d 634, 649-50 (9th Cir. 2008). *See CLS v. Kane,* 319 Fed. Appx. at 645-46. Thus, comparison of *CLS v. Walker* and *CLS v. Kane* necessarily requires consideration of the Ninth Circuit's *Truth* decision.

Amendment. The *Dale* criteria are plainly met by CLS in challenging Hastings' policy here; the First Amendment inherently favors speech and association while also disfavoring regulation of content and viewpoint. Freedom of association necessarily includes the right not to associate, and as a public university Hastings has nowhere near the interest required to burden private associations.

Neither this Court nor Hastings should give a few students the equivalent of a heckler's veto over the right of other students to associate with each other, a right that falls within the traditionally protected spheres of free expression. Speech codes and anti-discrimination policies like Hastings' violate the First Amendment's requirement for content and viewpoint neutrality by public universities.

ARGUMENT

I. GOVERNMENT CANNOT IMPOSE THE EQUIVALENT OF A HECKLER'S VETO TO INFRINGE ON FIRST-AMENDMENT RIGHTS

There is no First Amendment right to heckle, or for one faction to silence another. *See, e.g., Pleasant Grove City, Utah v. Summum,* 129 S.Ct. 1125, 1131 (2009) (quotation omitted). By extension, there is a First Amendment right to meet and associate free of a government-imposed heckler's veto. Yet that is what Hastings' accept-all-comers-as-members policy is: this policy requires every recognized school group to throw open its membership to everyone, including diehard opponents and even potential hecklers.

In various ways, this Court has consistently invalidated government policies that allow a heckler's veto. *See Good News Club,* 533 U.S. at 119 ("declin[ing] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive"); *Pleasant Grove City,* 129 S.Ct. at 1131 (declining to give each taxpayer "a First Amendment heckler's veto" over government speech with which the taxpayer disagrees). As *law students,* other groups like Hastings Outlaw are in an even better position than the "small children" in *Good News Club* to realize that Hastings' recognizing CLS does not imply approval of CLS's message. And as a *law school,* Hastings itself should recognize that it had no right to discriminate on the basis of content and viewpoint in a designated public forum.

Allegedly tender adult ears, eyes, and feelings provide no basis for universities to trammel expression in the name of civility, political correctness, or even the avoidance of harassment. *Bd. of Regents of the Univ. of Wisconsin System v. Southworth,* 529 U.S. 217, 233 (2000) ("principal standard of protection for objecting students … is the requirement of viewpoint neutrality in the allocation of funding support"); *Gooding v. Wilson,* 405 U.S. 518, 521-22 (1972) ("[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech'") (*quoting Chaplinsky v. New Hampshire,* 315 U.S. 568, 571 (1942)). Thus,

"[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989); *Street v. New York,* 394 U.S. 576, 592 (1969) ("[i]t is firmly settled that ... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

The above rulings apply with particular force to a "university campus [that], at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius,* 473 U.S. at 803 (*citing Widmar,* 454 U.S. at 267 n.5); *Healy,* 408 U.S. at 180 ("[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas"). Indeed, "the university is a traditional sphere of free expression ... fundamental to the functioning of our society." *Rust v. Sullivan,* 500 U.S. 173, 200 (1991); *see also Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957) ("[t]he essentiality of freedom in the community of American universities is almost self-evident").

Ironically, some of the student activists who toppled the old-school decorum in the name of free speech have returned as administrators to impose new-school speech codes in the name of diversity and political correctness. Of course, such "campus speech codes that, in the name of preventing a hostile educational environment" easily "may infringe students' First Amendment rights." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 682 (1999)

(Kennedy, J., dissenting). Although the lower appellate courts have often invalidated these speech codes on First-Amendment grounds, *see, e.g., Dambrot v. Central Mich. Univ.,* 55 F.3d 1177, 1182-84 (6th Cir. 1995); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.,* 993 F.2d 386, 393 (4th Cir. 1993); *Saxe v. State College Area School Dist.,* 240 F.3d 200, 207 (3d Cir. 2001), those rulings are often grounded on defects of vagueness rather than viewpoint-discrimination. *See Dambrot,* 55 F.3d at 1183-84. The Hastings policy has picked sides in the ongoing disagreement about homosexuality-related issues, and *Southworth* compels invalidation of such a viewpoint-based preference by a public university. 529 U.S. at 233.

