

No. 06-15956

**IN THE 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,

Hastings Outlaw,

Defendant-Intervenor-Appellee.

On Appeal From the United States District Court
for the Northern District of California, No. CV-04-04484-JSW

**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND
STATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES**

Ayesha N. Khan
Richard B. Katskee
Alex J. Luchenitser
AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
Tel. (202) 466-3234
Fax (202) 466-2587

Evan M. Tager
Archis A. Parasharami
Lauren R. Randell*
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006
Tel. (202) 263-3000
Fax (202) 263-3300

* Admitted in New York; practices under the su-
pervision of principals of the firm.

Counsel for *Amicus Curiae* Americans United for Separation of Church and State

January 19, 2007

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae Americans United for Separation of Church and State is a 501(c)(3) non-profit organization. Americans United has no parent corporation, and no publicly-held corporation owns ten percent or more of Americans United.

TABLE OF CONTENTS

| | Page |
|---|------|
| INTRODUCTION | 1 |
| IDENTITY AND INTERESTS OF <i>AMICUS CURIAE</i> | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| I. HASTINGS IS NOT REQUIRED BY THE FREE EXERCISE CLAUSE TO EXEMPT CLS FROM THE NONDISCRIMINATION POLICY..... | 4 |
| A. The Free Exercise Clause Does Not Require Hastings To Make An Exception For CLS Because Hastings’ Nondiscrimination Policy Is A Neutral, Generally Applicable Policy. | 4 |
| B. Doctrinal Exceptions To <i>Smith</i> Do Not Support CLS’s Contention That Hastings Has Violated The Requirements Of The Free Exercise Clause..... | 9 |
| C. CLS Cannot Demand An Exemption From The Nondiscrimination Policy When The Relevant Impact Of That Policy Is Merely To Deny It A Subsidy..... | 12 |
| II. HASTINGS COULD NOT PROVIDE THE EXEMPTION CLS SEEKS WITHOUT VIOLATING THE ESTABLISHMENT CLAUSE..... | 14 |
| A. To Provide State Benefits To CLS After Exempting It From Complying With The Nondiscrimination Policy Would Constitute Preferential Treatment Of A Religious Organization In Violation Of The Establishment Clause. | 16 |
| B. The Nondiscrimination Policy Does Not Impose A Significant Burden On CLS’s Religion Or Religious Practices, And Therefore An Exemption From The Policy Is Not A Permissible Accommodation Of Religion. | 20 |

TABLE OF CONTENTS
(continued)

| | Page |
|---|-------------|
| III. ALLOWING THE REQUESTED EXEMPTION HERE WOULD OPEN THE DOOR TO STATE RECOGNITION AND FUNDING OF ANY RELIGIOUS GROUP THAT CHOOSES TO ENGAGE IN INVIDIOUS DISCRIMINATION. | 26 |
| CONCLUSION | 29 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|---------------|
| Cases | |
| <i>Am. Family Ass’n, Inc. v. City & County of San Francisco</i> , 277 F.3d 1114 (9th Cir. 2002) | 5 |
| <i>Am. Friends Serv. Comm. Corp. v. Thornburgh</i> , 951 F.2d 957 (9th Cir. 1991) | 9 |
| <i>Anderson v. Town of Durham</i> , 895 A.2d 944 (Me. 2006) | 13, 14 |
| <i>Axson-Flynn v. Johnson</i> , 356 F.3d 1277 (10th Cir. 2004)..... | 9, 11 |
| <i>Board of Education v. Mergens</i> , 496 U.S. 226 (1990) | 23 |
| <i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983)..... | 27, 28 |
| <i>Bowen v. Roy</i> , 476 U.S. 693 (1986)..... | 9 |
| <i>Capitol Square Review & Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995)..... | 15 |
| <i>Christian Legal Soc’y v. Walker</i> , 453 F.3d 853 (7th Cir. 2006)..... | 23 |
| <i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)..... | 5, 6, 7, 11 |
| <i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989) | 26 |
| <i>Cnty. House, Inc. v. City of Boise</i> , 468 F.3d 1118 (9th Cir. 2006) | 16 |
| <i>Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos</i> , 483 U.S. 327 (1987)..... | <i>passim</i> |
| <i>County of Allegheny v. ACLU Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989)..... | 20, 21 |
| <i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)..... | 20, 26 |

TABLE OF AUTHORITIES – CONTINUED

| | Page(s) |
|--|----------------|
| <i>Employment Div., Dep’t of Human Res. of Oregon v. Smith</i> , 494 U.S. 872 (1990)..... | <i>passim</i> |
| <i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)..... | 16 |
| <i>Estate of Thornton v. Caldor, Inc.</i> , 472 U.S. 703 (1985) | 17, 18 |
| <i>Eulitt v. Maine</i> , 386 F.3d 344 (1st Cir. 2004)..... | 13 |
| <i>Finlator v. Powers</i> , 902 F.2d 1158 (4th Cir. 1990) | 18 |
| <i>Gillette v. United States</i> , 401 U.S. 437 (1971) | 16, 17 |
| <i>Gilmore v. City of Montgomery</i> , 417 U.S. 556 (1974) | 27 |
| <i>Haller v. Pa. Dep’t of Revenue</i> , 728 A.2d 351 (Pa. 1999) | 18 |
| <i>Harper v. Poway Unified Sch. Dist.</i> , 445 F.3d 1166 (9th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595)..... | 7, 10, 11 |
| <i>Hobbie v. Unemployment Appeals Comm’n</i> , 480 U.S. 136 (1987)..... | 15 |
| <i>Hsu v. Roslyn Union Free Sch. Dist. No. 3</i> , 85 F.3d 839 (2d Cir. 1996)..... | 23 |
| <i>In re Springmoor, Inc.</i> , 498 S.E.2d 177 (N.C. 1998)..... | 18 |
| <i>KDM v. Reedsport Sch. Dist.</i> , 196 F.3d 1046 (9th Cir. 1999)..... | 21 |
| <i>Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993)..... | 15, 23 |
| <i>Larson v. Valente</i> , 456 U.S. 228 (1982) | 17 |
| <i>Lee v. Weisman</i> , 505 U.S. 577 (1992) | 15 |
| <i>Locke v. Davey</i> , 540 U.S. 712 (2004) | 12, 13, 22 |
| <i>McCreary County v. ACLU of Kentucky</i> , 125 S. Ct. 2722 (2005)..... | 16 |

