No. 06-15956

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

FRANK H. WU , ET AL.,
Appellees.

On Remand from the United States Supreme Court,
Reviewing Ruling of March 17, 2009,
by Panel of Chief Judge Kozinski, Judge Hug, and Judge Bea
on Appeal from Judgment of the United States District Court
Northern District of California
Hon. Jeffrey S. White

MOTION TO REMAND FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE SUPREME COURT'S INSTRUCTIONS

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Appellant Christian Legal Society Chapter of the University of California, Hastings College of the Law ("CLS") respectfully moves this Court, pursuant to Fed. R. App. P. 27 (a) (1), to remand to the district court for further proceedings in accordance with the Supreme Court's instructions. In the alternative, CLS moves for additional briefing in this Court to determine whether Appellees' policy is pretextual and whether it has been selectively enforced.

In support of its motion, CLS shows as follows:

1. This Court entered an opinion and judgment in this case on March 17, 2009. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Newton, et al.*, 319 Fed. Appx. 645 (9th Cir. 2009).

2. This Court granted CLS's motion to stay the mandate pursuant to Fed. R. App. P. 41 (d) on April 10, 2009.

3. The United States Supreme Court issued a writ of certiorari to this Court on December 7, 2009. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, et al.*, --- U.S. ---, 130 S. Ct. 795 (2009).

4. The United States Supreme Court entered an opinion and judgment in this case on June 28, 2010, a copy of which is attached as Exhibit A. *Christian Legal Society Chapter of the University of California, Hastings College of the Law*

v. Martinez, et al., --- U.S. ---, 130 S. Ct. 2971, 2010 WL 2555187 (U.S., June 28, 2010).

5. In its opinion, the United States Supreme Court affirmed this Court's ruling and remanded for further proceedings consistent with its opinion. 130 S. Ct. at 2995.

6. Specifically, in regard to the remand, the Supreme Court stated:

> In its reply brief, CLS contends that "[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext." Reply Brief 23. Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved.

Id.

7. In a dissent written by Justice Alito and joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, four members of the Court concluded that "CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy." *Id.* at 3017 (Alito, J., dissenting). These four justices based their conclusion on: 1) Hastings' advancement of different policies at different times during the litigation as the basis of its denial of recognition to CLS; 2) the unwritten nature of any all-comers policy before the stipulation in December 2005;

and 3) the record evidence that the policy was not enforced before July 2005 because several groups had membership requirements inconsistent with an all-comers policy. *Id.* at 3017-3018 (Alito, J., dissenting). *See also id.* at 3001, 3002-3006, 3005 n. 1, 3012-3013, 3016-3019, 3018 n. 11 (Alito, J., dissenting). These justices concluded that "[i]f the record here is not sufficient to permit a finding of pretext, then the law of pretext is dead." *Id.* at 3018 (Alito, J., dissenting).

8. The majority of the Supreme Court declined to "resolve the pretext question" because "'we are a court of review, not of first view.'" *Id.* at 2995, n. 28 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). As the majority further explained, "[w]hen the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves." *Id.* The Court then remanded the issue to this Court. *Id.* at 2995.

9. CLS has preserved the issue by consistently arguing in this Court and the court below that Appellees' all-comers policy is pretextual and has been selectively enforced. *See, e.g., Cornhusker Cas. Ins. Co. v. Kachman*, 553 F.3d 1187, 1191-1192 (9th Cir. 2008) (issue not waived if it has been raised sufficiently for the trial court to rule on it). Justice Alito maintained that "as the record shows, CLS has *never* ceded its argument that Hastings applies its accept-all-comers policy unequally." 130 S. Ct. at 3018, n.11. Instead, "CLS consistently argued in

the courts below that Hastings had applied its registration policy in a discriminatory manner." *Id.* at 3005, n. 1 (Alito, J., dissenting) (citing Plaintiff's Notice of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in No. C 04-4484-JSW (N.D. Cal.), pp. 6-7 ("Hastings allows other registered student organizations to require that their members and/or leaders agree with the organization's beliefs and purposes")). Justice Alito observed that "CLS took pains to bring forward evidence to substantiate this claim." 130 S. Ct. at 3005, n. 1 (Alito, J., dissenting).

