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, THE NATIONAL LGBT BAR ASSOCIATION LAW STUDENT DIVISION AND 55 LGBT LAW STUDENT ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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March 15, 2010

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INTEREST OF *AMICI*[1]

Amici, the National LGBT Bar Association, the National LGBT Bar Association Law Student Division, and the 55 LGBT law student groups listed in the Appendix, are organizations 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* and their members work to 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 in which 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 promoting the interests of *all* law students, by fighting the persistent discrimination that unfortunately continues to exist at the nation's law schools.

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[1] *Amici* have obtained written consent from all parties to file this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part. 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 a law school, in an attempt to ensure that all students—including LGBT students—have equal access to registered student groups, can adopt a policy that does no more than prohibit discrimination based on a law student's status, including his or her sexual orientation, or beliefs. To hold that a law school cannot apply this basic principle, but must *subsidize* groups that engage in discrimination, would ignore the strong interests of the law school, the legal profession and society at large in promoting equal treatment without regard to sexual orientation.

SUMMARY OF ARGUMENT

The University of California Hastings College of the Law ("Hastings" or "Law School"), a state actor, has adopted a nondiscrimination policy that requires all recognized student groups to 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 certain limitations on conduct and speech. Here, the Law School has not exceeded its discretion.

As an initial matter, the Law School's nondiscrimination policy is not a restriction on speech, but rather a generally applicable restriction on the *act* of discrimination. But even if it were viewed as a regulation of speech, the policy passes muster because it applies neutrally to all groups without regard to the viewpoint of the speaker and it

is "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 addressing discrimination based on sexual orientation, in light of the State's unfortunate history of discrimination against gays and lesbians. 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 is also consistent with the legal profession's important interest in reducing discrimination in its own ranks. The profession has taken steps to improve the status of gays and lesbians in the practice of law. But a great deal more work remains. According to a recent study, nearly one out of four LGBT first-year law students experiences discrimination in law school. *See infra* Part II.B.3. This Court should not force Hastings and other law schools that wish to provide welcoming, discrimination-free environments for all students, including gay and lesbian students, to subsidize discrimination against their own students.

ARGUMENT

I. THE REGISTERED STUDENT ORGANIZATION PROGRAM IS A LIMITED PUBLIC FORUM, IN WHICH THE LAW SCHOOL MAY IMPOSE REASONABLE, VIEWPOINT-NEUTRAL RESTRICTIONS ON CONDUCT.

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." JA 220 ¶¶ 15-16. 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 220 ¶ 15. 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 organizations ("RSOs") from its general nondiscrimination policy. Rather, the RSO program requires that the bylaws of all RSOs make clear that they will abide by the policy in their membership decisions. *Id.* at 221 ¶ 17. And reasonably so. The RSO program is an extension of the classroom education and professional training that the Law School provides. 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 & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (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. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 46 (1983); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 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 instituted the RSO program, it created a limited public forum to complement the in-class education that its students receive. *See* JA 349 ¶ 4 ("[S]tudent organizations provide Hastings students with opportunities to

pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience."). 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 [its forum] 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; *see also Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49.

The Law School has made it clear that RSOs 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 rules. As outlined in the Handbook for Student Organizations, which includes "Excerpts of Policies and Regulations Applying to College Activities, Organizations and Students":

> "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.

Groups like Petitioner, even though not recognized as RSOs, may apply to use classrooms on campus for their activities, Pet. App. 7a-8a, and there is no evidence in the record that any non-registered group has ever been denied access on the Law School campus. The Law School has decided that it will provide *additional* access and greater resources to those groups that apply to become RSOs, conform to the Law School's rules and further its educational interests. After all, whatever else is true about the steps the Law School can and should take to combat discrimination, the Constitution does not require it to subsidize groups that engage in discrimination. *See* Hastings Br. 51-54.