TABLE OF AUTHORITIES – CONTINUED

| | Page(s) |
|---|----------------|
| <i>McLeod v. Providence Christian Sch.</i> , 408 N.W.2d 146 (Mich. Ct. App. 1987) | 28 |
| <i>Miller v. Reed</i> , 176 F.3d 1202 (9th Cir. 1999)..... | 11 |
| <i>Mitchell v. Helms</i> , 530 U.S. 793 (2000) | 20 |
| <i>Norwood v. Harrison</i> , 413 U.S. 455 (1973) | 26, 27 |
| <i>Otten v. Baltimore & Ohio R. Co.</i> , 205 F.2d 58, 61 (2d Cir. 1953) | 18 |
| <i>Pelosa v. Capistrano Unified Sch. Dist.</i> , 37 F.3d 517 (9th Cir. 1994)..... | 15 |
| <i>Peterson v. Wilmur Commc’ns, Inc.</i> , 205 F. Supp. 2d 1014 (E.D. Wis. 2002)..... | 28 |
| <i>Port Wash. Union Free Sch. Dist. v. Port Wash. Teachers Ass’n</i> , 702 N.Y.S.2d 605 (N.Y. App. Div. 2000)..... | 18 |
| <i>Prince v. Jacoby</i> , 303 F.3d 1074 (9th Cir. 2002) | 18, 19 |
| <i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995)..... | 19, 20, 23 |
| <i>San Jose Christian Coll. v. City of Morgan Hill</i> , 360 F.3d 1024 (9th Cir. 2004) | 5, 11 |
| <i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1 (1989)..... | 17 |
| <i>Thayer v. S.C. Tax Comm’n</i> , 413 S.E.2d 810 (S.C. 1992)..... | 18 |
| <i>United States v. Am. Library Ass’n</i> , 539 U.S. 194 (2003)..... | 13 |
| <i>United States v. Lee</i> , 455 U.S. 252 (1982)..... | 5 |
| <i>United States v. Trainer</i> , 265 F. Supp. 2d 589 (D. Md. 2003) | 28 |
| <i>Walz v. Tax Comm’n</i> , 397 U.S. 664 (1970) | 20 |
| <i>Wiggins v. Sargent</i> , 753 F.2d 663 (8th Cir. 1985)..... | 28 |

TABLE OF AUTHORITIES – CONTINUED

Page(s)

Miscellaneous

| | |
|---|----|
| Independent Student Organization Agreement, University of Colorado at Boulder, <i>available at</i> http://www.colorado.edu/studentaffairs/sofo/forms/independentAgreement.pdf | 4 |
| Student Code, Article 2, Part 3, Registered Organizations and Organization Fund, University of Illinois Urbana-Champaign, <i>available at</i> http://www.admin.uiuc.edu/policy/code/article_2/a2_2-302.html | 4 |
| Andrew Payne, <i>Keep the Money for Nondiscrimination</i> , Technician (North Carolina State University), Aug. 30, 2004 | 26 |
| Editorial, <i>Discriminating Against You</i> , Indiana Daily Student, Sept. 21, 2004 | 26 |
| Gavin Aronsen, <i>An Unhealthy Precedent</i> , Iowa State Daily, Oct. 23, 2006 | 26 |

INTRODUCTION

This case involves the important question of whether a student organization may avoid compliance with a state university's anti-discrimination regulations simply because of the organization's religious character. The religion clauses of the First Amendment, properly understood, do not permit such a result. Americans United for Separation of Church and State appears as *amicus curiae* to explain why the Constitution does not require—and indeed forbids—granting an exemption from such a nondiscrimination policy exclusively to religious organizations.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Americans United is a national, nonsectarian public-interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Americans United actively opposes governmental aid or support for religious discrimination. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the United States Supreme Court and the Courts of Appeals. Americans United has more than 75,000 members nationwide, including many within the jurisdiction of this Court. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Hastings College of the Law, a public law school that is part of the University of California, requires all student organizations that desire official recognition and funding to agree to and comply with its Nondiscrimination Policy, which forbids discrimination on the basis of a student's race, gender, sexual orientation, and religion, among other characteristics. The appellant, a student chapter of the Christian Legal Society, claims that it is entitled to an exemption from Hastings' Nondiscrimination Policy. CLS seeks to become a registered student organization and thus to become entitled to direct state funding for its activities, but CLS wishes to retain its ability to discriminate against law students on the basis of their religion and sexual orientation. That desire is incompatible with the First Amendment's religion clauses. The Free Exercise Clause does not require Hastings to provide CLS with this exemption; indeed, to do so would run afoul of the Establishment Clause.¹

Hastings' Nondiscrimination Policy is a neutral policy that is generally applicable to all law students. Its purpose and effect are to ensure an equal educational opportunity for all of Hastings' students. Under these circumstances, the Free Exercise Clause does not require Hastings to create an exemption to the pol-

¹ Our brief focuses on the impact of the religion clauses on CLS's claims. We agree with Hastings that CLS's other constitutional theories also fail, and that the district court's judgment should be affirmed.

icy for CLS. Indeed, it is well established that religious organizations have no claim to equal funding from the state.

