

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 THE NATIONAL LGBT BAR
ASSOCIATION, _ , AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENTS**

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INTEREST OF *AMICI*¹

Amici are bar associations and law student groups that are committed to fighting discrimination against lesbian, gay, bisexual and transgender ("LGBT") people on law school campuses, in the legal profession, and in society at large. *Amici* view the law as a progressive force that will promote equality for all people regardless of sexual orientation, and serve in their roles as lawyers and future lawyers to fight discrimination against LGBT people where it continues to exist.

Amici are further committed to fostering a legal profession that is open to all qualified people, regardless of sexual orientation. In order to achieve the goal of a profession that reflects the diverse elements of our society, *Amici* believe that law schools must provide an environment where LGBT students feel welcome and capable of participating in all aspects of their legal education. The law student groups that are *amici* in this case further this goal on a daily basis by protecting the interests of LGBT students on law school campuses, and fighting the persistent discrimination that unfortunately continues to exist across the nation's law schools.

¹ The parties have consented to the filing of all timely *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

At issue in this case is whether law schools, in an attempt to promote the interests of LGBT law students can adopt a policy that does no more to promote the LGBT cause than to *prohibit* discrimination based on sexual orientation. To hold that a law school cannot apply this basic principle, without exception, would ignore the strong interests of the law school, the legal profession and society at large in equal treatment without regard to sexual orientation.

SUMMARY OF ARGUMENT

The University of California Hastings College of the Law ("Hastings" or the "Law School") has adopted a nondiscrimination policy that prohibits discrimination on the law school campus based on a number of factors, including sexual orientation. Outside the classroom, in the context of the extracurricular program, the Law School has gone one step further, to require that officially-recognized student groups provide equal access to *all* law students to participate as members or leaders.

Petitioner argues that the Law School's policy is unlawful because it infringes on Petitioner's First Amendment rights. It does not. For purposes of this Court's First Amendment analysis, the Law School's extracurricular program is a "limited public forum," in which the Law School retains discretion to place limitations on speech within the forum. Here, the Law School has not exceeded its discretion.

In order to pass constitutional muster, the Law School's policy, which applies neutrally to all groups without regard to the viewpoint of the

speaker, must also be "reasonable" in light of the Law School's purpose in the forum. That purpose is coterminous with the Law School's general purpose: to educate and train the next generation of lawyers in California and throughout the country. As an arm of the State of California, Hastings has a societal interest in remedying discrimination based on sexual orientation. As discussed below, California has gone to great lengths to strive for equality for gays and lesbians, in response to an unfortunate history of discrimination against the same. The Law School's policy is consistent with, and furthers, the State's goal of equal treatment for all Californians.

The Law School's policy also furthers the important interest of the legal profession it serves, in remedying discrimination both in its own ranks and in society at large. The profession, too, has taken steps to improve the status of gays and lesbians in the practice of law. But a great deal more work remains. Law schools must provide welcoming environments for gays and lesbians to ensure that such students are not dissuaded from attending law school for fear of discrimination. A policy that prohibits discrimination against gays and lesbians in *all* facets of the education that the Law School provides clearly furthers that goal.

ARGUMENT

I. The RSO Program is a Limited Public Forum, in Which the Law School May Impose Reasonable, Viewpoint-Neutral Restrictions.

Adopted in 1990, and amended in 2002, the Law School's nondiscrimination policy prohibits unlawful discrimination on the basis of "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." Pet. App. 72a, 88a. The policy applies with equal force to all groups within the Law School, including "administration, faculty, student governments, College-owned student residence facilities, and programs sponsored by the College," and extends to "admissions, access, and treatment in Hastings-sponsored programs and activities." *Id.* at 88a. The policy reflects a clear statement that the Law School does not tolerate "legally impermissible, arbitrary or unreasonable discriminatory practices." *Id.*

The Law School does not exempt its registered student groups from its general nondiscrimination policy. Rather, the RSO program requires that the bylaws of all registered groups make clear that they will abide by the policy in its membership decisions. *Id.* at 8a, 72a-98a. And reasonably so. The RSO program is an extension of the classroom education that the Law School provides and the professional training that law students receive. Given the Law School's commitment to nondiscrimination, it makes good sense that the Law School should ensure that the policy applies to all facets of the education—both curricular and extracurricular—that it provides.

It also makes constitutional sense. As this Court has held, when a university authorizes its students to form student groups, those groups are deemed to exist in a "limited" public forum. See *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995) (applying limited public forum analysis to the distribution of funding to student groups). By contrast to a public forum, in which restrictions only for time, place and manner are allowed, a limited public forum is susceptible to greater regulation to ensure that the forum is used for the purpose to which it has been committed. Accordingly, when an educational institution transforms otherwise non-public property into a limited public forum within it, it does not concede its power to control, at least to some extent, the content of the forum. "[L]ike the private owner of property, [a school] may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, (1993); see also *Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129-130 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

When the Law School created the RSO program, it created a limited public forum to complement the in-class education that its students receive. The Law School did not forfeit the ability to place restrictions on the program that are consistent with the overall purpose of the school. As this Court has consistently reasoned, the Law School is "justif[ied] . . . in

reserving it for certain groups or for the discussion of certain topics" in light of "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49. The RSO program—which includes student groups that are devoted to numerous areas of legal study and practice—is an extension of the legal education that the Law School offers its students in the classrooms.