II. THE LAW SCHOOL'S POLICY IS VIEWPOINT-NEUTRAL AND REASONABLE IN LIGHT OF THE PURPOSE OF THE FORUM.

Even were it the case that the Law School's policy effected a restriction on speech, not conduct,[2]

[2] As the district court recognized, Pet. App. 24a-27a, and as we argue below, *see infra* Part II.A.2, Hastings' policy should be viewed as a restriction on the conduct of student groups in the forum. Because Hastings' policy satisfies the standard that this Court has used to evaluate limited public forums for speech, it *a fortiori* satisfies the standard for limits on expressive conduct articulated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

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. *Lamb's Chapel*, 508 U.S. at 392-93. Both prongs of the test are met here.

A. The Law School's Policy Is Viewpoint-Neutral.

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

1. Petitioner enjoys substantial protection to express its moral disapproval of homosexuality. Ultimately, however, the Law School is permitted to prohibit discriminatory *conduct* within its voluntary, subsidized RSO program. This Court has repeatedly recognized that, while the First Amendment protects a particular subject or opinion, the same protection is not afforded to all of its associated behaviors and modes of delivery. *Hill v. Colorado*, 530 U.S. 703, 735-37 (2000) (Souter, J., concurring); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758, 769-770 (1994); *O'Brien*, 391 U.S. at 376-77.

2. This Court has also repeatedly held that antidiscrimination laws regulate conduct, not speech. *See*, *e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (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. U.S. 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 & Institutional Rights, Inc.*, 547 U.S. 47, 60 (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 from the laws that this Court has already held to be regulations of conduct. Just like those laws, Hastings' nondiscrimination policy targets conduct, as it merely seeks to ensure that RSOs like Petitioner Christian Legal Society ("CLS") do not engage in the *act* of discrimination, regardless of the viewpoint they would express.

By the same token, a registered 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 that has been recognized by the Law School exclude heterosexuals on the belief that the message of "gay pride" would be diluted by their presence. In short, *no* group that operates within the RSO program, and receives the benefits of that official affiliation with the Law School, can express

its adopted viewpoints through the exclusion of others.

3. As the District Court recognized, by arguing that CLS seeks to exclude homosexuals in order 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 the viewpoint of Petitioner or any particular group. 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*, 512 U.S. at 762-63 (a prohibition on demonstrating outside an abortion clinic was not viewpoint-based, even though the injunction only applied to abortion protestors).

B. The Law School's Policy Is Reasonable In Light Of The Law School's Purpose In Establishing The RSO Program.

Studies show that gay and lesbian law students continue to experience discrimination in law school, and perceive that law schools are not uniformly welcoming to gay and lesbian people. *See infra* Part II.B.3. Through adoption of its nondiscrimination policy, Hastings has made it clear that it will not subsidize or tolerate acts of discrimination towards its students, including based on sexual orientation. The policy applies to *all* those who act on behalf of the Law School, including faculty, administration and RSOs. It does not apply to students who organize outside the reach of the RSO program,

where their conduct is not Law School-sponsored and therefore not subject to the policy.

By adopting an "open-membership policy" with respect to its RSO program, Hastings has made it 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 various areas of legal study and practice—is an extension of the legal education that the Law School offers its students in the classroom. The reasonableness of the Law School's decision to provide these opportunities on an equal footing to all students, and, in particular, without regard to sexual orientation, cannot seriously be questioned. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (stating that the Court will defer to "[t]he law school's educational judgment that . . . diversity is essential to its educational mission").

Furthermore, the Law School's refusal to allow discrimination in the RSO program 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 specifically, has sought to eradicate. The Law School's nondiscrimination policy is consistent with, and furthers, that effort. *See infra* Part II.B.1.

The Law School's nondiscrimination 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* Law School-sponsored actors 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. Studies conducted by California bar associations and the judiciary have shown the existence of significant bias in all aspects of the profession, including hiring, advancement and compensation of gay and lesbian attorneys, and demonstrate that gay and lesbian attorneys continue to experience discriminatory attitudes or treatment from co-workers or clients. A policy that seeks to instill the value of nondiscrimination in law students furthers the goal of the legal profession to remove the remnants of discrimination from its midst. *See infra* Part II.B.2.

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 nearly exclusive avenue by which to enter the profession—to provide a welcoming environment for all students, including gays and lesbians. The Law School's commitment to seeking equal treatment for all law students, without regard to sexual orientation, rather than subsidizing discrimination against some of its students, cannot be second-guessed as an unreasonable path towards that goal. *See infra* Part II.B.3.