Moreover, the Establishment Clause provides an independent ground for affirmation of the district court's judgment. By freeing CLS from the requirements of the Nondiscrimination Policy, Hastings would be preferentially aiding a discriminatory religious organization while maintaining a policy of denying such aid to discriminatory secular groups. The provision of a special exemption solely for religious organizations is not permissible under the Establishment Clause except to rectify a significant, governmentally imposed burden on the practice of religion. The Nondiscrimination Policy creates no such burden. At the same time, Hastings has a compelling interest in avoiding an Establishment Clause violation and not opening the floodgates for other religious student groups to seek similar exemptions entitling them to discriminate based on race, gender, or other protected characteristics.

ARGUMENT

CLS asks this Court to require a state university to recognize and fund a religious organization that engages in invidious discrimination. This Court should reject CLS's invitation to do so.

I. HASTINGS IS NOT REQUIRED BY THE FREE EXERCISE CLAUSE TO EXEMPT CLS FROM THE NONDISCRIMINATION POLICY.

Colleges and universities throughout this Nation have adopted policies similar to Hastings' Nondiscrimination Policy.² That policy is designed to foster an educational environment in which students are treated equally, and in which a student's race, gender, religion, or sexual orientation has no bearing on his or her ability to obtain a legal education or to engage in the extracurricular opportunities that are as much a part of that education as classes. ER 518 ¶¶ 4-5. The Nondiscrimination Policy is both neutral toward religion and generally applicable to all student groups at Hastings.

Perhaps for this reason, CLS and its *amici* do not devote much effort to arguing that the Nondiscrimination Policy violates the Free Exercise Clause. *See* CLS Br. 61-63; Brief *Amicus Curiae* of Wallbuilders, Inc. at 6-10. As we next explain, it plainly does not.

A. The Free Exercise Clause Does Not Require Hastings To Make An Exception For CLS Because Hastings' Nondiscrimination Policy Is A Neutral, Generally Applicable Policy.

As Hastings correctly explains in its brief, the Nondiscrimination Policy is,

² *See, e.g.*, Student Code, Article 2, Part 3, Registered Organizations and Organization Fund, University of Illinois Urbana-Champaign, *available at* http://www.admin.uiuc.edu/policy/code/article_2/a2_2-302.html; Independent Student Organization Agreement, University of Colorado at Boulder, *available at* <http://www.colorado.edu/studentaffairs/sofo/forms/independentAgreement.pdf>.

and was designed to be, a neutral policy of general applicability. *See* Hastings Br. 63. It is well established that the Free Exercise Clause does *not* require a governmental actor such as Hastings to grant an exemption from a neutral, generally applicable policy. As the Supreme Court has explained, “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 Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Indeed, the Supreme Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990). Accordingly, CLS must comply with any “valid and neutral law of general applicability,” regardless of whether the law “proscribes (or prescribes) conduct that [a particular] religion prescribes (or proscribes).” *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)) (quotation marks omitted).

Thus, CLS’s free-exercise claim “hinges on showing that the challenged [policy] is either not neutral or not generally applicable.” *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004) (quoting *Am. Family Ass’n, Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir.

2002)). “Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Lukumi Babalu Aye*, 508 U.S. at 531. Here, Hastings’ policy is both neutral and generally applicable.

To begin with, Hastings’ Nondiscrimination Policy is neutral because it does not aim “to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533. On its face, the Policy evidences no intent to punish or deter religious practices. To the contrary, Hastings requires *all* registered student organizations to certify that they will comply with the Nondiscrimination Policy, not only to ensure that all Hastings students can receive equal educations and career-related opportunities, but also to further Hastings’ and the State of California’s substantial interest in stamping out invidious discrimination. The Policy facially applies with equal force to *every* student organization, regardless of its sectarian or secular nature. Neither a sectarian group such as CLS nor an anti-religious secularist group that would prefer to keep out religious believers can discriminate on the basis of religion under the Policy. This is fully consonant with the true purpose of the Nondiscrimination Policy—preventing discrimination against Hastings’ students.

Looking “beyond” facial neutrality, no evidence suggests that the Nondiscrimination Policy was designed with animus or “masked” governmental hostility toward religion. *See id.* at 534. CLS has not shown—nor could it on this record—

that Hastings instituted the Nondiscrimination Policy in a disguised attempt to hinder religion or religious practices. Indeed, this case is entirely unlike *Lukumi Babalu Aye*. In that case, city council members had explicitly discussed their intention to target Santeria practitioners and drive them out of the city. *Id.* at 535. By contrast, no inference can possibly be drawn that a hostility to religion motivated Hastings to adopt its Nondiscrimination Policy; instead, the Policy demonstrates Hastings' solicitude toward law students practicing various religions (minority or majority) and law students who practice no religion. In sum, the Policy does not aim to "infringe upon or restrict practices *because of* their religious motivation" or to "*target*[]" religious beliefs." *Id.* at 533 (emphasis added); accord *Harper v. Po-way Unified Sch. Dist.*, 445 F.3d 1166, 1187 n.33 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595).

Hastings' policy also is generally applicable because it does not "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi Babalu Aye*, 508 U.S. at 543. First, the Policy forbids discrimination on a number of bases: race, color, religion, national origin, ancestry, disability, age, sex, and sexual orientation. The Nondiscrimination Policy thus provides comprehensive protection to students of varying backgrounds and characteristics from invidious discrimination by registered student organizations.

Moreover, Hastings' anti-discrimination policy applies whether the dis-

crimination is based on a religious motive or a secular one. Thus, for example, no registered student organization can ban black law students from membership, whether the motivation is religious or secular in nature. A recognized organization may not exclude evangelical Christians from membership, whether it is a Muslim student organization that does not wish non-Muslims to join or a pro-choice student group that presumes that evangelical Christians will not share the organization's goals. Hastings has thus ensured that no student is discriminated against on account of race, religion, sexual orientation, or any other protected category by a group that receives the university's support.

