No. 06-15956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

MARY KAY KANE, *et al.*
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of Plaintiff-Appellant
Supporting reversal

Steven W. Fitschen
Counsel of Record for Amicus Curiae
Regent University School of Law
1000 Regent University Drive
Virginia Beach, VA 23464
(757) 226-4584

Barry C. Hodge
National Legal Foundation
2224 Virginia Beach Blvd.,
Suite 204
Virginia Beach, VA 23454
(757) 463-6133

FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae Wallbuilders, Inc. has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages(s)

Cases

Statutes

Other Sources

INTEREST OF THE AMICUS CURIAE

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

The Brief is filed pursuant to consent by Counsel of Record for all parties.

ARGUMENT

I. THIS COURT SHOULD FIND THAT HASTINGS' POLICY VIOLATES THE FREE EXERCISE CLAUSE BECAUSE HASTINGS' POLICY IS HOSTILE TOWARDS RELIGION.

This case is about the University of California, Hastings College of the Law's deliberate choice between encouraging religion, being neutral to religion, or being hostile to religion. When the school chose to enact the Nondiscrimination Policy of its Law School's Policies and Regulations Applying to College Activities, Organizations and Students, Hastings could have included or excluded protection on the basis of sexual orientation under that Policy. Excluding sexual orientation–and thereby not compelling Christian student groups to accept integration of practicing homosexuals into their leadership–could arguably be characterized as encouraging religion or as being neutral towards religion. While

your *Amicus* believes that the better characterization is that exclusion of homosexual protection would have constituted neutrality, neither characterization is problematic since either would be permissible under the Supreme Court's Religion Clause jurisprudence.

First, it is a First Amendment commonplace that government should be neutral towards religion. *See, e.g., Good News Club v. Milford Cent. Sch*., 533 U.S. 98, 114 (2001); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 215-18 (1963).

However, the Supreme Court has not construed the neutrality principle as antithetical to encouraging religion, at least in certain senses of that word. And this is not surprising, for as this Court stated in a much-cited passage from its opinion in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "[w]e are a religious people whose institutions presuppose a Supreme Being."

Specifically, the following words have appeared in no less than ten Supreme Court opinions by the following justices: "When the state encourages religious instruction . . . it follows the best of our traditions." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, J.J., & Rehnquist, C.J., concurring in the judgment in part and

dissenting in part) *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, J.J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, J.J., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman,* 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, J.J.); and *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, J.J.).[1]

What the Supreme Court has ruled out is hostility towards religion. In each of the "neutrality" cases cited above, hostility is painted as the opposite of neutrality; and in each of the "encouragement" cases cited above, excepting only *Lemon v. Kurtzman*, hostility is also set in juxtaposition to encouragement. Furthermore, while the prohibition on hostility may be more familiar in an

[1] All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

Establishment Clause context,[2] the Supreme Court has made it clear that the prohibition on hostility is also a stricture of the Free Exercise Clause. First, many cases cited above indicate that the prohibition on hostility arises from both of the Religion Clauses. Furthermore, and importantly for the instant case, the Supreme Court has stated that hostility is prohibited by the Free Exercise Clause alone.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), the Supreme Court stated that "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt." In *Lukumi*, Justice Souter noted in his concurring opinion that

> [t]here appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God.

Id. at 575-76 (Souter, J., concurring).

CLS is trying to fulfill its duty to its God by practicing "the highest standards of morality as set forth in Scripture." *Christian Legal Soc'y v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *11 (N. Dist. Ca. Apr. 17 2006). Hastings, by demanding that CLS refrain from its high moral standards, has demonstrated

[2] One *very* rough indicator of this fact can be demonstrated by searching this Court's opinions electronically. Searching for the words "hostile" and "hostility" in the same sentence with "Establishment Clause" produces five times as many results as when searching for those words in the same sentence with "Free Exercise Clause."

hostility toward actions carried out pursuant to that duty. Since the Free Exercise Clause preserves CLS right to engage in activities of duty to one's God, Hastings' Policy violates the principles articulated in the *Lukumi* opinions.

While a main point of Justice Souter's concurrence was to question the validity of the rule laid down in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), that dispute need not be settled to recognize the validity of some aspects of Justice Souter's assertions. As Justice Souter stated, the scholarship on this point is not uniform. However, this Amicus brief will address those items that are less speculative and more easily demonstrated. On the basis of this historical data alone, it is clear that Hastings' Nondiscrimination Policy is hostile toward religion and thus violative of the Free Exercise Clause.

As Justice Souter noted, one of the indications that the Free Exercise Clause was designed to "preserve a right to engage in activities" is the development of the Clause. While the debates over the final language of the Free Exercise Clause are not recorded, one important change has been noted by many scholars: over the course of twenty drafts, the language of freedom of conscience was replaced with freedom to exercise religion. *See, e.g.*, John Witte, Jr., *Religion and the American* Constitutional Experiment: Essential Rights and Liberties 72 (2000). Not only religiously motivated beliefs, but also religiously motivated actions, were to be

protected from government hostility.