1. The State Of California Has An Interest In Prohibiting Discrimination Based On Sexual Orientation.

The Law School's nondiscrimination policy reflects and serves the interest of the University of California, and the State of California generally, in ensuring equal treatment to all students 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 Cal. L. Rev. 1785 (2009) ("Eskridge, *Foreword*"), gays and lesbians in the State of California have endured a history of cruel discrimination, which went unaddressed until the 1970s. California has since adopted anti-discrimination laws to address that history, including a law prohibiting sexual orientation discrimination "in 'any program or activity conducted by any postsecondary educational institution' that receives [State funding]." *See* Hastings Br. 33-34 (quoting Cal. Educ. Code § 66270; Cal. Gov. Code § 11135(a)). Consequently, State law *requires* the Law School to ensure that no registered student group discriminates on the basis of sexual orientation. *Id.* In light of the general State prohibition on discrimination in schools—and the history that provides the backdrop for that prohibition—there is no basis on which to view the Law School's policy mandating simple nondiscrimination as anything but "reasonable."

1. In 1850, California criminalized the act of sodomy—which the legislature then characterized as "[t]he infamous crime against nature." Eskridge,

Foreword, at 1789 (citing 1850 Cal. Stat. 234 § 48). However, because of the difficulty of convicting consenting adults for private acts, there were very few sodomy convictions before 1890. *Id.*

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. *Id.* at 1790. The public considered homosexuals to be "mental inverts" and "degenerates," "devils" and "sodomites," who violated natural law and threatened the "fabric of society." *Id.* at 1789. 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. *Id.* at 1790. The police also spied on homosexuals in their own homes. *Id.* at 1792.

Licensed professionals, including lawyers, doctors, dentists and teachers, could be subjected to disciplinary action upon conviction for a sex crime, even when the crime was based on consensual conduct. *Id.* at 1794. After 1947, gays and lesbians convicted of sodomy in California were required to register as sex offenders with the police in their local jurisdictions. *Id.*

Until 1952, the sodomy laws of California imposed a maximum possible sentence of 15 years for first time offenders and second-time sodomy 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.* at 1794. In addition, those convicted who failed to register as sex offenders were

subject to proceedings for indefinite commitment as "psychopathic offender[s]." *Id.* at 1793. By 1930, more than 7,000 people—many of them homosexuals—were categorized by the State as "moral or sexual pervert[s]" and underwent forced sterilization procedures. *Id.* at 1792.

In 1954, California opened the Atascadero Hospital, which experimented with new theories of treating "sexual psychopaths." *Id.* at 1793. Gay inmates were subjected to horrific "therapies" such as lobotomies and electric and pharmacological shock in order to "cure" them of their "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 as applied to consenting adults. *Id.* 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.* at 1798. 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.* It was not until 1975 that the California legislature repealed the sodomy laws as they applied to consenting adults. *Id.*

3. During this period, the California courts intervened in support of preventing discrimination against gays and lesbians. In 1969, the California Supreme Court held that a public school teacher could not be terminated based only on the fact that

he was gay without a showing that he was unfit to teach. *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969). In 1979, the California Supreme Court narrowed the State's lewd vagrancy law, after finding it had been discriminatorily used to arrest gay men who accepted invitations to consensual activities that posed no legitimate threat to public order. *Pryor v. Mun. Ct.*, 599 P.2d 636, 645, 647-48 (Cal. 1979).

In 1979, Governor Jerry Brown issued an executive order barring sexual orientation discrimination against state employees. Eskridge, *Foreword*, at 1801. That year, the California Supreme Court held that the California 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. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

During this time, new ordinances barring discrimination by private employers based on sexual orientation were enacted by city councils all over California: San Francisco (1978), Los Angeles (1979), Oakland (1984), Santa Monica (1984), Sacramento (1986), Long Beach (1987) and San Diego (1990). Eskridge, *Foreword*, at 1804-05.