CLS's remaining challenges to the neutrality and general applicability of the Policy can be easily dismissed. That a religion or religious practice is affected by the imposition of a governmental policy does not mean that the policy is either non-neutral or not generally applicable, and certainly is not evidence that the policy is "targeted" toward religious practices (CLS Br. 62). For example, the general drug policy at issue in *Smith* incidentally prevented practitioners of a Native American religion—who were required by that religion to consume sacramental peyote—from obtaining state unemployment compensation benefits. Without question, the *Smith* plaintiffs and their religious practice were "affected" or "burdened" by Oregon's drug laws, yet the Supreme Court held that the drug laws were "neutral" and "generally applicable." Here, likewise, any alleged burdens placed

on religious practices are “not the object” of the Policy, “but merely the incidental effect of a generally applicable and otherwise valid provision.” *Smith*, 494 U.S. at 878. The Nondiscrimination Policy is not tailored to reach only religiously motivated behavior.

B. Doctrinal Exceptions To *Smith* Do Not Support CLS’s Contention That Hastings Has Violated The Requirements Of The Free Exercise Clause.

CLS contends in the alternative that exceptions to *Smith* support its claim that it is entitled to an exemption from the Nondiscrimination Policy. In *Smith*, the Court described two exceptions to its rule that only laws or government practices that are not neutral and generally applicable can trigger heightened scrutiny under the Free Exercise Clause: the “individualized exemption” exception and the “hybrid rights” exception. *See, e.g., Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (describing the exceptions). Neither exception applies here.

1. Under the “individualized exemption” exception, when “the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)); *see also, e.g., Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991) (quoting *Smith*); *Axson-Flynn*, 356 F.3d at 1295 (quoting same). As the district court found, however, Hastings does not grant individualized exemptions from the Nondis-

crimination Policy. *See Christian Legal Soc’y Chapter of Univ. of California, Hastings Coll. of Law v. Kane*, 2006 WL 997217, at *25 (N.D. Cal. May 19, 2006). Although CLS and its *amici* assert that there are many examples of such exemptions, neither their examples nor any other exemptions exist in the record.³ Indeed, Hastings has never permitted a registered student organization, religious or otherwise, to evade the Nondiscrimination Policy. ER 519. To be sure, many student groups reflect particular interests, and their members may well hold similar views or beliefs. But there is no evidence that any of those groups prohibited students with divergent beliefs from becoming voting members or leaders or that any other group sought an exemption from the Nondiscrimination Policy to allow the organization to exclude fellow law students. Hence, CLS cannot claim refuge in the “individualized exemption” exception to *Smith*.

2. Nor does the “hybrid rights” exception support heightened scrutiny here. That exception provides that when a plaintiff makes “a ‘hybrid claim,’ *i.e.*, a claim that involves ‘not the Free Exercise Clause alone, but the Free Exercise Clause *in conjunction with* other constitutional protections, such as freedom of

³ In the district court, CLS pointed to an earlier version of La Raza’s bylaws, which arguably required members to have Hispanic ancestry. The district court correctly found, however, that when Hastings became aware of this possible interpretation and brought it to La Raza’s attention, La Raza agreed to revise its bylaws; Hastings most assuredly did not grant La Raza an exemption from the Nondiscrimination Policy. *Christian Legal Soc’y*, 2006 WL 997217, at *25. CLS does not challenge this finding on appeal.

speech,” such a claim “merits application of strict scrutiny.” *Harper*, 445 F.3d at 1187 (quoting *Smith*, 494 U.S. at 881) (emphasis added). But “to assert a hybrid-rights claim, a free exercise plaintiff must make out a *colorable claim* that a companion right has been violated—that is, a fair probability or a likelihood, but not a certitude, of success on the merits.” *Id.* (quoting *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999)) (emphasis added); *see also San Jose Christian Coll.*, 360 F.3d at 1032. For the reasons explained in Hastings’ brief, CLS has failed to show that companion rights (for example, its free-speech or free-association rights) have been violated; indeed, it has not come close. *See generally* Hastings Br. 15-64. Accordingly, CLS cannot make out a hybrid-rights claim.⁴

But even if CLS were permitted to pursue a hybrid-rights claim, CLS’s challenge would fail. As this Court recently explained in *Harper*, in hybrid-rights cases the relevant inquiry is whether the challenged governmental action “*substantially burden[s]* a religious practice,” and, if so, whether it cannot be “justified by a compelling governmental interest.” 445 F.3d at 1188 (citing *Smith*, 494 U.S. at

⁴ Moreover, we note that the hybrid-rights exception has been the subject of substantial criticism. *See, e.g., Lukumi Babalu Aye*, 508 U.S. at 567 (Scalia, J., concurring) (“If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule”); *Axson-Flynn*, 356 F.3d at 1296 (“the hybrid-rights theory has been roundly criticized from every quarter and many have pointed out the danger of interpreting such hybrid-rights claims broadly”). Even if the hybrid-rights exception retains force, this is certainly not the case in which to apply it, because CLS’s companion-rights claims are so weak.

883) (emphasis added). Neither prong is met here.

First, CLS's religious practice is not substantially burdened. The Nondiscrimination Policy does not ask any member of CLS to abandon belief in his or her conception of Christianity, or in a conviction that any sexual orientation other than heterosexuality is condemned by the Bible. The Policy does not prevent CLS from communicating to the rest of the Hastings student body its disapproval of non-heterosexual orientations, or from declaring in meetings its interpretation of Christian doctrine.