A. Hastings' Policy Violates the Free Exercise Clause Because the Framers Intended the Clause to Prohibit Hostility Against Religious Beliefs.

However, accepting this premise, one must look elsewhere for what exactly the Framers considered government hostility to be. As the Supreme Court has stated, it has "recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute [i.e., the Virginia Bill for Religious Freedom]". *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). James Madison's *Memorial and Remonstrance Against Religious Assessments* has similarly been cited as the document that cleared the way for the passage of the Virginia Statute. *Id*. Justice Douglas also specifically noted the *Memorial's* relevance to Free Exercise principles. *Walz v. Tax Com. of New York*, 397 U.S. 664, 706 (1970) (Douglas, J., dissenting).

1. *Virginia's Battle Over Religious Liberty Is a Leading Example of Hostility and its Lessons Should Be Applied in This Case.*

The background of these documents and the assessment controversy that engendered them has been well documented in the Supreme Court's opinions. *See, e.g., Everson,* 330 U.S. at 9-15. For purposes of this brief, it suffices to point out

that the *Virginia Statute for Religious Freedom*, written by Thomas Jefferson, shows at least one type of hostility that would come to be forbidden by the Free Exercise Clause. Although Jefferson's concern in this regard was with the establishment of religion, he implicitly had a concern for the hostility that "unestablished" sects would face. *See* Thomas Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).[3]

Perhaps the most telling passage from Jefferson's Bill is the second Article which states that "no man shall be . . . enforced, restrained, molested, or burdened, nor shall otherwise suffer on account of his religious opinions." *Id*. at 54. Jefferson, along with the Virginia General Assembly when it passed the statute in 1786, was concerned with acts that went beyond encouragement, created an establishment, and might subsequently lead to the suppression of the free exercise of religion. The kind of discouragement, or hostility, that the Bill prevented was, in part, one in which people would be "burdened."

Undeniably, Hastings' Policy burdens CLS. All student groups whose beliefs do not include a prohibition against homosexual behavior are given official recognition while such recognition is denied to CLS. The denial of official status is a result of the group's mission to abide by the Scripture's moral standards

[3] This document is often referred to as the Virginia Bill for Religious Liberty. These documents are, in fact, the same and will hereinafter be cited to as *The Virginia Statute of Religious Freedom* as titled in the *Annals of America*.

concerning homosexual practice–a quintessential exercise of religion.

Similarly, the *Memorial and Remonstrance* demonstrates a concern that the free exercise of religion not be burdened. As pointed out by Justice Thomas in *Rosenburger v. Rector and Visitors Of University of Virginia*, 515 U.S. 819, 854-55 (1995) (Thomas, J., concurring), Madison, at several points in the *Memorial* was concerned that some sects would be comparatively burdened by not being eligible for benefits extended to other sects. When speaking of the exemption made to the Quakers and Mennonites, Madison asked, "Ought their religions to be endowed above all others . . . ?" James Madison, *Memorial and Remonstrance Against Religious Assessments*, Article 4, *in* 3 *Annals of America* 16, 18 (1968). While various members of the *Rosenberger* Court differed over the proper reading of the *Memorial* as an insight into *Rosenberger's* Establishment Clause question, there are additional passages of the *Memorial* that are unambiguous with regard to the present Free Exercise question. In article 12 of the *Memorial*, Madison charges that "[i]nstead of leveling as far as possible every obstacle to the victorious progress of Truth, [it] . . . would circumscribe it with a wall of defence." *Id*. at 12-13. While this assertion certainly addresses Establishment Clause values, its broader implication is germane to Free Exercise values; government should not place obstacles in the path of the free exercise of religion, rather it should level such obstacles.

Hastings, in the instant case, has not leveled the playing field. Rather, the school has placed Christian student groups at a unique disadvantage by forcing them to make a mutually exclusive choice between the exercise of their faith and the attainment of recognition by the school. Such an obstacle demonstrates hostility towards CLS and thus violates the Free Exercise Clause.

2. *Joseph Story's View of the Free Exercise Clause Is Pertinent Because His Understanding Is That the Clause Allows Government Encouragement of Religion.*

As this brief has noted previously, the court has seen hostility and encouragement as opposites. Therefore, it is important to note that in Joseph Story's influential *Commentaries on the Constitution of the United States,* the connection between encouragement and the other Free Exercise values noted in this brief is explicitly stated. First, Story notes that "it is the especial duty of government to foster, and encourage [religion] among all the citizens." Joseph Story, *Commentaries on the Constitution of the United States* § 1865 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833). Then he notes that the Religion Clauses go beyond freedom of conscience to include action and that they contain an anti-leveling component:

> Probably at the time of the adoption of the Constitution, and of the amendment to it, now under consideration, the general if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state

> policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. Documents from Virginia's battle over religious liberty evince an attitude of prohibition towards government hostility.

Id. at § 1865.