The Law School has made clear that the student groups do not exist separate and apart from the law school community but are part of that community, and thus must comply with the community's norms. As outlined in the Handbook for Student Organizations, which includes "Excerpts of Policies and Regulations Applying to College Activities, Organizations and Students" ("Handbook"):

"In order to carry on its work of teaching, research and public service, the College has an obligation to maintain conditions under which the work of the College can go forward freely, in accordance with the highest standards of quality, institutional integrity and freedom of expression, with full recognition by all concerned of the rights and privileges, as well as the responsibilities, of those who comprise the College community. Each member of the College shares the responsibility for maintaining conditions conducive to the achievement of the College's purpose." Pet. App. 74a.

Accordingly, the Law School is permitted to allow entry into the forum and, in turn, expend the resources necessary to provide for such entry, only to groups that conform to the Law School's norms and further its educational interests.

II. Hastings' Policy is Viewpoint Neutral and Reasonable in Light of the Purpose of the Forum

The law is clear that restrictions on speech are permissible within a limited public forum so long as the restrictions are "viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) (citing *Cornelius*, 473 U.S. 799-800 (1985)). Both prongs of the test are met here.

A. Hastings' Policy Is Viewpoint Neutral.

Contrary to Petitioner's argument, the Law School's policy, by prohibiting discrimination and requiring that all registered student groups accept "all-comers," does not single out the viewpoint expressed by Petitioner.

1. Petitioner continues to be free to express its viewpoint about the immorality of homosexuality, albeit not through the *act* of excluding homosexuals from joining its on-campus society. Within the RSO program, Petitioner enjoys substantial protection by which to conduct its studies of the Bible and to express its moral disapproval of homosexuality. Ultimately, however, the Law School is permitted to prohibit discriminatory *conduct*, even if Petitioner

believes that that conduct furthers its expressive goals.

This Court has repeatedly recognized that, while the First Amendment protects a particular subject or opinion, the same protection is not afforded to its associated behaviors and modes of delivery. *Hill v. Colorado*, 530 U.S. 703, 736-737 (2000) (Souter, J., concurring); *United States v. O'Brien*, 391 U.S. 367, 370 (1968) (holding that opposing the draft is protected speech, but the conduct of burning a draft card is not); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 758 (1994) (holding that expressing the belief that abortion is morally wrong is protected speech, but the conduct of physically protesting in front of the clinic is not).

2. This Court has repeatedly held that antidiscrimination laws regulate conduct, not speech. *See, e.g., Hurley*, 515 U.S. at 572 (holding that a public accommodations law "[did] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (holding that, "[o]n its face," a public accommodations law "[did] not aim at the suppression of speech, [did] not distinguish between prohibited and permitted activity on the basis of viewpoint, and [did] not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."); *cf. Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), Inc.*, 547 U.S. 47 (2006) (upholding the Solomon Amendment on the ground that "[a]s a general matter," it regulates conduct, not speech. It

affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.”)

The Law School's nondiscrimination policy is no different than the laws that this Court has already held to be regulations of conduct. Just like those laws, Hastings' nondiscrimination policy regulates conduct, and not speech, because it merely seeks to ensure that CLS not engage in the *act* of discrimination. The policy is neutral with respect to what perspective CLS may or may not express regarding homosexuality. By contrast, for example, with the Irish Day Parade organizers in *Hurley*—who excluded a gay, lesbian and bisexual group based *not* on their sexual orientation but rather based on the fact that they intended to identify themselves as gay, lesbian and bisexual Irish descendants—CLS would exclude homosexuals based *only* on their sexual orientation, and not on their expression.

For the same reason, a group that preaches against miscegenation cannot exclude an interracial couple from applying for membership (however unlikely that may be). Nor can a gay and lesbian group exclude heterosexuals on the belief that the message of gay pride would be diluted by their presence. In short, *no* group can express the viewpoints it adopts through the exclusion of others.

3. As the District Court recognized, by arguing that CLS seeks to exclude homosexuals so as to promote its own viewpoint, Petitioner “is confusing the appropriate analysis by focusing on the reasons CLS is acting, as opposed to the reasons underlying Hastings' Nondiscrimination Policy.” Pet. App. 34a.

There is no indication that Hastings' prohibition of discrimination targets or is restricted to Petitioner's, or any particular group's, viewpoint. As such, Hastings' policy—which does not allow Petitioner, or *any* group, to exclude *any* student from membership within an RSO—is not viewpoint based. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (a prohibition on demonstrating outside an abortion clinic was not viewpoint based, even though the injunction only applied to abortion protestors).