Second, even if a substantial burden did exist, Hastings has compelling interests in eradicating discrimination and in complying with the Establishment Clause. *See infra* Part II. Those interests outweigh whatever burden the Nondiscrimination Policy might impose on CLS.

C. CLS Cannot Demand An Exemption From The Nondiscrimination Policy When The Relevant Impact Of That Policy Is Merely To Deny It A Subsidy.

CLS and its *amici* argue that Hastings has imposed a special disability and a unique burden on CLS on the basis of its religious views by denying it recognition, and that this burden justifies granting CLS an exemption from the Nondiscrimination Policy. *See* CLS Br. 61; Brief *Amicus Curiae* of Wallbuilders, Inc. at 10. They are mistaken. As Hastings has convincingly explained in its brief (*see* Hastings Br. 9 n.9), the only concrete effect on CLS from denial of recognition is the

unavailability of state funding.

In *Locke v. Davey*, 540 U.S. 712 (2004), the Supreme Court rejected a free exercise challenge to the exclusion of students majoring in devotional theology from eligibility for a state scholarship program. The Court found no merit to the argument that students who had undertaken religious pursuits were entitled to the same level of funding as students pursuing secular callings. As the Court explained, “generally available benefits” to secular students were *not* “part of the baseline against which burdens on religion are measured.” *Id.* at 721 (internal quotation marks omitted).

Likewise, Hastings has done nothing more than decline to provide discriminatory organizations with the same aid that the university grants to non-discriminatory organizations. *Cf. id.* (“The State has merely chosen not to fund a distinct category of instruction.”). As the Supreme Court has recently explained, “[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 quotation marks omitted).

Following *Locke*’s reasoning, the First Circuit recently reaffirmed that the Free Exercise Clause “does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity.” *Eulitt v. Maine*, 386 F.3d 344, 354 (1st Cir. 2004)

(upholding Maine statute that denied equal funding to sectarian schools); *accord Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006) (same). *Locke* and its progeny make clear that CLS cannot claim that Hastings has imposed an unconstitutional burden by refusing to fund CLS. Simply put, the Free Exercise Clause does not obligate Hastings to fund CLS on a basis equal to the funding received by other student organizations that have agreed to comply with the Nondiscrimination Policy.

II. HASTINGS COULD NOT PROVIDE THE EXEMPTION CLS SEEKS WITHOUT VIOLATING THE ESTABLISHMENT CLAUSE.

The district court's judgment also may be affirmed on the alternative ground that Hastings would violate the Establishment Clause by granting CLS an exemption from the Nondiscrimination Policy, because compliance with the Establishment Clause is a compelling governmental interest that satisfies any heightened scrutiny that may be applicable under the constitutional provisions CLS invokes. The Establishment Clause violation that would arise from an exemption for CLS would go to the very heart of the fundamental principle of separation of church and state: Instead of acting with neutrality among all religions (and between religion and nonreligion), Hastings would be forced to treat CLS on a preferential basis because—unlike all other campus groups, religious or secular—CLS would retain the ability to discriminate while receiving state funds.

Moreover, because Hastings' Nondiscrimination Policy places no signifi-

cant, governmentally imposed burden on CLS members’ practice of their religion, granting CLS an exemption from the policy could not survive Establishment Clause scrutiny as an “accommodation of religion.” Instead, such an exemption would violate the Establishment Clause by affording state sanction and aid to the promotion of CLS’s stated religious goals. As the Supreme Court has explained, government must avoid “accommodation [that] may devolve into an ‘unlawful fostering of religion.’” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 145 (1987)).

Because affording CLS its requested exemption would require Hastings to violate the Establishment Clause, CLS would not be entitled to relief even if it were correct (which it is not) that Hastings’ policy triggers heightened or strict scrutiny under other constitutional provisions. Compliance with the Establishment Clause is a compelling governmental interest that satisfies strict scrutiny. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (plurality opinion); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”).

A. To Provide State Benefits To CLS After Exempting It From Complying With The Nondiscrimination Policy Would Constitute Preferential Treatment Of A Religious Organization In Violation Of The Establishment Clause.

Not only does the Free Exercise Clause not *require* Hastings to grant CLS an exemption from the Nondiscrimination Policy (*see* pages 3-14, *supra*), but the Establishment Clause *forbids* Hastings from doing so. To grant the exemption would place CLS, a religious group, on a different footing from all other student organizations, which are required to comply with the policy.

This Court recently reaffirmed that the Establishment Clause is violated when governmental action has the effect or purpose of advancing religion. *Community House, Inc. v. City of Boise*, 468 F.3d 1118, 1130 (9th Cir. 2006). Governmental action unmistakably has the effect of advancing religion when the state ceases acting neutrally toward religion and begins providing benefits to religious organizations on a preferential basis. The Establishment Clause unyieldingly requires neutrality toward religious organizations. *See, e.g., McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2733 (2005) (“The touchstone for [Establishment Clause] analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.’”) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). When the state moves beyond neutrality and affords preferential treatment to religious organizations, it contravenes the Establishment Clause. *See, e.g., Gillette v. United*

States, 401 U.S. 437, 450 (1971); accord *Larson v. Valente*, 456 U.S. 228, 246 (1982).

The exemption sought by CLS would flow only to religious groups and, more insidiously, only to religious groups that profess that discrimination is central to their religious practices. The Supreme Court has repeatedly rejected state statutes attempting to provide just such preferential treatment targeted at religious organizations or individuals. For example, the Supreme Court held in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), that a state violated the Establishment Clause by enacting a sales tax exemption for religious periodicals without extending the exemption to non-religious periodicals. The plurality opinion in *Texas Monthly* explained that when a law directs a benefit exclusively to religious organizations, the government “‘provide[s] unjustifiable awards of assistance to religious organizations’ and cannot but ‘conve[y] a message of endorsement’ to slighted members of the community.” *Id.* at 15 (plurality opinion) (quoting *Amos*, 483 U.S. at 348).