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Against this backdrop, in 1990, Hastings adopted its nondiscrimination policy, prohibiting discrimination based on a number of classifications, including sexual orientation. Then, as today, the policy provided a simple assurance that gay and

lesbian students would receive equal access to all facets of the education offered by the Law School.

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 limiting 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 training lawyers who will, as lawyers have historically done, serve society's interest in nondiscrimination), a law school's decision to adopt a robust nondiscrimination policy must not be second-guessed as unreasonable. As this Court recognized in *Grutter*:

> "[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."

539 U.S. at 332. A nondiscrimination policy, like the Hastings policy, categorically applies to *all* actors. It does not promote or restrict any particular group and aptly reflects the central feature of equal access for all that this Court has recognized as an aspiration of the profession.

1. 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, gay and lesbian lawyers were forced to hide their sexual orientation, often on pain of being denied admission into, or being disbarred from, the practice of law.[3]

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[3] *See, e.g.*, *State ex rel. Fla. Bar v. Kimball*, 96 So. 2d 825 (Fla. 1957) (per curiam). After being disbarred in Florida, Mr. Kimball's application for admission to the New York bar was also denied, and the denial was upheld by the Appellate Division. *In re Kimball*, 339 N.Y.S.2d 302 (N.Y. App. Div. 1973) (per curiam). The New York Court of Appeals subsequently reversed, offering a seemingly mixed verdict on whether the bar could and should consider a lawyer's sexual orientation and conduct: "While [Kimball's] status and past conduct may be now and has been in the past violative of accepted norms, they are not controlling, albeit relevant, in assessing character bearing on the right to practice law in this State." *In re Kimball*, 301 N.E.2d 436, 436 (N.Y. 1973) (per curiam). It was not until 1978 that the Florida Supreme Court held that an "applicant with an admitted homosexual orientation" could be admitted to the bar, but explicitly left open the "circumstance where evidence establishes that an individual has actually engaged in homosexual acts." *In re Fla. Bd. of Bar Exam'rs*, 358 So. 2d 7, 8 (Fla. 1978) (per curiam).

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% of the states," even if "such an investigation would be unlikely to lead to a denial of admission." William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 Hastings L.J. 1101, 1110 (1997) (citing Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 532-33, 580-81 (1985) ("Rhode, *Moral Character*")). In 1981, an applicant to the Florida bar who reported having been excluded from military service on grounds of homosexuality was subjected "to an hour and a half of 'every tricky question about his sex life [the bar examiners] could dream of.'" *Id.* at 1110-11 (citing Rhode, *Moral Character*, at 580-81 & n.422).

Unsurprisingly, discrimination against gay and lesbian lawyers strongly affected their ability to be open about their sexual orientation. In a 1989 interview with the New York Times, Justice Richard Failla, the first openly gay man to serve on the New York Supreme Court, reflected on his decision to "come out" in the 1970s: "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." E.R. Shipp, *Homosexual Lawyers Keep Fighting Barriers*, N.Y. Times, Feb. 3, 1989, at B11.

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 a study on the issue of sexual orientation bias in the legal profession.[4] The S.F. Committee identified broad problems in three categories: (i) antidiscrimination policies; (ii) recruitment and hiring; and (iii) retention, advancement and compensation. 1991 S.F. Report at 4-12.

Many employers did not include explicit prohibitions against sexual orientation discrimination in their antidiscrimination policies, thus "fail[ing] to send a clear message to their employees that manifestations of hostility and prejudice toward gay men 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.* at 5-6. The S.F. Committee also learned of occurrences where interviewers made overtly anti-gay comments or alienated gay and lesbian

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[4] Bar Association of San Francisco, *Creating an Environment Conducive to Diversity: A Guide for Legal Employers on Eliminating Sexual Orientation Discrimination* (1991) ("1991 S.F. Report"), *available at* http://LGBTbar.org/documents/AGuideforLegalEmployersonEliminatingSexualOrientationDiscrimination.pdf.

applicants through particular lines of questioning. *Id*. at 6-8.[5]

More generally, employers were found to have failed to create a hospitable workplace for gays and lesbians. *Id*. at 8-12. Lawyers were subject to pressures to remain in the "closet," and some employers insisted that openly gay and lesbian attorneys keep their personal life separate from their professional life, even "in situations in which heterosexual attorneys are expected to do the opposite." *Id*. at 9-10. Many employers catered to their clients' actual (or assumed) desires not to work with a gay or lesbian lawyer. *Id*. at 10-11. According to the S.F. Committee, this difficult work environment led to increased stress, a lack of productivity and, ultimately, the loss of valuable gay and lesbian employees. *Id*. at 10. In an effort to remediate these problems, the S.F. Committee made 23 recommendations which were adopted by the Bar Association of San Francisco. *Id*. at 12-21.