4. Petitioner incorrectly argues that it will not be able to express its viewpoint at all—even through traditional speech means—if it cannot exclude students based on sexual orientation or religion. Petitioner presents the hypothetical situation in which a vocal minority of gay and lesbian students will "hijack" CLS so as to silence any message deriding homosexuality. Br. 28-30, 33. As an initial matter, Petitioner's wildly prejudicial tale is both imagined and contrary to the history of the RSO program. More fundamentally, Petitioner's hypothetical fails because, if Hastings' open-membership policy does indeed allow for possible "takeovers" it does so without regard to *viewpoint*. No group and no perspective is differently subject to the threat. Petitioner is no more threatened by a "takeover" than is another group. The Jewish Law Students Association could, hypothetically, be overrun by Gentiles; the women's club could have male leadership; and the gay and lesbian group could be flooded with heterosexuals. Hastings has not yet had to face this problem but, presumably, it could modify its open-membership rule to preserve their

originally-intended expressive rights, without suspending the nondiscrimination policy.

B. The Law School's Policy is Reasonable in Light of the Law School's Purpose in Establishing the RSO Program.

Through adoption of its nondiscrimination policy, Hastings has made clear that it will not tolerate acts of discrimination towards its students. By going one step further, to adopt an "open-membership policy" with respect to its RSO program, Hastings has further made clear that exclusion of *any* student from the opportunities provided by the Law School is improper. The RSO program—which includes, among others, numerous student groups that are devoted to varied areas of legal study and practice—is an extension of the legal education that the Law School offers its students in the classrooms. The reasonableness of the Law School's decision to provide these opportunities on equal footing to all students, and, in particular, without regard to sexual orientation, cannot seriously be questioned.

Furthermore, the Law School's refusal to allow student groups to discriminate based on sexual orientation serves society's strong interest in equal treatment. Unfortunately, the State of California has demonstrated a long history of discrimination against gays and lesbians, which the State generally, and through its public universities, has sought to remedy. The Law School's nondiscrimination policy is consistent with, and furthers, that effort. *See* Part IIB.1, *infra*.

The Law School's policy also furthers the interests of the legal profession that it serves. A nondiscrimination policy that applies not only to the Law School's faculty and administration but to *all* actors within the Law School aptly reflects the central feature of equal treatment for all, which is the hallmark of our profession. Like society at large, the legal profession generally has an unfortunate history of discrimination against gays and lesbians. A policy that seeks to instill the value of nondiscrimination in law students furthers the goals of the legal profession to remove the remnants of discrimination from its midst. *See* Part IIB.2, *infra*.

In an attempt to ensure optimal diversity within the ranks of the legal profession, there is a pressing need for law schools—which are, after all, the exclusive avenue to enter the profession—to be a welcoming environment for gays and lesbians. *See* Part IIB.3, *infra*. The Law School's commitment to ensure equal treatment for all law students, without regard for sexual orientation, cannot be second-guessed as an unreasonable path towards that goal.

**1. The Law School's Policy is
Consistent with the State of
California's Interest in Reversing
State-Sponsored Discrimination
Against Gays and Lesbians**

Hastings' nondiscrimination policy reflects and serves the greater interest of the University of California, and the State of California generally, in equal treatment without regard to sexual orientation. As detailed in William N. Eskridge, *Foreword: The Marriage Cases—Reversing the*

Burden of Inertia in a Pluralist Constitutional Democracy, 97 S. Cal. L. Rev. 1785 (2009), gays and lesbians in the State of California have endured an horrific history of cruel discrimination, which the State only began to remedy in the 1970s. With this backdrop, it is impossible to view a policy mandating simple nondiscrimination as anything but reasonable.

1. In 1850, while still a territory, California criminalized the act of sodomy—which the legislature then characterized as "[t]he infamous crime against nature." 1850 Cal. Stat. 234, § 48. However, because of the difficulties of convicting consenting adults for private acts, there were very few sodomy convictions before 1890. Eskridge, *Foreword*, at 1789.

In the early twentieth century, California experienced an increased anxiety about growing homosexual populations in large urban areas such as San Francisco and Los Angeles. Eskridge, *Foreword*, at 1790. The public considered homosexuals to be "mental inverters" and "degenerates," "devils" and "sodomites" who violated natural law and threatened the fabric of society. *Id.* Responding to this public anxiety, in the 1920s and 1930s, the police in California systematically designed undercover stake-outs in order to arrest homosexuals who met in public spaces. Eskridge, *Foreword*, at 1791. The police also spied on homosexuals in their own homes. *Id.*

Gays and lesbians who were convicted of sex crimes were often denied licenses to practice their professions, including lawyers, doctors, dentists,

pharmacists, teachers, embalmers and funeral directors. Eskridge, *Foreword*, at 1794. After 1947, gays and lesbians convicted in California of sodomy were required to register as sex offenders with the police in their local jurisdictions. *Id.* at 1794.

In 1950, the California legislature expanded the laws targeting homosexuals, criminalizing the mere act of loitering near a public restroom. *Id.* at 1794. Like people convicted of sodomy, "lewd vagrants" were also required to register as sex offenders and deprived licenses to practice their professions. *Id.*

Until 1952, the sodomy laws of California imposed a maximum sentence of 10 years for a man and 15 years for a woman; second-time offenders were subject to an automatic life sentence. *Id.* In 1952, the legislature increased the maximum sentence for a first-time offender to life imprisonment. *Id.* In addition, those convicted who failed to register as a sex offender were subject to proceedings for indefinite commitment for "psychopathic offenders." *Id.* By 1930, more than 7,000 people within these hospitals--many of them prostitutes and homosexuals--were categorized by the state as "moral or sexual perverts" and underwent forced sterilization procedures. *Id.*, at 1792-93.