Similarly, CLS’s exemption would impermissibly benefit “Plaintiff and similarly situated religious organizations who desire to select members and officers based upon their shared religious beliefs and/or viewpoint regarding homosexual conduct” (ER 82-83) over any other organization or student. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Supreme Court struck down as violative

of the Establishment Clause a state statute that provided Sabbath observers with an absolute right not to work on their Sabbath. *Id.* at 710-11. The Court held that the statute, by giving Sabbath observers a right to designate a particular weekday off, represented an unconstitutional governmental preference for Sabbath observers over “other employees who have strong and legitimate, but non-religious, reasons for wanting” a particular day off. *Id.* at 710 n.9. Critically, the Court noted that “[t]he First Amendment * * * gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.” *Id.* at 710 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.)).⁵

Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002), does not assist CLS. In *Prince*, this Court held only that the Establishment Clause did not require a secon-

⁵ Other courts have also found governmental benefits to violate the Establishment Clause when they are directed exclusively to religious organizations or persons. *See, e.g., Finlator v. Powers*, 902 F.2d 1158, 1162-63 (4th Cir. 1990) (striking down statute exempting “Holy Bibles” from state’s retail sales and use taxes); *Haller v. Pa. Dep’t of Revenue*, 728 A.2d 351 (Pa. 1999) (striking down sales tax exemption for religious articles, Bibles, and other religious publications sold by religious organizations); *In re Springmoor, Inc.*, 498 S.E.2d 177 (N.C. 1998) (striking down statute granting property tax exemptions to nursing homes only if owned, operated, and managed by religious or Masonic organizations); *Thayer v. S.C. Tax Comm’n*, 413 S.E.2d 810 (S.C. 1992) (striking down exemption for religious publications from use tax); *Port Wash. Union Free Sch. Dist. v. Port Wash. Teachers Ass’n*, 702 N.Y.S.2d 605 (N.Y. App. Div. 2000) (striking down religious holidays provision of collective-bargaining agreement that gave religiously observant teachers more leave than non-religious teachers).

dary school to deny a non-discriminatory religious student group equal access to certain school facilities and benefits. The religious student group in *Prince* did not seek an exemption from a neutral policy; rather, it challenged the school's *non-neutral* refusal to grant religious groups official recognition solely because of their religious nature. *See id.* at 1076. Furthermore, there was no evidence in *Prince* that the student group sought to discriminate based on religion or any other protected characteristic. In addition, unlike what CLS has sought here, the student groups in *Prince* could not receive direct cash payments from the school. *Id.* at 1092.

The Supreme Court's decision in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), is similarly distinguishable. The Court held in *Rosenberger* that a university that paid the printing costs for secular student newspapers could not refuse to provide such support to religious student newspapers. *Id.* at 822-23. The religious student group involved in that case was non-discriminatory; that group fully complied with the university's requirements to qualify as a Contracted Independent Organization, including a "pledge not to discriminate in its membership." *Id.* at 823. And, unlike Hastings' situation, in which funds would be disbursed *directly* to CLS, the university in *Rosenberger* made no direct payments to the religious newspaper itself; rather, all funds were paid in the form of reimbursements to the printer of the newspaper. *See id.* at 842 ("We do not con-

front a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.”⁶

B. The Nondiscrimination Policy Does Not Impose A Significant Burden On CLS’s Religion Or Religious Practices, And Therefore An Exemption From The Policy Is Not A Permissible Accommodation Of Religion.

To be sure, “[t]here is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’” *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)). This principle can sometimes permit the government to “accommodat[e] religion” by granting religious organizations an exemption from a statute or regulation. *See, e.g., id.* at 338. Such an accommodation of religion, however, is compatible with the Establishment Clause when it “alleviates *exceptional* government-created burdens on private religious exercise.” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added); *see also County*

⁶ In *Mitchell v. Helms*, 530 U.S. 793 (2000), all nine Supreme Court Justices reaffirmed the Court’s “continued recognition of the special dangers associated with direct money grants to religious institutions.” *Id.* at 855-56 (O’Connor, J., concurring); *accord id.* at 818 (plurality opinion) (“[o]f course, we have seen ‘special Establishment Clause dangers’ when *money* is given to religious schools or entities directly”) (quoting *Rosenberger*, 515 U.S. at 842); *id.* at 890-91 (Souter, J., dissenting). Thus, it is appropriate for this Court to consider in an Establishment Clause analysis the fact that the exemption that CLS desires would enable CLS to receive direct cash payments from Hastings.

of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 613 n.59 (1989) (a permissible “accommodation of religion * * * must lift ‘an identifiable burden *on the exercise of religion*’”) (quoting *Amos*, 483 U.S. at 348 (O’Connor, J., concurring)).

CLS’s rhetoric aside, the Nondiscrimination Policy cannot be said to impose a burden on any religious practice, much less an “exceptional” one. This Court has long adhered to the fundamental principle that not all effects on religious organizations rise to the level of a “burden” on the exercise of religious belief that may be freely lifted without running afoul of the Establishment Clause. The mere fact that a “regulation, standing alone, ‘discriminates’ against students in religious schools, i.e., treats them differently by denying them state services on the school grounds, does not result in a burden on the free exercise of religion.” *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999). As noted above (at pages 12-14), the mere lack of funding does not create a burden, substantial or otherwise, on CLS’s practice of religion. Neither does the application of a Nondiscrimination Policy that covers only groups that receive special benefits from the law school.