In 1994, the Los Angeles County Bar Association published a study concerning the experience of gays and lesbians in the legal profession.[6] The study

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[5] "In one reported 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." 1991 S.F. Report at 7.

[6] The Los Angeles County Bar Association Committee on Sexual Orientation Bias, *Report* (1994) ("1994 L.A. Report"),

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. 1994 L.A. Report at i.

Roughly 15% of respondents, both heterosexual and homosexual, reported that their employers engaged in some form of anti-gay discrimination in hiring. *Id.* at 5. Over 40% of respondents believed their work environment was less hospitable to gay and lesbian lawyers than to heterosexual lawyers. *Id.* at 8. Survey respondents perceived that sexual orientation discrimination negatively affected recruitment, hiring, work environment, assignments, performance evaluations, promotions, career advancement and compensation. *Id.* at 5. Notably, 66% reported that attorneys in their office made homophobic comments or jokes. *Id.* at 8. Approximately 15% of attorney survey participants said clients had expressed a desire not to work with gay or lesbian attorneys. *Id.* at 13. Over 12% reported that partners in their office had expressed the same preference. *Id.* Visibility remained a major issue for gay and lesbian respondents. Only 39% of participants were out to most or all of their coworkers. *Id.* at 27. Fewer than 10% were out to clients, judges or opposing counsel. *Id.* Many gay and lesbian participants believed that bringing a same-sex partner to an event would be harmful to their career. *Id.* at 30.

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available at http://www.LGBTbar.org/documents/LACountyBarAssociationCommitteeOnSexualOrientationBias.pdf.

Also in 1994, the State Bar of California Standing Committee on Sexual Orientation Discrimination released the results of a study derived from data gathered as part of the State Bar Demographic Survey, a survey of over 14,000 randomly-selected active members of the California bar.[7] According to the report, as of the time of the study, 50% of heterosexual attorneys over the age of forty made more than $100,000 per year, compared with only 25% of gay and lesbian attorneys. Rubenstein, *Some Reflections*, at 392-93. Similarly, 54% of heterosexual attorneys earned more than $100,000 while only 33% of gay and lesbian attorneys earned that much. *Id*. at 393. After ten years in the profession, 38% of heterosexual attorneys were law firm partners while only 26% of gay and lesbian attorneys were. *Id*.

3. In 1995, the San Francisco Bar Association surveyed the employers whose employees had participated in the study described in the 1991 S.F. Report in order to measure how successfully its 23 recommendations had been implemented.[8] The

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[7] William B. Rubenstein, *Some Reflections on the Study of Sexual Orientation in the Legal Profession*, 8 UCLA Women's L.J. 379, 388 (1998) (citing Susan H. Russell & Cynthia L. Williamson, SRI Int'l, SRI Project 2310, *1991 Demographic Survey of the State Bar of California: Comparisons of Gay and Non-Gay State Bar Members* (1994) ("1994 Cal. State Bar Report")) ("Rubenstein, *Some Reflections*").

[8] Committee on Sexual Orientation Issues of the Bar Association of San Francisco, *Bar Association of San Francisco Report on Employment Policies for Gay and Lesbian Attorneys* (1996) ("1996 S.F. Report"), *available at* http://

results, published in 1996, found that compliance with the 12 recommendations classified as directly dealing with "equal treatment" tended to be higher than compliance with the 11 recommendations classified as ones that "fostered diversity." 1996 S.F. Report at 57-58. Firms indicated that many of these latter recommendations were often considered unnecessary because of the generally nondiscriminatory workplace perceived to exist. *Id.* at 58. The recommendations addressing diversity and sexual orientation training had among the lowest compliance rates of the survey, with only a minority of firms stating that they provided such training. *Id.* at 2.