In 1954, California opened the Atascadero Hospital, which experimented with new theories of treating "sexual psychopaths." Eskridge, *Foreword*, at 1793. Gay and lesbian inmates were subjected to horrific "therapies" such as lobotomies, electric shock, pharmacological shock and experimental drugs in order to "cure" them of "perversion." *Id.*

2. Gays and lesbians whose lives were impacted by the California laws of the 1940s and 1950s found new freedom in the 1960s when society began to question the efficacy of criminal sodomy laws. Eskridge, *Foreword*, at 1797-98. In 1955, The American Law Institute ("ALI") voted to exclude consensual sodomy from the Model Penal Code, because criminalizing such conduct served no public interest and engendered police corruption. *Id.* Likewise, between 1964 and 1967, the California Legislature's Penal Code Revision Project drafted — but ultimately did not implement — new versions of the law consistent with the ALI's direction. *Id.* at 1798. Despite the Legislature's slow resistance, gays and lesbians, encouraged by the potential reforms, organized in groups that sought to make a political impact.²

It was not until 1975 that the California legislature repealed the sodomy laws as they applied to consenting adults. Eskridge, *Foreword*, at 1798. The move was not entirely welcomed. Legislators who voted for the repeal were blasted by constituents who saw this development to be the promotion of homosexuality. Thus, in a political compromise, legislators did not remove the less punishable crimes for lewd vagrancy, which allowed that gays and lesbians, but especially gay men, could continue to be

² During the 1960s in California, groups such as the Mattachine Society and the Daughters of Bilitis formed with the intent to challenge the State to decriminalize homosexual intimacy and to increase their liberties relating to their right to socialize in bars and publish gay and lesbian tracts and literature. Eskridge, *Foreword*, at 1798.

targeted by police in parks and in public accommodations.

3. During this period, the California courts intervened in support of rights of gays and lesbians. In 1969, the California Supreme Court held that a public school teacher could not be terminated because he had had a homosexual relationship with another teacher. *Morrison v. State Board of Education*, 1 Cal. 3d 214 (Cal. 1969). The court required there to be a nexus between a disqualifying factor and the teacher's ability to do his job. *Id.* at 218. In 1979, the California Supreme Court found that the State's lewd vagrancy law was disproportionately used to arrest gay men and its vagueness invited enforcement against invitations to consensual activities that posed no legitimate threat to public order. As such, the Court narrowed the law's scope to apply only to the solicitation of sexual conduct that took place in public and non-consensual sexual touching. *Pryor v. Municipal Court*, 25 Cal. 3d 238, 254 (Cal. 1979).

In 1978, John Briggs, a state legislator from Orange County, sponsored an initiative to reverse the California Supreme Court's decision and ban gays and lesbians (as well as those who publicly advocated or encouraged "private or public homosexual activity") from teaching in California's public schools. Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1702-1706 (1993). Former governor Ronald Reagan and then-governor Jerry Brown opposed the Briggs initiative, and the voters of California followed the Court's decision and narrowly defeated its passage. Eskridge, *Foreword*,

at 1801; *see also* Ronald Reagan, Editorial, San Francisco Chronicle, Nov. 1, 1978.

One year after the electorate defeated the Briggs Initiative, Governor Brown followed suit and issued an executive order barring sexual orientation discrimination against state employees. Eskridge, *Foreword*, at 1801. In 1979, the California Supreme Court held that the state constitution's equal protection clause prohibited a quasi-public utility company from discriminating based on sexual orientation in its hiring decisions. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

In the years following the California Supreme Court's decision, new ordinances barring private job discrimination based on sexual orientation were enacted by city councils all over California: Berkeley (1978), San Francisco (1978), Los Angeles (1979), Oakland (1984), Santa Monica (1984), West Hollywood (1984), Sacramento (1986), Long Beach (1987) and San Diego (1990). Finally, in 1992, the California legislature amended the labor code proscribing discrimination based on sexual orientation and adopted the principle for its laws applying to public accommodations.

* * *

On this historical foundation, the Law School, adopted its nondiscrimination policy protecting gays and lesbians in 1990. The policy represents an important principle at the Law School, and one that reflects an important step in California's struggle to protect and promote its gay and lesbian citizens. In

light of this historical backdrop, no one can argue that a policy *prohibiting* discrimination is unreasonable.

2. The Law School's Policy Furthers the Legal Profession's Strong Interests in Diversity and Equality

Hastings' policy is eminently "reasonable," not only for the inherent value of remedying discrimination in the State of California and society at large, but because of the particular importance of nondiscrimination in the legal profession and in the schools that prepare students to enter the profession. Given the particular interests of the legal profession in ensuring diversity in its ranks and in creating lawyers who will, as lawyers have historically done, commit significant time and effort to fight discrimination, the Law School's decision to adopt a robust nondiscrimination policy must not be second-guessed as unreasonable. As this Court recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003):

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate.

Id. at 332. A nondiscrimination policy, like the Hastings policy, that applies to *all* actors within the Law School aptly reflects the central feature of equal treatment for all that this Court recognized is an aspiration of the profession.