Importantly, as discussed above (at page 12), the Nondiscrimination Policy imposes no burden on the ability of CLS’s members to practice their faith in full. CLS members can hold themselves to Christian values if they so choose, including any theological prohibitions against homosexual conduct. Members can advocate

both in meetings and to the general student body the virtues of their religion and its tenets. Indeed, the Nondiscrimination Policy does not prohibit CLS members, if they so choose, from expressing disapproval of law students with non-heterosexual orientations. CLS members can choose to associate socially with individuals of the same religion. Against all of this, the only thing CLS *cannot* do is limit its membership and leadership to a particular subset of law students—practicing Christians who observe a particular form of the religion and neither practice nor endorse a homosexual lifestyle—while obtaining state funding. This condition for receiving funding imposes *no* burden on the ability of CLS members to exercise their religion, spread that religion, or engage in religious practices.

Furthermore, the Nondiscrimination Policy “imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community.” *Locke*, 540 U.S. at 720.⁷ There is no evidence that Hastings expels members of student groups who

⁷ In *Locke*, the Supreme Court held that providing the scholarship funding sought by the plaintiff divinity student would not violate the Establishment Clause because, by giving money directly to the student instead of the religious institution, the State would break “the link between government funds and religious training.” *Locke*, 540 U.S. at 719. CLS cannot rely on a similar disconnect here. Any funds would be given directly to CLS to reimburse it for expenses, or to subsidize its meetings. See, e.g., *Christian Legal Soc’y*, 2006 WL 997217, at *3; ER 78 (*First Amended Verified Complaint* ¶ 4.6). Moreover, unlike the relief CLS seeks here, the relief sought by the *Locke* plaintiff would not have provided preferential treatment to religious institutions.

violate the Nondiscrimination Policy, or notes the violations on their transcripts. Although such student groups may lack Hastings' imprimatur, they nonetheless remain free to hold meetings on the Hastings campus and to use generally available bulletin boards to communicate with other students.⁸ *Christian Legal Soc'y*, 2006 WL 997217, at *1.⁹

CLS may contend—as it did below—that under *Amos* the government may make benefits available to religious organizations that are not generally available to other institutions. See Pl.'s Reply Mem. in Supp. of Mot. for Summ. J. 19.

⁸ This fact serves to distinguish this case from the recent Seventh Circuit decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), as well as cases such as *Rosenberger*, *Lamb's Chapel*, and *Board of Education v. Mergens*, 496 U.S. 226 (1990). In *Walker*, Southern Illinois University completely prohibited the local CLS chapter from meeting on campus or communicating with students. *Walker*, 453 F.3d at 858. Hastings permits CLS to remain as a student group, albeit not a “registered” student organization. CLS can hold private meetings on Hastings' campus, and use bulletin boards to communicate with students. Any “burden” imposed on the Hastings CLS chapter is much less than that imposed on the Southern Illinois Chapter. These factual distinctions notwithstanding, *Walker's* articulation of legal principles is mistaken. See 453 F.3d at 867 (Wood, J., dissenting).

⁹ For the above-discussed reasons, this Court should not adopt the Second Circuit's rationale in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). The court in *Hsu* granted a religious student group's request for an exemption from the school's neutral, generally applicable antidiscrimination policy, to allow it to discriminate on the basis of religion in choosing certain of its officers. But *Hsu* is mistaken in a number of respects. Most notably, because in *Hsu* the school had not imposed a significant burden on the group's practice of religion, the Second Circuit erred in concluding that the exemption was valid under the Establishment Clause.

Such an argument would be misplaced. In *Amos*, the Supreme Court held that Congress’s decision to amend Title VII to permit religious groups to engage in discriminatory employment practices based on religion—regardless of whether the employees performed secular or sectarian functions—did not offend the Establishment Clause. The previous version of Title VII had differentiated between employees who pursued religious activities and employees whose functions were secular; religious organizations were permitted to discriminate in hiring the former set of employees, but not the latter.

Amos did **not** create a rule that **any** exemption permitting a religious organization to discriminate is constitutionally sound. The Court upheld the amendment to Title VII only because it concluded that, for two reasons, the prior version of Title VII was resulting in “significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” 483 U.S. at 335. First, it was an inherently complicated and burdensome task for the religious organizations to define who counted as a “religious” employee and who was a “secular” employee. Second, and quite troubling for Establishment Clause reasons, that task threatened to pull the government into making religious judgments or second-guessing the judgments of churches and other religious institutions. *Id.* at 339. By eliminating the distinction and permitting religious organizations to discriminate in all hiring decisions, Congress lifted a significant, governmentally

imposed burden on religion and avoided “governmental interfer[ence] with the decision-making process in religions.” *Id.* at 336 (internal quotation marks omitted; alteration in original).

Because the prior version of Title VII applied to all religious employers—and the employers had no way to avoid being subject to the statute—there also was no question that the statute imposed a significant burden on the employers’ religious exercise. Instead of *advancing* religion, the amendment to Title VII had the effect of returning religious organizations to the pre-Title-VII state of affairs, under which there was no federally imposed burden on religious entities’ employment decisions.

Here, the Nondiscrimination Policy places no significant burden on the practice of religion. CLS can remain as an unofficial student group and can avoid complying with the Nondiscrimination Policy simply by forgoing certain special benefits. Its members can fully and freely function and exercise their religion without those benefits. Moreover, the Nondiscrimination Policy does not enmesh Hastings in religious decision-making. *Amos* therefore cannot support the provision of an “accommodation of religion” to CLS. Accordingly, this Court cannot order an accommodation based on free exercise concerns without simultaneously causing a violation of the Establishment Clause.

III. ALLOWING THE REQUESTED EXEMPTION HERE WOULD OPEN THE DOOR TO STATE RECOGNITION AND FUNDING OF ANY RELIGIOUS GROUP THAT CHOOSES TO ENGAGE IN INVIDIOUS DISCRIMINATION.