Just as "[t]hose who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth," *Thornhill, infra,* the First Amendment is there to protect the freedom of CLS and other private associations.

II. THE FIRST AMENDMENT COMPELS EXACTING REVIEW AND INVALIDATION OF HASTINGS' POLICY

The Government violates the First Amendment by "giv[ing] one side of a debatable public question an advantage in expressing its views." *Bellotti,* 435 U.S. at 785-86, or by ordaining the "permissible subjects for public debate" and thereby "control[ling] ... the search for political truth." *Consolidated Edison*

Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980). This Court has been especially diligent in striking down subversion of the First Amendment by government, and this case presents another prime example.

Beginning with "We the People," the U.S. Constitution embodies a unique vision regarding the sovereignty of the People and the means by which our People exercise that sovereignty. This Court has often recognized the First Amendment as the premier safeguard of this genuine self-government and free consent of the People:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self-government.... And self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (internal quotations omitted).

The First Amendment plays a "structural role" in "securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 587 (1980). Under that system, it remains "essential to free government" to "safeguard[] these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion." *Thornhill v. Alabama,* 310 U.S. 88, 95 (1940).

As this Court explained in *Thornhill*:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Id.

Grounded in this constitutional foundation, the exacting standard of strict scrutiny applies against Hastings' policy, and it cannot survive.

A. STRICT SCRUTINY APPLIES TO SPEECH RESTRICTIONS ON CLS AT HASTINGS

The Ninth Circuit erred in using a reasonableness test to uphold Hastings' policy, when in fact strict scrutiny should have applied to invalidate it.

The Seventh Circuit's *CLS v. Walker* decision correctly treated the school's actions as restrictions on groups within the dedicated public forum established by the school. As such, the Seventh Circuit evaluated *CLS v. Walker* under strict scrutiny. 453 F.3d at 861-62.

Ninth Circuit assumed in *Truth* (and thus in *CLS v. Kane*) that the school's open-membership rule placed the Truth group outside the limits imposed on the school's dedicated public forum. *Truth,* 542 F.3d at 652 (citing *Rosenberger,* 515 U.S. at 829-30). As such, the Ninth Circuit evaluated *Truth* (and thus *CLS v. Kane*) under reasonableness review. *Id.*

This was error by the Ninth Circuit in viewing *Rosenberger* to hold that the reasonableness test applied, *Truth,* 542 F.3d at 652. The *Rosenberger* Court, in fact, did not reach that issue because it did not need to reach that issue. While *Rosenberger* described that test in surveying First-Amendment law in general, *see* CLS Opening Br. at 22 (quoting *Rosenberger,* 515 U.S. at 829), *Rosenberger* cited *Lamb's Chapel* as the "most recent and most apposite case." *Rosenberger,* 515 U.S. at 830. In *Lamb's Chapel,* this Court struck down restrictions on religious content under the strict-scrutiny review for content discrimination by assuming *arguendo* that the school had limited its designated public forum. *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 391-92 (1993); *see also Good News Club,* 533 U.S. at 106 (same). Nothing in *Rosenberger* suggests otherwise and strict scrutiny must be the applicable standard here.

B. HASTINGS' FORCED INCLUSION, AS APPLIED, TARGETS CLS'S PROTECTED VIEWPOINTS

The Ninth Circuit reasoned that because "all groups must accept all comers as voting members

even if those individuals disagree with the mission of the group," Hastings' policy was "viewpoint neutral." *CLS v. Kane,* 319 Fed. Appx. at 645-46. In its two short sentences, the Ninth Circuit made two key errors: (1) it confused viewpoint neutrality with content neutrality, and (2) it confused facial challenges with as-applied challenges. Just as a mandate that the Constitutional Convention "accept all comers" would have had predictably dire and biased consequences with respect to the content of its speech, Hastings' policy is not content neutral.

As to the Ninth Circuit's first error, strict scrutiny applies to *content discrimination*. *See Roberts,* 468 U.S. at 623 ("any restriction based on the content of the speech must satisfy strict scrutiny, … and restrictions based on viewpoint are prohibited"). "[C]ontent-based regulations of speech are presumptively invalid" because they raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Davenport v. Washington Educ. Ass'n,* 551 U.S. 177, 188 (2007) (internal quotations omitted).