1. Certainly, like many professions, the legal profession's history with regard to discrimination is mixed. In the 1950s, while Thurgood Marshall and the legal giants of the Civil Rights Era battled for social justice on one front, discrimination was rampant on another. In the 1950's, state bar associations used their power to police applicants for moral character to disbar and discourage the admission of gays and lesbians in the legal profession. One victim of this discrimination, Harris L. Kimball, a Florida civil rights lawyer, was arrested after "he and another man were caught having sex on a deserted stretch of beach one midnight in Orlando, Florida." *The Law: Homosexual Lawyers Keep Fighting Barriers*, N.Y. Times, Feb. 3, 1998. Two years later, the Florida Supreme Court upheld his disbarment for "behavior contrary to good morals."³ Mr. Kimball's story served as a warning to other gay lawyers. When, in 1998, the *New York Times* interviewed Justice Richard Failla, the first openly gay man to serve on

³ The statute under which Mr. Kimball was disbarred was found unconstitutional by the Florida Supreme Court in *Franklin v. Sate*, 257 So.2d 21 (Fla. 1971). Mr. Kimball's application for admission to the New York bar was also denied. The state's refusal to admit him was upheld by the trial court, but reversed by the Appellate Court in *Application of Kimball*, 33 N.Y.2d 586 (1973).

the New York Supreme Court, Justice Failla recalled his feelings regarding the news of Mr. Kimball in 1955: "It was easy for me to assume at that point that I could lose my license, lose my job, lose my ability to practice law - something I had worked so long for." *Id.*

Unfortunately, stories like Mr. Kimball's were not uncommon in the environment of the 1950s and beyond. Studies show that even into the mid-1980s, a "bar applicant's 'sexual conduct or lifestyle' [could] still trigger a bar investigation in nearly 40 percent of the states," even if "such an investigation would be unlikely to lead to a denial of admission." *Id.* (citing D. L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 532-33 (1985)). And in 1981, an applicant to the Florida bar who reported having been excluded from military service on grounds of homosexuality was submitted "to an hour and a half of 'every tricky question about his sex life [the bar examiners] could dream of.'" *Id.* (citing Rhode, *Moral Character* at 580-81 & n. 422).

2. While the legal profession has reflected society's unfortunate prejudices against gays and lesbians, it has also taken strides in remedying those biases. A number of bar associations, notably in California, are to be commended for the initial steps they took in surveying sexual orientation discrimination in the legal profession in the early 1990s. The results of these surveys, however, were disheartening.

In 1991, the Committee on Lesbian and Gay Issues of the San Francisco Bar Association ("S.F. Committee") conducted one of the first studies on the

issue of sexual orientation bias in the legal profession. Bar Assoc. of S.F., *Creating an Environment Conducive to Diversity: A Guide for Legal Employers on Eliminating Sexual Orientation Discrimination* (1991).⁴ The S.F. Committee identified broad problems in three categories: (i) antidiscrimination policies; (ii) recruitment and hiring; and (iii) retention, advancement and compensation.

Many employers did not include prohibitions against sexual orientation discrimination in their antidiscrimination policies, thus failing to send a clear message to their employees that manifestations of hostility and prejudice toward gay and lesbians would not be tolerated. *Id.* at 5. In terms of recruiting, the S.F. Committee found instances where hiring committees screened out applicants whose resumes reflected involvement in gay and lesbian activities. *Id.* The S.F. Committee also found occurrences of interviewers making overtly anti-gay comments or unintentionally alienating gay applicants through particular lines of questioning.⁵ *Id.* at 6.

⁴ Available at <http://LGBTbar.org/documents/AGuideforLegalEmployersonEliminatingSexualOrientationDiscrimination.pdf>.

⁵ In an interview with a promising Ivy League applicant, "a partner in a major San Francisco firm listed among the city's few disadvantages its 'gay community.' The interviewee, in fact, was a lesbian whose interest in bringing her talents to a San Francisco law firm was largely motivated by the city's reputation for being open and hospitable to gay men and lesbians." S.F. Committee Report at 7.

More generally, employers failed to create a hospitable workplace for gays and lesbians. *Id.* at 8. Lawyers were subject to pressures to remain in the "closet," and some employers insisted that openly gay attorneys keep their personal life separate from their professional life. *Id.* at 9. This forced separation of personal and professional lives increased stress and led to isolation. *Id.* at 10. Some employers also assumed that clients would not want to work with a gay lawyer. *Id.* Lastly, gay attorneys did not enjoy the same benefits as heterosexual attorneys. *Id.* at 11. According to the S.F. Committee, this difficult work environment led to the loss of valuable gay and lesbian employees. *Id.* at 9. In an effort to remediate these problems, the S.F. Committee made 23 recommendations which were adopted by the Bar Association of San Francisco and communicated to all of its approximately 400 member firms. *Id.* at 12-21.

In 1993, the Los Angeles County Bar Association conducted a study concerning the experience of gays and lesbians in the legal profession. Los Angeles County Bar Association, Committee on Sexual Orientation, (1994).⁶ The study concluded that discrimination based on sexual orientation was prevalent in the Los Angeles bar and was strongly perceived by the gay and lesbian lawyers who suffered it. Roughly 15 percent of respondents, both heterosexual and homosexual, reported that his or employer engaged in some form of anti-gay

⁶ This study is available at: <http://www.LGBTbar.org/documents/LACountyBarAssociationComitteeOnSexualOrientationBias.pdf>.

discrimination in hiring. *Id.* at 5. Over half of respondents believed their work environment was less hospitable to gay lawyers than to straight lawyers. *Id.* at 8.