Characterizing the record as "replete with evidence that . . . Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints," Justice Alito offered the Hastings Democratic Caucus, the Association of Trial Lawyers of America at Hastings ("ATLA"), the Vietnamese American Law Society, Silenced Right, and La Raza as examples of such groups. *Id.* at 3004. *See also id.* at 3018 (again noting that "[t]he record is replete with evidence that Hastings made no effort to enforce the all-comers policy until after it was proclaimed" and citing specific student groups). Justice Alito additionally relied upon Hastings' answer in May 2005 in which it "admitted that its Nondiscrimination Policy 'permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.'" *Id.* at 3003 (quoting

App. 93 [ER 92]). Justice Alito remarked that the district court "took care to address both the Nondiscrimination Policy and the accept-all-comers policy." *Id.* at 3004 (citing App. to Pet. for Cert. 8a-9a, 16a-17a, 21a-24a, 26a, 27a, 32a, 44a, 63a [ER 725-726, 730-731, 733-735, 736-737, 737, 740, 747, 759]).

10. In its appeal to this Court, "CLS argued strenuously, as it had in the District Court, that prior to the former dean's deposition, numerous groups had been permitted to restrict membership to students who shared the groups' views." 130 S. Ct. at 3004 (Alito, J., dissenting). In support, Justice Alito observed that "CLS's brief in the Court of Appeals reiterated its contention that Hastings had not required all RSOs to admit all student applicants. CLS's brief stated that 'Hastings allows other registered student organizations to require that their leaders and/or members agree with the organization's beliefs and purposes.'" *Id.* at 3005 n. 1 (quoting Brief for Appellant in No. 06-15956 (CA9), pp. 14-15). Justice Alito further quoted CLS's assertion in this Court that "Hastings routinely recognizes student groups that limit membership or leadership on the basis of belief …. Hastings' actual practice demonstrates that the forum is not reserved to student organizations that do not discriminate on the basis of belief." *Id.* (quoting Brief for Appellant, pp. 54-55). Finally, Justice Alito noted that, in this Court, Hastings itself "remarked that CLS 'repeatedly asserts that Hastings routinely recognizes student groups that limit membership or leadership on the basis of belief.'" *Id.*

(quoting Brief for Appellees in No. 06-15956 (CA9), p. 4) (additional quotation marks omitted).

In this Court, CLS asserted that Hastings selectively applied its policy. When CLS insisted that "Hastings' actual practice demonstrates that the forum is not reserved to student organizations that do not discriminate on the basis of belief," it cited the leadership and membership requirements of several other groups. Brief for Appellant, pp. 54-55, *citing* ER 325 (under Outlaw's bylaws, officers may be removed for "working against the spirit of the organization's goals and objectives"), ER 301 (under ATLA's constitution, members must "adhere to the objectives of the Student Chapter as well as the mission of ATLA"), ER 296 (under Hastings Democratic Caucus's bylaws, members must not "exhibit a consistent disregard and lack of respect for the objective of the organization"), ER 282 (under Vietnamese American Law Society's bylaws, members must "not exhibit consistent disregard and lack of respect for the objective of the organization").

Under the heading "Hastings' Treatment of Other Recognized Student Organizations," CLS devoted a separate section to the fact that "Hastings allows other registered student organizations to require that their leaders and/or members agree with the organization's beliefs and purposes." Brief of Appellant, pp. 14-15. CLS supported this statement by noting the membership and/or leadership

requirements of Outlaw, ATLA, Vietnamese American Law Society, and Hastings Democratic Caucus, as well as Silenced Right (ER 285) (members must support its purpose), Hastings Motorcycle Riders Club (ER 293) (members must share interest in motorcycles), Hastings Health Law Journal (ER 271) (members must be interested in law and medicine), and Students Raising Consciousness at Hastings (ER 278) (members must support its mission to educate the student body about particular social issues). *See also, e.g.*, Brief for Appellant, p. 17 ("Hastings recognizes a wide range of political, cultural, religious, and recreational student groups … [who] require that their officers and members agree with the mission and purposes of their organizations."), p. 18 ("Hastings allows a whole host of student organizations to require that their officers and members agree with their mission and purposes, but it precludes religious student organizations, like CLS, from doing the same."), p. 57 ("Hastings forbids student groups to organize around religious ideals, but allows groups to organize around other ideals"), p. 57-58 ("To prohibit religious student groups from using religious criteria in their leadership and membership practices, while allowing other groups to select officers and members that support their mission and objectives, is religious viewpoint discrimination."), p. 61 ("This is why, regardless of what Hastings alleges, almost every student organization requires its officers and members to agree with its mission and objective."), p. 63 (Unlike political and cultural groups, "a religious

student group may not have religious qualifications for their officers and members."). *See also id.* at 10, 11, 12, 62.

As already noted, Appellee Hastings addressed "CLS's *repeated* allegation that the Policy is not viewpoint neutral because Hastings permits *other* student groups 'to discriminate on the basis of shared personal beliefs,' while at the same time prohibiting CLS from doing so …." Brief of Appellees, p. 31-32 (emphasis on "repeated" added). *See id.*, p. 34 ("CLS's contrary arguments (AB 60-61) again ignore the undisputed record concerning both the *purpose* of Hastings' Policy and *its application to other student groups*.") (emphasis added). *See also id.*, pp. 4, 14, 58.