4. Studies of the discrimination against gays and lesbians are made difficult by the fact that gays and lesbians often hide their sexual orientation in environments where discrimination is present. Indeed, the "apparent invisibility" of sexual orientation "present[s] unique problems for those attempting to define what actions evidence bias and to assess the precise quantity of such bias." Rubenstein, *Some Reflections*, at 390.

The California studies emphasized this difficulty. In the 1991 S.F. Report, the S.F. Committee stated that the "collecti[on] of data documenting sexual orientation discrimination" was challenging "because many gay and lesbian law students and attorneys are reluctant to reveal their sexual orientation." 1991 S.F. Report at 1 n.1. In

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lgbtbar.org/documents/EmploymentPoliciesforGayandLesbianAttorneys.pdf.

addition, "many legal organizations [were] reluctant to collect data on the numbers of openly gay and lesbian law students and employees," *id.*, perhaps reflecting an unwillingness to identify or address the absence of gay and lesbian lawyers.

The Los Angeles County Bar Association experienced the same obstacles in generating the 1994 L.A. Report. It noted that its "own experience in performing this study suggested apathy, even hostility, concerning the subject of sexual orientation bias." 1994 L.A. Report at 43. Moreover, the bar committee that conducted the survey received angry responses from many members of the bar. *Id.* at 43-44.

5. In addition to conducting studies and fostering awareness concerning the challenges that gay and lesbian attorneys face, the California legal profession and law schools there and elsewhere began to focus on other measures to redress the disparity in the number of openly gay and lesbian lawyers. In 1992, the American Bar Association formally accepted *amicus* the National LGBT Bar Association as an affiliate. Also, 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 strived to win 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).

6. 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, a report on the role of sexual orientation discrimination in California's courts was published by the Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee ("Fairness Subcommittee").[9] The resulting 2001 California Courts Report "was among the first comprehensive, empirical studies of sexual orientation bias in an American court system." Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 Am. U. J. Gender Soc. Pol'y & L. 39, 40 (2002).

In and of itself, the mere undertaking of such a study by the judiciary was a promising sign for gay and lesbian attorneys. The findings contained in the Report, however, demonstrated that there was still much to be accomplished to eradicate sexual orientation bias in the California courts. 2001 Cal. Courts Report at 1. The Fairness Subcommittee, comprised of attorneys, sent surveys to two groups of

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[9] The Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee, *Final Report on Sexual Orientation Fairness in the California Courts* (2001) ("2001 Cal. Courts Report"), *available at* http://www.courtinfo.ca.gov/programs/access/documents/report.pdf.

individuals: (i) gay and lesbian court users and (ii) court employees, irrespective of their sexual orientation. *Id.* The study showed that gay and lesbian court users and employees in the California court system continued to face significant bias. For instance, "[f]ifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians." *Id.* at 3-4. "One out of every five court employee respondents heard derogatory terms, 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 4. Moreover, as in other earlier studies, the Fairness Subcommittee noted that the "survey . . . generated a number of negative responses. 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." *Id.* at 13.[10]

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[10] 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." 2001 Cal. Courts Report at 13.

7. More recently, in 2006, the State Bar of California published a report on the challenges faced by minorities in the legal profession, including the discrimination that LGBT attorneys continued to experience.[11] The Report described the results of the State Bar's online poll of California attorneys regarding discrimination they had personally experienced or witnessed. 2006 Cal. State Bar Report at 3. LGBT attorneys who responded to the survey reported facing discrimination and bias in the workplace, the courtroom and other legal venues. *Id.* at 16. They reported hearing inappropriate jokes and comments, experiencing denial of good work assignments, marginalization and receiving unequal pay. *Id.* Thirty-five percent of LGBT attorneys reported having been denied a promotion based on their sexual orientation. *Id.* at 17. Most notably, *none* of the 155 LGBT 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.* By contrast, 51% of female lawyers, 40% of lawyers over 40 years old, and 52% of other minority lawyers who felt they had experienced discrimination reported it to management. *Id.* Among the remedial measures to be implemented, each of the State Bar committees recommended "that enforcement of

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[11] The State Bar of California, *Challenges to Employment and the Practice of Law Facing Attorneys from Diverse Backgrounds* 17 (2006) ("2006 Cal. State Bar Report"), *available at* http://calbar.ca.gov/calbar/pdfs/reports/2006_Diversity-Survey-Report.pdf.

existing anti-discrimination statutes and policies would make a difference." *Id*. at 21.