At some level, of course, "[v]iewpoint discrimination is … an egregious form of content discrimination." *Rosenberger,* 515 U.S. at 828-829. "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation. *Consolidated Edison,* 447 U.S. at 538. Thus, Hastings presumably could eliminate all student clubs or maybe only student clubs "with the intent to intimidate," *Virginia v. Black,* 538 U.S. 343,

363 (2003), but Hastings cannot eliminate only student clubs that dispute Hastings' preferred views on sexual orientation. *Compare R.A.V. v. St. Paul,* 505 U.S. 377, 391 (1992) (striking viewpoint-specific cross-burning prohibition) *with Black,* 538 U.S. at 360-63 (upholding across-the-board cross-burning prohibition).

Hastings simply cannot "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). When government does so, the plaintiff need not prove animus to prevail. *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993).

When governments adopt facially neutral rules that burden speech "because of disagreement with the message it conveys" or enforces such rules discriminatorily because of such a disagreement, those governments violate the First Amendment, notwithstanding facial neutrality. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Here, Hastings singled CLS out for enforcement and adopted its *post-hoc* open-membership policy to defend its pro-homosexual, anti-orthodox-Christian policy, which suggests both discrimination and animus.

As to the Ninth Circuit's second error, it ignored that CLS has brought both a facial and an as-applied challenge. For an as-applied challenge, facial neutrality is irrelevant: "[t]hat the regulation may be

invalid as applied … does not mean that the regulation is facially invalid," and vice versa. *INS v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). A statute that is facially neutral under the First Amendment obviously still can violate the First Amendment as applied. *See, e.g., Bowen v. Kendrick,* 487 U.S. 589, 624-25 (1988) (Kennedy, J., concurring).

Contrary to the Ninth Circuit's reasoning, therefore, Hastings' policy discriminates on content and viewpoint, and CLS could challenge even facially neutral rules as applied that discriminate against CLS's First-Amendment rights. Clearing away the Ninth Circuit's doctrinal errors, it becomes clear both that Hastings' actual policy is neither content neutral nor viewpoint neutral and that Hastings' litigation position (the open-membership policy) is unconstitutional.

Compelling the "presence [of homosexuals] in the [organization] would, at the very least, force the organization to send a message, both to … members and the world, that the [organization] accepts homosexual conduct as a legitimate form of behavior." *Dale,* 530 U.S. at 653. Significantly, *R.A.V.* struck down an ordinance that punished cross burning that knowingly would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" as impermissible viewpoint discrimination because, for example, it did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union

membership, or homosexuality." 505 U.S. at 391 (interior quotations omitted). Even if it could limit the *content* of homosexuality, Hastings cannot tilt the scales on viewpoints on homosexuality.

As a litigation position,[3] Hastings' open-membership policy is dubious, but it fails constitutionally because, unlike Hastings' viewpoint discrimination, it bears no relationship to a government interest. "It is the absence of a neutral justification for its selective ban … that prevents the [government] from defending its [challenged] policy as content neutral." *Discovery Network,* 507 U.S. at 429-30. Thus, for example, if the government interest is residential privacy, that interest cannot support a ban on non-labor picketing that exempts labor picketing because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Carey v. Brown,* 447 U.S. 455, 465 (1980). Even under the reasonableness test's intermediate scrutiny, government regulation of protected First Amendment conduct must promote a *significant* government interest. *Ward v. Rock*

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[3] The open-membership policy that the parties incorporated into their stipulated facts surfaced in depositions and contradicted prior evidence. *See* CLS Br. at 47-48. If this stipulation carries the day in this Court, as it did in the Ninth Circuit, that result would reflect on a flawed legal strategy, not on a lawful Hastings policy.

Against Racism, 491 U.S. 781, 799 (1989). Leaving aside Hastings' unlawful and discriminatory favoring of homosexual viewpoints over opposing viewpoints, Hastings simply has not identified (and cannot identify) a "significant government interest" to support its open-membership requirement.

III. THE *DALE* CRITERIA PROHIBIT HASTINGS FROM COMPELLING CLS TO ASSOCIATE WITH ADVERSARIES

CLS satisfies all the criteria set forth in *Dale* in order to enjoy full freedom of association rights without governmental inference.