3. Further studies performed in 1994 and 1995 by the San Francisco Bar Association and the Los Angeles County Bar Association also confirmed the widespread biased treatment and discrimination directed at gay and lesbian attorneys by legal employers. SRI Int'l, 1991 Demographic Survey of the State B. of Cal.: Comparisons of Gay and Non-gay State B. Members (1994); L.A. County Bar Assoc. Comm. on Sexual Orientation Bias, Report (1995), 4 S. Cal. Rev. L. & Women's Stud. 305.

Respondents in Los Angeles, including gay and non-gay attorneys, perceived that sexual orientation discrimination negatively affected performance evaluations, promotions, career advancement, benefits and salary. L.A. County Bar Assoc. Comm. on Sexual Orientation Bias, Report (1995), 4 S. Cal. Rev. L. & Women's Stud. 305, 311. Specifically, 66 percent reported that attorneys in their office made homophobic comments or jokes. *Id.* at 345. Approximately 15 percent of attorney survey participants said clients had expressed a desire not to work with gay attorneys. *Id.* at 356. Over 12 percent reported that partners in their office had expressed the same preference. *Id.* Visibility remained a major issue for gay attorney respondents. A slight majority reported being out to most of their superiors. *Id.* at 338. Only 39 percent of participants were out to most of their coworkers. *Id.* Less than 10 percent were out to clients, judges, or opposing counsel. *Id.* The report emphasized the

stress and emotional cost associated with being in the "closet." *Id.* at 339. Many participants wrote that the attitudes of coworkers towards them began to change after they brought a same-sex partner to an event. *Id.* at 342.

In the San Francisco area, 50 percent of non-gay attorneys over forty made more than \$100,000 per year, compared with only 25 percent of gay attorneys. SRI Int'l, 1991 Demographic Survey of the State B. of Cal.: Comparisons of Gay and Non-gay State B. Members (1994), at 3. After ten years in the profession, 54 percent of non-gay attorneys earn more than \$ 100,000 while only 33 percent of gay attorneys earn that much. *Id.* After ten years in the profession, 38 percent of non-gay attorneys were law firm partners while only 26 percent of gay attorneys were. *Id.*

Most of the studies conducted emphasized the difficulties associated with studying sexual orientation discrimination. In its 1991 study, the SF Committee stated that "collecting data documenting sexual orientation discrimination" was challenging "because many gay lawyers and law students are not willing to out themselves." Bar Assoc. of S.F., Creating an Environment Conducive to Diversity: A Guide for Legal Employers on Eliminating Sexual Orientation Discrimination, at 1 n. 1. In addition, "many law schools and legal employers [did] not collect statistics on the number of openly gay and lesbian students or employees." *Id.* This can reflect an unwillingness to address the absence of gay and lesbian lawyers. The Los Angeles County Bar Association experienced the same obstacles in conducting its 1995 study: "The Committee's

experience in conducting this study provided evidence of anti-gay bias within the legal profession. The average response rate to mail questionnaires is between 20 percent and 30 percent. The response rate here was significantly smaller [at 16 percent]. The Committee received many angry responses to the bar association's use of member dues to fund such a survey." 4 S. Cal. Rev. L. & Women's Stud. 305, 357-58. Other commentators have also expressed doubts as to whether studies can reveal an adequate picture of sexual orientation bias.⁷

Moreover, the "fact that it is often difficult to know who 'is' gay leads to" further "methodological concern about sexual orientation bias studies." William B. Rubenstein, *Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA Women's L.J. 379, 389 (1998). "The ambiguity of sexual orientation and its apparent invisibility present unique problems for those attempting to define what actions evidence bias and to assess the precise quantity of such bias." *Id.* at 390. Professor Kenji Yoshino's scholarship addresses one reason why gays and lesbians are sometimes "invisible," explaining that gays and lesbians often "cover" when inside institutions that express a higher value for "acting straight." Yoshino, *supra*, at 76-91. Yoshino identifies a pressure on

⁷ See, e.g., Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 61-66, 82-85 (2006); Bettina Boxall, *Statistics on Gays Called Unreliable*, L.A. Times, May 1, 1994, at A1, A3; Felicity Barringer, *Polling on Sexual Issues Has Its Drawbacks*, N.Y. Times, Apr. 25, 1993, 1, at 23 (reporting on a poll by Louis Harris & Associates).

gays and lesbians "to present [themselves] as identical to straights in all ways except orientation." *Id.* at 80. The methodological challenge in conducting such studies is to encourage gays and lesbians to be honest about their sexual orientation, which is best achieved through policies, such as nondiscrimination, the promote environments in which gays and lesbians feel comfortable and open.