* * *

While the legal profession, both in California and beyond, has seen success internally in the number of gays and lesbians who are now openly represented in its ranks, major challenges remain. Discriminatory conduct toward, and attitudes about, gays and lesbians remain all too prevalent, and gay and lesbian attorneys remain concerned about whether their sexual orientation will be harmful to their career. As bias against gays and lesbians continues to exist, 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 any basis, including on the basis of sexual orientation.

3. Despite Recent Improvements, Law Schools Must Continue To Improve Their Efforts To Promote A Welcoming Environment For Gay And Lesbian Students.

As 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, 1628 (2007). The Association of American Law Schools has formalized nondiscrimination as a requirement for member schools.[12]

Over the past several years, the Law School Admission Council ("LSAC") conducted a series of surveys to quantify the progress of law schools in creating welcoming environments for LGBT students. The LSAC effort consisted of three parts: (1) a national survey of first-year law students in their second semester, asking them to identify themselves by a number of demographic subpopulations, including ethnicity, gender, political views, age, sexual orientation and sexual identity;[13] (2) a national survey of all LGBT law students ("LGBT Law Student Survey"); and (3) a series of small focus groups used to solicit narrative responses. *See* Kelly Strader *et al.*, *An Assessment of the Law School Climate for GLBT Students*, 58 J. Legal Educ. 214, 216-17 (2008).

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[12] *See* American Association of Law Schools, *AALS Handbook* § 6-3(a) (2008), *available at* http://www.aals.org/about_handbook_requirements.php ("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.").

[13] Law School Admission Council, *The Climate in Law Schools for GLBT Persons: Results from a Survey of Law Students* at 2 (2006) ("Climate Survey"), *available at* http://lsacnet.lsac.org/publications/GLBT-Climate-Survey.pdf.

Approximately 93% of students who self-identified as LGBT law students reported that their law school had an LGBT organization. *Id.* at 229. LGBT participants in the survey recognized that the existence of an LGBT-friendly student organization "is an important criterion for assessing the law school climate for [LGBT] students." *Id.* at 228.

Another criterion that surveyed students identified to gauge the extent to which a law school climate is welcoming for LGBT students is whether issues related to sexual orientation are meaningfully represented in course offerings. *Id.* at 223. The LGBT Law Student Survey revealed that 60.7% of law schools have courses on law and sexual orientation or some other course in which a primary focus relates to legal issues facing LGBT people. *Id.* at 223.

While law schools have taken steps to create an inclusive environment, there is still much work to be done. Only 66.4% of LGBT law students report that they would be "very likely" to recommend their school to other LGBT students. *Id.* at 229. Fewer than half of all LGBT students (43.8%) reported feeling "very comfortable" discussing LGBT issues in the classroom. *Id.*

Even more troubling, the empirical evidence shows that there is still significant discrimination against LGBT students at law schools. Of the LGBT first-year law students who were questioned as part of the Climate Survey, 23% reported that they had witnessed discrimination based on sexual orientation; roughly the same number had experienced such discrimination themselves.

Climate Survey at 9. Those percentages were the highest of all affiliation groups identified by the survey. By comparison, 15.9% of racial-ethnic minority students, 14.7% of socioeconomically disadvantaged students and 7.0% of female students reported experiencing discrimination because of their status as a member of the affiliation group. *Id.* As such, it is unsurprising that many LGBT students perceive their law school environment to be unwelcoming, or that "a significant number of students reported going at least partially back into the closet upon entering law school." Strader *et al.*, *An Assessment of the Law School Climate for GLBT Students*, at 221.