CLS indeed engages in activities protected by the First Amendment, which no party seriously questions or could seriously question. *Rosenberger,* 515 U.S. at 834; *Healy,* 408 U.S. at 181; *Roberts,* 468 U.S. at 622. Associating for educational, speech, advocacy, religious, and expressive purposes easily qualifies.

Another *Dale* criterion likewise resolves easily in favor of CLS: whether applying Hastings' policy to compel including those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity. As the Seventh Circuit explained, "[t]o ask this question is very nearly to answer it." *CLS v. Walker,* 453 F.3d at 862. In general, courts defer to associations' claims "of what would impair [their] expression." *Dale,* 530 U.S. at 653; *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450

U.S. 107, 123-124 (1981) (with respect to government's burdening a group's associational rights, "a State, or a court, may not constitutionally substitute its own judgment for that of the [group]").

The final *Dale* criterion is whether Hastings' interests outweigh CLS's First-Amendment rights. But the government's power to tamper with First Amendment rights is exceedingly confined. Under the First Amendment, the People "are entitled to speak as they please on matters vital to them." *Wood v. Georgia,* 370 U.S. 375, 388-89 (1962). Any "errors in judgment or unsubstantiated opinions may be exposed, of course," but "[u]nder our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Id.* Moreover, that freedom to speak unmistakably includes the freedom to association: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958).

"With full knowledge" that unfettered expression "may be dangerous to the status quo," "the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous." *Wieman v. Updegraff,* 344 U.S. 183, 193-94 (1952) (Black, J., concurring). Because they trusted the People's

wisdom to evaluate issues of debate, the Framers limited government's ability to silence or (even worse) tilt the debate:

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. In sum, [any] restriction so destructive of the right of public discussion [as the challenged law], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.

Bellotti, 435 U.S. at 791-92 (footnotes, citations, and interior quotations omitted). "This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest. It means that Americans discuss such questions as of right and not on sufferance of legislatures, courts or any other governmental agencies." *Updegraff,* 344 U.S. at 193-94 (Black, J., concurring). Hastings has no more right than California or Congress to weaken the First Amendment.

The government's power to restrict debate is exceedingly confined. "The ability of government,

consonant with the Constitution, to shut off discourse solely to protect others from hearing it is … dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209-10 (1975) (internal quotations omitted, alteration in original). "Any broader view" of the government's authority to restrict First Amendment freedoms "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.* Government interference with private

First Amendment expression "puts the head of the camel inside the tent and enables administration after administration to toy with [expression] in order to serve its sordid or its benevolent ends." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 154 (1973) (Douglas, J., concurring). Under the Equal Protection Clause, this Court recognizes that there is no such thing as good discrimination and bad discrimination, *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995), and that recognition applies even more strongly to content and viewpoint discrimination under the First Amendment. The government cannot select the approved topics – much less pick the winners – in matters of public debate.

A. FORCED INCLUSION IMPAIRS CLS'S RIGHTS UNDER THE FIRST AMENDMENT

There is no question that the "freedom of association ... plainly presupposes a freedom not to associate," or that "forced inclusion of an unwanted person in a group" can "infringe[] the group's freedom of expressive association." *Dale,* 530 U.S. at 648. The original members of groups like CLS face the real prospect that compelled members not only will limit the original members' First Amendment rights but also will sweep aside the original members. At least when antagonist groups can use an open-membership rule to hijack a group, that impairs the original group's First-Amendment rights.

The prospect of compelled members (and thus the prospect of compelled officers) who do not share a group's mission threatens the very existence of a group. Indeed, "a single election in which the [officers are] selected by [such compelled "members"] could be enough to destroy [a group]. *California Democratic Party v. Jones,* 530 U.S. 567, 579 (2000). As this Court explained in *California Democratic Party*:

> In the 1860 Presidential election, if opponents of the fledgling Republican Party had been able to cause its nomination of a proslavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs.

Id. (*citing* 1 *Political Parties & Elections in the United States: An Encyclopedia* 398-408, 587 (L. Maisel ed. 1991)).

Humorous but likewise harmful effects can result from compelled membership. For example, meat eaters could take over a vegetarian's club or hunters could take over an anti-vivisection group; there is no shortage of pranksters. *See* Anne C. Mulkern, *U.S. Chamber Sues Activists Over Climate Stunt,* N.Y. TIMES, Oct. 27, 2009, __ (impostor activist group holds fake press conference and launches fake website to announce Chamber of Commerce's allegedly changed position on global warming); *see also* CLS Br. at 29 n.4 (citing instances of groups' hijacking rival groups). Members unaligned with a group's mission – or even aligned *against* that mission – pose a serious threat to small groups' ability to engage in expressive association.