11. In the district court, CLS argued that Hastings' policy is pretextual and has been selectively enforced. 130 S. Ct. at 3004, 3005 n. 1, 3018 n. 11 (Alito, J., dissenting). In its motion for summary judgment, CLS asserted that "Hastings allows other registered student organizations to require that their members and/or leaders agree with the organization's beliefs and purposes." Notice of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in No. C 04-4484-JSW (N.D. Cal.), pp. 6-7. As it did in this Court, CLS cited many other student groups' membership and leadership requirements as examples of Hastings' selective enforcement of its policy. *Id.* *See also id.* at pp. 14-15 (other groups require leaders and members to share their purpose), p. 18

("Defendants exempt, at least by practice, numerous student organizations from the Policy on Nondiscrimination, such as the La Raza Student Association and the Vietnamese American Law Society. . . ."), p. 23 ("[A]mong the almost 60 registered student organizations are a number whose constitutions—which are on file with the law school—[] explicitly require students to be of a particular national origin, age, or political persuasion."). CLS claimed that "Defendants' application of the Policy on Nondiscrimination to CLS at Hastings is arbitrary. Defendants permit numerous other student organizations to choose members and/or officers dedicated to their organization's cause." *Id.* at p. 20 (citing Silenced Right, Vienamese American Law Society, and Outlaw as examples).

12. In its brief before the United States Supreme Court, Hastings asserted several previously unmentioned, unwritten exceptions to the all-comers policy. The brief stated, contrary to the deposition testimony of Hastings' dean, that student organizations may "impose[] dues, attendance and even conduct requirements, and … academic and writing competitions that are open on the same terms to all students." Brief of Respondents, p. 5. 130 S. Ct. at 2979 n. 2. For example, at oral argument, Hastings agreed that CLS could require applicants to pass a test on the Bible "[i]f it were truly an objective knowledge test." Tr. of Oral Arg. 52. *See also* 130 S. Ct. at 3015, 3019 (Alito, J., dissenting) (deeming Hastings' previously unmentioned, unwritten exceptions for "objective knowledge

test" of Bible or determination of members' "commitment to a group's vitality, not its demise" as "hopelessly vague").

13. If further discovery is permitted, CLS would wish to introduce evidence that Hastings continues to recognize groups whose bylaws limit membership and/or leadership on the basis of belief, conduct, and other criteria. *See, e.g.*, Bylaws of National Lawyers Guild, San Francisco Bay Area Chapter, *at* http://www.uchastings.edu/student-services/docs/bylaws/bylaws-national-lawyers-guild.pdf (last visited July 29, 2010) ("persons who agree with the objectives of the organization as set forth herein, shall be admitted to membership"). CLS would also seek to take depositions of Hastings administrators and students, past and present, regarding when, if ever, an all-comers policy was adopted or applied, as well as the precise nature of the various exceptions to the policy and whether those exceptions are applied evenhandedly.

14. Therefore, CLS respectfully moves this Court to remand to the district court for further proceedings in accordance with the Supreme Court's instructions. This Court has previously reversed summary judgment and remanded for further discovery on the issue of pretext and selective enforcement in a case in which a religious student group challenged its exclusion from a speech forum. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648, *reh'g en banc denied,* 551 F.3d 850 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 *and* 129 S. Ct. 2889 (2009).

15. In the alternative, should the Court determine that a remand to the district court is not necessary to resolve the issues on which the Supreme Court remanded, CLS moves for additional briefing in this Court to determine whether Appellees' policy is pretextual and whether it has been selectively enforced.

16. Counsel for Appellant contacted counsel for Appellees Frank H. Wu, *et al.*, and Intervenor-Appellee Hastings Outlaw on the day this motion was being filed to ask whether they would oppose this motion. The latter oppose this motion, while the former indicated that they will respond in writing.

WHEREFORE, CLS respectfully moves this Court to remand to the district court for further proceedings in accordance with the Supreme Court's instructions. In the alternative, CLS moves for additional briefing in this Court to determine whether Appellees' policy is pretextual and whether it has been selectively enforced.

Dated: July 30, 2010.

Respectfully submitted,

s/ Kimberlee Wood Colby
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2010, I electronically filed the foregoing MOTION TO REMAND FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE SUPREME COURT'S INSTRUCTIONS and attached EXHIBIT A with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by United States Postal Service to the following non-CM/ECF participants:

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