The continued existence of discrimination, as well as other unwelcoming aspects of the environment at certain law schools, influence the selection of law schools to which prospective LGBT students apply. When considering where to apply, surveyed LGBT students identified three law school climate issues, not otherwise listed by heterosexual students, among their top ten issues: friendliness to LGBT students, diversity and friendliness to women. *Id.* at 233. It is thus unsurprising 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, at some schools, to over 10%. Climate Survey at 2.

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The refusal by law schools like Hastings to subsidize discrimination, in favor of a policy of allowing all students—including gay and lesbian students—to have equal access to school-recognized and school-funded activities is reasonable, and crucially important, in light of the legal profession's interest in ensuring diversity among its future members.

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.

Respectfully submitted,

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March 15, 2010

AMICI LGBT LAW STUDENT ORGANIZATIONS*

Albany Law School
OUTLAW
American University—
Washington College of Law
LAMBDA LAW SOCIETY
Arizona State University—
Sandra Day O'Connor College of Law
OUTLAW
Atlanta's John Marshall Law School
LAMBDA LAW SOCIETY
Boston University School of Law
OUTLAW
California Western School of Law
PRIDE LAW
Chapman University School of Law
OUTLAW
Chicago-Kent College of Law
LAMBDAS
Cleveland State University—
Marshall College of Law
ALLIES
Columbia Law School
OUTLAWS
Drexel University—
The Earle Mack School of Law
OUTLAW

*Appendix is a list of 55 LGBT law student organizations that join this brief as *amici* in their capacity as student organizations and offer the names of their affiliated law schools only for purposes of identification.

Georgetown University Law Center
OUTLAW
Golden Gate University School of Law
QUEER LAW STUDENTS ASSOCIATION
Hamline University School of Law
STONEWALL ALLIANCE
Hofstra University School of Law
OUTLAW
Indiana University—
Maurer School of Law
LAMBDA LAW SOCIETY
Indiana University School of Law-
Indianapolis
LAMBDA LAW SOCIETY
Loyola Law School-Los Angeles
OUTLAW
Loyola University-Chicago School of Law
OUTLAW
Northeastern University School of Law
QUEER CAUCUS
The Ohio State University—
Moritz College of Law
OUTLAWS
Pace University School of Law
LAMBDA LAW STUDENTS ORGANIZATION
Phoenix School of Law
JUSTICE FOR ALL
Saint Louis University School of Law
OUTLAWS
Santa Clara University School of Law
BGLAD
Seattle University School of Law
OUTLAWS
Southwestern Law School
OUTLAW

Stanford Law School
OUTLAW
Suffolk University Law School
QUEER LAW ALLIANCE
Texas Wesleyan Law School
OUT LAW
Thomas Jefferson School of Law
OUTLAW
Touro College—
Jacob D. Fuchsberg Law Center
AMICUS
University of Arkansas-Little Rock—
William H. Bowen School of Law
LAMBDA
University of California-Davis School of Law
LAMBDA LAW STUDENTS ASSOCIATION
UCLA School of Law
OUTLAW
University of Cincinnati College of Law
OUT & ALLIES
University of Colorado-Boulder Law School
OUTLAW
University of Connecticut School of Law
LAMBDA LAW SOCIETY
University of Idaho College of Law
OUTLAWS
University of Louisville—
Louis D. Brandeis School of Law
LAMBDA LAW CAUCUS
University of Minnesota Law School
OUT!LAW
The University of Mississippi School of Law
OUTLAW

University of the Pacific—
McGeorge School of Law
LAMBDA LAW STUDENTS ASSOCIATION
University of Pennsylvania Law School
LAMBDA LAW
University of San Francisco School of Law
PRIDE LAW
University of Wisconsin Law School
QLAW
Valparaiso University School of Law
LAMBDA STUDENT ASSOCIATION
Vermont Law School
ALLIANCE
Wake Forest University School of Law
OUTLAW
Washburn University School of Law
GAY-STRAIGHT LEGAL ALLIANCE
Wayne State University Law School
OUTLAWS
Western New England College—
School of Law
OUTLAW
Widener University School of Law
OUTLAW
William Mitchell College of Law
OUT!LAW
Yale Law School
OUTLAWS