4. In addition to conducting studies and fostering awareness concerning the challenges that gay and lesbian attorneys face, the California legal profession and the law schools there and elsewhere began to focus on other measures to redress the disparity in openly gay and lesbian lawyers. In 1989, the American Bar Association formally created *amicus* the National LGBT Bar Association, to promote justice in and through the legal profession for the gay and lesbian community in all its diversity. In the early 1990s, student groups like *amici* began to form on law school campuses to ensure that law schools would provide a welcoming environment for gay and lesbian students. As the legal profession has devoted tremendous resources to achieving civil rights victories for women and racial minorities, gay and lesbian interest groups within the profession have also won landmark victories in the courtroom, including in this Court, underscoring the profession's commitment to equality for gays and lesbians throughout society. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

5. While most if not all of the sexual orientation bias studies conducted in the 1990s had been conducted by state or local bar associations, the

judiciary has also shown a commitment to participate in implementing remedial measures. In 2001, the Sexual Orientation Fairness Subcommittee ("Fairness Subcommittee") of the Judicial Council's Access and Fairness Advisory Committee presented its Final Report on Sexual Orientation Fairness in the California Courts (the "California Courts Report").⁸ The California Courts Report study is the most comprehensive study of sexual orientation bias ever undertaken within an American court system.

In and of itself, the mere undertaking of such a study by the judiciary is a promising sign for gay and lesbian attorneys. The findings contained in the California Courts Report, however, demonstrate that there is still much to be accomplished to eradicate sexual orientation bias in the legal profession. The Fairness Subcommittee elicited feedback from five focus groups consisting of attorneys conducted in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles. California Courts Report, at 1. It also sent surveys to two groups of individuals: (i) gay and lesbian court users; and (ii) court employees, irrespective of their sexual orientation. *Id.* The study showed that homosexual court users and employees in the California court system continue to face significant bias. For instance, fifty-six percent of the gay and lesbian respondents "experienced or observed a negative comment or action toward gay men or lesbians." *Id.* at 2. "One out of every five court employee respondents heard derogatory terms,

⁸ Available at <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf>.

ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees." *Id.* at 3. Moreover, as in other earlier studies, the Fairness Subcommittee noted that the "survey generated a number of negative responses to the survey itself. These negative statements underscore some of the findings from the survey, which indicate that some court employees are unconcerned or hostile with respect to sexual orientation issues in the courts."⁹ *Id.* at 13.

In a 2007 Report¹⁰, the Equality Subcommittee of the San Francisco Bar Association ("Subcommittee") acknowledged the tremendous advances legal employers have made in creating hospitable workplaces for gay and lesbian attorneys. Subcommittee, Report on Lesbian, Gay, Bisexual, and Transgender Issues, at ii (2007). The Report, however, noted a troubling statistic: according to a

⁹ The Report includes a sampling of those responses: "I have received your survey on sexual orientation and found it to be degrading and offensive. . . . I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel."; "I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians."; "I, as a heterosexual, am getting a little tired of the whole hoo-haw and feel that if any individual thinks he/she is being mistreated, he/she should bring this to the attention of the appropriate authority." *Id.* at 13.

¹⁰ Available at http://www.sfbar.org/forms/diversity/lgbt_report_nov07_basf.pdf

study done the previous year, *none* of the 155 gay and lesbian attorneys who indicated having experienced workplace discrimination reported such mistreatment to supervisors, possibly out of fear of not being taken seriously or, worse, out of fear of negative repercussions in the workplace. *Id.* at 2 (citing Challenges to Employment and the Practice of Law Facing Attorneys from Diverse Backgrounds, State Bar of California, at 17 (2006)¹¹). “By contrast, 51 percent of female lawyers, 40 percent of lawyers over 40 years old, and 52 percent of minority lawyers who felt they had experienced discrimination did report it to management.” *Id.*

6. On a more positive note, a 2010 study shows that California's major law firms are making substantial progress in increasing representation of gay and lesbian attorneys. The percentage of self-identified gay and lesbian attorneys (partners, associates, and of counsel) in major California firms exceeds the estimated percentage for major law firms in the country (3 percent vs. 2 percent). California Law Firm Critical Mass Best Practices, Diversity Research Study Report, January 18, 2010, http://www.talentadvisoryboard.com/TAB_-_Fenwick_Critical_Mass_Report_-_Final.pdf. In addition to good mentoring programs, pro bono work on civil rights cases and pro bono representation of clients involved in gay and lesbian related matters have been successful in bolstering a firm's reputation as a

¹¹ Available at http://calbar.ca.gov/calbar/pdfs/reports/2006_Diversity-Survey-Report.pdf

place that welcomes diversity, which in turn attracts diverse attorneys.

* * *

While the legal profession, both in California and beyond, has seen success internally in the number of gays and lesbians that are now openly represented in its ranks, major challenges remain. Discriminatory conduct towards, and attitudes about, gay and lesbians remains all too prevalent, and gay and lesbian attorneys remain concerned about whether their sexual orientation will be harmful to their career. The legal profession has an important interest in remedying any remnants of discrimination in its own ranks based on sexual orientation. That interest is furthered at the law school level through policies adopted by schools like Hastings that clearly prohibit discrimination on the basis of sexual orientation.