But some of the harm is far from funny. Homosexual activism has included vandalism, physical violence, and even death threats. *Hollingsworth v. Perry,* 130 S.Ct. 705, 707 (2010); *Citizens United v. Fed. Election Comm'n,* __ S.Ct. __; 2010 WL 183856, 97 (2010) (Thomas, J., concurring in part and dissenting in part); Carlton, *Gay Activists Boycott Backers of Prop 8,* WALL STREET JOURNAL, Dec. 27, 2008, A3. At a law school, one hopes that not many compelled student members would threaten original student members so directly, but the release of group information to the larger activist community could. The retaliation against

some supporters of Proposition 8 in California included very serious intimidation.

"[O]utside [the] context [of] "requiring the dissemination of purely factual and uncontroversial information" in "commercial advertising," government] may not compel affirmance of a belief with which the speaker disagrees." *Hurley,* 515 U.S. at 573 (internal quotations omitted); *cf. New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 13 (1988) ("[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the [city law] erects no obstacle to this end"). The facts here easily meet the *Dale* test by significantly threatening CLS's ability to associate, speak, and advocate its mission.

B. HASTINGS LACKS A COMPELLING BASIS TO JUSTIFY IMPAIRING CLS'S RIGHTS

In contrast to CLS's unquestioned and broad rights under the First Amendment, Hastings has an extremely limited right to burden First-Amendment freedoms. At the outset, content discrimination in traditional and designated public fora is presumptively impermissible. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115-16 (1991).

Nor does it help Hastings that CLS might offend either Hastings' sensibilities or those of some Hastings students: the "point … of all speech protection … is to shield just those choices of content that in someone's eyes are misguided, or even

hurtful." *Hurley,* 515 U.S. at 574. Hastings "may not restrict speech or association simply because it finds the views expressed by [CLS] to be abhorrent." *Healy,* 408 U.S. at 187-88. "[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Id.* (citation and internal quotations omitted). Accordingly, "invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.,* 545 U.S. 844, 875-76 (2005).

Because CLS remains a private group, for which Hastings has no derivative liability, Hastings cannot use its government status to leverage anti-discrimination laws against CLS. *Rosenberger,* 515 U.S. at 842-43; *Hurley,* 515 U.S. at 566 ("the guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct'") (*quoting Shelley v. Kraemer,* 334 U.S. 1, 13 (1948)); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 543-44 (1987) ("[t]he fact that [the Government] granted [an entity its] corporate charter does not render the [entity] a Government agent"); *id.* at 547 ("[b]ecause the USOC is not a governmental actor, [petitioner's] claim that the USOC has enforced its rights in a discriminatory manner must fail").

Indeed, as CLS explains, both the United States and California exempt religious organizations from

anti-discrimination statutes. *See* CLS Br. at 44; *see also* 20 U.S.C. §1681(a)(3) (sex discrimination in federally funded education). Without repeating the authorities cited by CLS, *amicus* Eagle Forum ELDF considers it significant that the very California statute that prohibits sexual-orientation discrimination in post-secondary education exempts religious schools if the law's "application would not be consistent with the religious tenets of that organization." CAL. EDUC. CODE §66271. If California exempts religious schools, Hastings cannot have a truly significant interest in applying its policies to religious groups.

Indeed, in the rare instances that this Court has found that government anti-discrimination interests outweigh private associational rights, the private interest not only lacked any particular indicia of privacy but also occurred within the commercial or economic sphere. Thus, in *Roberts,* the state's interest that the Court recognized was in "assuring its citizens equal access to publicly available goods and services." 468 U.S. at 624; *see also id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment) (referring to the "goal of ensuring nondiscriminatory access to commercial opportunities"). Likewise in *New York State Club Association,* the interest was described as providing all persons "a fair and equal opportunity to participate in the business and professional life of the city." 487 U.S. at 5 (interior quotations omitted). Nothing of that sort exists here.

CONCLUSION

For the foregoing reasons, this Court should hold that Hastings has violated the First Amendment by imposing an open-membership requirement on recognized school groups.

Respectfully submitted,

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