The Supreme Court has noted that it has rejected this passage from Story to the extent that it limits encouragement to the Christian religion, *Wallace v. Jaffree*, 472 U.S. 38, 52 (1984). However, as we have seen earlier, the Supreme Court has also repeatedly stated the ongoing validity of state encouragement of religion. Similarly, Story's concern about the leveling of Christianity with other religions no longer animates Free Exercise jurisprudence, but the principle can be more broadly construed for the proposition that government need not level religion generally with irreligion nor eliminate religion from all aspects of public life.

Thus, in the instant case, Hastings' Policy fails to encourage religious exercise when viewed in this historic context. In fact, as noted it is hostile to it. Hastings' Policy goes beyond leveling religious student groups with other student groups by uniquely burdening Christian student groups. The other groups need not adjust religious, moral, or ethical values in order to achieve recognition as a Student Organization on campus. Because the Policy violates the above principles, it violates the Free Exercise Clause.

B. The Free Exercise Clause Prohibits Hostility Toward Religion as Reflected in the Constitution's Proscription of Religious Tests.

Finally, some insight into the animating principles of the Free Exercise Clause can be gained by looking to another provision of the Constitution, namely the third clause of Article VI, which prohibits religious tests for holding office. Again, one sees a proscription against hostility towards religion. The Framers were aware of the pitfalls that would accompany a nation that was hostile towards religious views. Adopting religious tests would allow those not as tolerant as the framers to "arm [themselves] with all the terrors of the civil power to exterminate those, who doubted [their] dogmas, or resisted its infallibility." Joseph Story, *Commentaries on the Constitution of the United States* § 1841 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833). Another explanation of this clause's principles was provided almost six years before its adoption. In the Virginia Statute of Religious Freedom, Thomas Jefferson said:

> the proscribing [of] any citizen as unworthy [of] the public confidence by laying upon him an incapacity of being called to offices . . . unless he profess or renounce this or that religious opinion is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right.

Thomas Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).

United States Supreme Court Chief Justice Oliver Ellsworth realized the damaging effects a religious test would have. Ellsworth called religious liberty an "important right of human nature." Oliver Ellsworth, *On a Religious Test for Holding Public Office*, *in*, 3 *Annals of America* 169 (1968). Ellsworth recognized that the right of a person to exercise his beliefs without government intrusion was a right that set the United States apart from other countries. In a letter, written during the period of the ratification of the Constitution, he gave perhaps the best description of this important right. Ellsworth wrote that if a person "be a good and peaceable person, he is liable to no penalties or incapacities on account of his religious sentiments; or, in other words, he is not subject to persecution." *Id*. at 170. He also recognized that this right of human nature limited the power that government could exercise over a persons' religious conscience, saying that government has "no right to set up an inquisition and examine into the private opinions of men." *Id*. at 172.

The prohibition of religious tests is an extension of the effect the framers wanted the Free Exercise Clause to have. A religious test would allow the government to not only discourage, but abolish the ability of certain religious persons to hold public offices. For example, as recognized by this Court, an adoption of a religious test in the form of clergy disqualification for political office would force those clergy to choose between religiously motivated conduct, i.e., the

free exercise of religion, and the right to hold public office. *See McDaniel v. Paty*, 435 U.S. 618 (1978).

In the present case, Hastings' Policy is hostile toward religion as applied. The school's Policy has created a general student recognition process for which CLS qualified. However, because of CLS's deeply held convictions about the practice of homosexuality, the recognition has been taken away. The Policy, in effect, has created a religious test similar to the clergy disqualification in *McDaniel*: CLS is forced to choose between upholding religious beliefs and the recognition as a Student Organization, just as the clergy's choice to hold public office or follow their religion. Since the Policy makes it uniquely impossible for CLS to qualify for generally available recognition, the Policy is hostile to religion and violates CLS's constitutional right to the free exercise of religion.

CONCLUSION

For the foregoing reasons, and for other reasons stated in the Appellant's brief, this Court should reverse the judgment of the District Court.

Respectfully Submitted,
this 6th day of October, 2006

_____
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
1000 Regent University Drive
Virginia Beach, VA 34545
(757) 226-4584

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of Wallbuilders, Inc. in the case of *Christian Legal Society v. Kane,* No. 06-15956, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on October 6, 2006, addressed as listed below. The required number of paper copies were filed in the same manner on the same date.

Steven H. Aden
Religious Liberty Advocates of the Christian Legal Society
8001 Braddock Road
Springfield, VA 22151

Counsel for Christian Legal Society Chapter of University of California, Hastings College of the Law,
Plaintiff-Appellant

Ethan P. Schulman, Esq.
Howard Rice Nemerovski Canady Falk
Three Embarcadero Center
San Francisco, CA 94111-4065

Counsel for Mary Kay Kane, in her official capacity as Chancellor and Dean of University of California, Hastings College of the Law, *et al*
Defendant-Appellee

_____

Steven W. Fitschen
Counsel of Record for Amicus Curiae
1000 Regent University Drive
Virginia Beach, Virginia 2364
(757) 226-4584