3. Despite Recent Improvements, Law Schools Must Continue and Improve Their Efforts to Promote a Welcoming Environment for Gay and Lesbian Students

Like in the legal profession generally, law schools across the country have undertaken measures to promote tolerance and inclusion for -- along with other protected groups -- gay and lesbian students. Now "[v]irtually every American law school has a nondiscrimination policy that forbids discrimination on the basis of . . . sexual orientation," among other protected characteristics. Pamela S. Karlan, *Compelling Interests/Compelling*

Institutions: Law Schools as Constitutional Litigants, 54 UCLA L. Rev. 1613, 1629 (2007). The Association of American Law Schools has formalized nondiscrimination as a requirement for member schools. See Ass'n of Am. Law Sch., 2008 Handbook §6-3(a) (2008), available at http://www.aals.org/about_handbook_requirements.php#6 ("A member school shall provide equality of opportunity in legal education for all persons, including . . . applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of . . . sexual orientation.").

Over the past several years, the Law School Admission Council (LSAC) conducted a series of surveys to quantify how well law schools are doing in creating welcoming environments for lesbian, gay, bisexual and transgender ("LGBT") students. The LSAC effort consisted of three parts. First, LSAC asked all students in designated first-year classes to identify themselves by a number of categories, including ethnicity, sex, political beliefs, age, sexual orientation, and sexual identity (the "Climate Survey"). *The Climate in Law Schools for GLBT Persons: Results from a Survey of Law Students*, Law School Admissions Council, at 9 (April 2006). Second, the Subcommittee initiated a national survey specifically directed to LGBT law students (the "LGBT Law Student Survey"). Third, the LSAC held small focus groups to solicit narrative responses to a series of questions posed during personal discussions. Kelly Strader et al., *An Assessment of the Law School Climate for GLBT Students*, 58 J. Legal Educ. 214, 216-17 (2008).

As the LGBT Law Student Survey revealed, most law schools now have an LGBT student organization on campus. 93.7 percent of students self-identifying as LGBT law students reported a LGBT student organization at their law school. *Id.* at 229 (2008). LGBT participants in the survey recognized that the existence of a LGBT student organization "is an important criterion for assessing the law school climate for [LGBT] students." *Id.* at 228-29.

Another criterion that surveyed students identified to gauge the extent to which a law school climate is welcoming for LGBT students is whether LGBT issues are meaningfully represented in course offerings. *Id.* at 223. The LGBT Law Student Survey revealed that over half (60.7 percent) of law schools have courses on law and sexuality or some other course in which a primary focus is LGBT legal issues. *Id.* at 223-24.

While law schools have taken steps to create an inclusive environment, there is still much work to be done. Despite the fact that nearly two-thirds of LGBT students are enrolled at law schools that offer courses relating to the law and sexuality, less than half of all LGBT students (43.8 percent) reported feeling "very comfortable" discussing LGBT issues in the classroom. *Id.* at 225.

Even more troubling, the empirical evidence shows that there is still significant discrimination against gay and lesbian students at law schools. 23.6 percent of LGBT students who were questioned as part of the Climate Survey reported that they had witnessed discrimination based on sexual

orientation; 23.5 percent had experienced such discrimination themselves. *The Climate in Law Schools for GLBT Persons*, at 9. Those percentages were the highest of all affiliation groups identified by the survey. By comparison, 15.9 percent of racial-ethnic minority students; 14.7 percent of socioeconomically disadvantaged students; and 7.0 percent of women students reported experiencing discrimination because of their status as a member of the affiliation group. *Id.* As the data reveals, nearly one in four LGBT students in law school will witness direct discrimination against the subject as the result of his or her sexual orientation. Likewise, nearly one in four will directly experience discrimination based on sexual orientation. Discrimination is not as pervasive against any other group.

The continued existence of discrimination and other unwelcoming aspects at certain law schools is dissuading a significant number of prospective law students who are LGBT from applying to or from matriculating at those schools. With respect to deciding where to apply, LGBT students included three law school climate issues in their top ten issues that were not included by non-LGBT students. All three issues deal with the environment of the law school: friendliness to LGBT students; diversity; and friendliness to women. Strader, *An Assessment of the Law School Climate for GLBT Students*, at 233. Because, rightfully so, LGBT prospective students take these issues seriously, the evidence reveals that LGBT students (at least those who feel comfortable and confident enough to self-identify as such for an LSAC survey) tend to gravitate towards certain

schools and away from others. In the Climate Survey, the percentage of LGBT students at individual schools ranged from zero to 10.9 percent. *The Climate in Law Schools for GLBT Persons*, at 2. Because gay and lesbian applicants strongly consider how welcoming the schools' environment will be to them when deciding which school to attend, and because certain schools already are known for a welcoming environment while others are not, the prophecy of certain schools being non-welcoming becomes self-fulfilling. Individual law schools, in order to affect a change in the way gay and lesbian students regard their school, must affect and enforce policies that do not allow these stigma to persist.

* * *

California, in light of its long history of discrimination against gay and lesbian people, has a strong interest in responding to these disturbing statistics and in training its future lawyers in safe, welcoming environments. Efforts by California law schools, like Hastings, to address persistent problems related to the comfort level of gay and lesbian students in law school are not only reasonable, they are crucially important to ensuring diversity among the future members of the profession.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that this Court should affirm the result reached below by the United States Court of Appeals for the Ninth Circuit.

March 15, 2010

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