The relief CLS seeks here is nothing less than an order requiring a state to provide direct aid to a group that engages in discrimination. That would set a dangerous precedent that is wholly unwarranted. As the Supreme Court recently warned in *Cutter*, “an accommodation must be measured so that it does not override other significant interests.” 544 U.S. at 722.

Hastings has compelling interests in not furthering a group’s discriminatory practices by directly funding that group and in protecting its students from such discrimination.¹⁰ *See generally* Hastings Br. 20-21 (analyzing and citing cases). “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars * * * do not serve to finance the evil of private prejudice.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O’Connor, J., plurality opinion). “That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state

¹⁰ Moreover, CLS conveniently ignores the rights of other students to be free from discrimination. Students in universities around the country have spoken out strongly against exemptions of the sort CLS seeks. *See, e.g.*, Gavin Aronsen, *An Unhealthy Precedent*, Iowa State Daily, Oct. 23, 2006; Editorial, *Discriminating Against You*, Indiana Daily Student, Sept. 21, 2004; Andrew Payne, *Keep the Money for Nondiscrimination*, Technician (North Carolina State University), Aug. 30, 2004.

support for such discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 463 (1973). Indeed, “[t]he constitutional obligation of the State ‘requires it to steer clear not only of [engaging in discrimination itself] but also of *giving significant aid to institutions that practice racial or other invidious discrimination.*’” *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) (striking down attempt by city to grant exclusive use of city parks to discriminatory private schools, and to provide recreational services only through segregated YMCAs) (quoting *Norwood*, 413 U.S. at 467) (emphasis and bracketed text added).

It is irrelevant whether CLS seeks to discriminate because of secular animus or a religious motivation. Even if limited to the context of religious groups, CLS’s arguments, if accepted, would place this Court in the position of countenancing exemptions and aid for student religious groups that seek to discriminate based on race, gender, ancestry, or any other protected characteristic. Examples of such groups abound; under CLS’s reasoning, *all* such groups would be entitled to receive funding from Hastings. But the Supreme Court has made clear that governmental policy interests justify a refusal to subsidize groups that engage in discrimination. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court refused to order the IRS to grant a tax exemption to two schools that, based on religious motivations, discriminated against African-Americans. Despite Bob Jones University’s “genuine[] belie[f] that the Bible forbids interracial dating and mar-

riage” (*id.* at 580), the Supreme Court held that “[w]hatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy” (*id.* at 595).

Since *Bob Jones*, other religious groups have asserted their right to practice racial discrimination. The World Church of the Creator, for example, espouses strict segregationist practices. *United States v. Trainer*, 265 F. Supp. 2d 589 (D. Md. 2003) (upholding supervisory release condition barring World Church adherent from associating with white supremacist groups); *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002) (holding that the World Church is a religion for Title VII purposes). The Church of Jesus Christ Christian, Aryan Nations, the Sword of Christ Good News Ministries, and other “Christian Identity” ministries similarly practice racial discrimination as part of their religious beliefs. *Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 1985) (holding that allegedly religious literature sought by inmates was protected under the First Amendment). Other religious groups practice discrimination of other kinds. *See, e.g., McLeod v. Providence Christian Sch.*, 408 N.W.2d 146, 148 (Mich. Ct. App. 1987) (rejecting effort of the Netherlands Reformed Denomination to fire a married female teacher after birth of her child, on grounds that “a woman’s place is in the home raising children and not in the work force”). If all of these forms of discrimination are “religiously motivated,” then under CLS’s logic a state school must support any dis-

criminatorious religious group with a student chapter by granting it state recognition and funding.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted.

Ayesha N. Khan
Richard B. Katskee
Alex J. Luchenitser
AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
Tel. (202) 466-3234
Fax (202) 466-2587

Evan M. Tager
Archis A. Parasharami
Lauren R. Randell*
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006
Tel. (202) 263-3000
Fax (202) 263-3300

* Admitted in New York; practices under the supervision of principals of the firm.

Counsel for *Amicus Curiae* Americans United for Separation of Church and State

January 19, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C)

I hereby certify that, according to the word-count facility in Microsoft Word, this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 6793 words and thus complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(d). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface, 14-point Times New Roman, using Microsoft Word 2002.

Archis A. Parasharami

January 19, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2007, I filed an original and 15 copies of the foregoing Brief of Americans United for Separation of Church and State as *Amicus Curiae* in Support of Appellees with the Clerk of the Court by overnight delivery, and I served, by overnight delivery, two copies of the foregoing brief to each of the following addresses:

| | |
|---|---|
| Ethan P. Schulman Howard Rice Nemerovski Canady Falk & Rabkin, P.C. Three Embarcadero Ctr., 7th Fl. San Francisco, CA 94111 | Steven H. Aden Center for Law & Religious Freedom 8001 Braddock Rd., Suite 300 Springfield, VA 22151 |
| Elise K. Traynum General Counsel Hastings College of the Law University of California 198 McAllister St., Mezzanine Lvl. San Francisco, CA 94102 | Timothy Smith McKinley & Smith, P.C. 3445 American River Dr., Suite A Sacramento, CA 95864 |
| Christopher F. Stoll Heller Ehrman LLP 333 Bush St. San Francisco, CA 94104 | Steven Burlingham Gary, Till & Burlingham 5330 Madison Ave., Suite F Sacramento, CA 95841 |
| Shannon Minter National Center for Lesbian Rights 870 Market St., Suite 570 San Francisco, CA 94014 | Benjamin Bull Alliance Defense Fund 15333 North Pima Rd., Suite 165 Scottsdale, AZ 85260 |
| Terry L. Thompson Law Office of Terry L. Thompson 1804 Piedras Circle Alamo, CA 94507 | Steven W. Fitschen Regent University School of Law 1000 Regent University Drive Virginia Beach, VA 23464 |

Archis A. Parasharami