**No. 06-15956**

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

FRANK H. WU , ET AL.,
*Appellees*.

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

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

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Although the Supreme Court upheld the facial constitutionality of Hastings' all-comers policy, *all nine* justices expressly left open the possibility that the policy could be unconstitutional if it were selectively enforced—calling this "the pretext question." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2995 n.28 (2010) (hereinafter "*CLS*"). Justice Alito's dissenting opinion, of course, explained in great detail how CLS had "made a strong showing" of selective enforcement. *Id*. at 3017 (Alito, J., dissenting). But even Justice Ginsburg's opinion for the Court acknowledged the possibility of selective enforcement while declining to reach the issue. *Id*. at 2995. What is more, *all nine* justices observed that this Court had not previously addressed whether the all-comers policy was selectively enforced. *Ibid*.; *id*. at 3019 (Alito, J., dissenting). And so, the Supreme Court affirmed this Court's ruling that the all-comers policy is facially constitutional—but remanded for further proceedings, giving this Court a very specific directive: "On remand, *the Ninth Circuit may consider CLS's pretext argument* if, and to the extent, it is preserved." *Id*. at 2995 (emphasis added).

Remarkably, Hastings' chief response to CLS's motion is to claim that this Court somehow *may not* consider the selective enforcement issue, even if preserved. In other words, Hastings asks this Court to disregard the Supreme Court's instruction on remand. That invitation should be rejected, and the Supreme Court's directives should be followed: first, by deciding if the selective

enforcement issue was preserved; and second, if preserved, by resolving the substantive question of whether the all-comers policy has been selectively enforced or is otherwise pretextual.

## I. Hastings Cannot Use Law-Of-The-Case Doctrine To Nullify The Supreme Court's Remand Order.

The most "fundamental" reason Hastings gives for rejecting CLS's motion is no more than a thinly-veiled plea for this Court to disregard the Supreme Court's remand instructions. Opp. 14. Hastings claims, "Nothing in the Supreme Court's decision remotely calls into question this Court's prior disposition, which is law of the case." Appellees' Opposition to Motion to Remand to District Court for Further Proceedings (hereinafter "Opp.") 2. That is a remarkable assertion in light of the Supreme Court's finding that "[n]either the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy." *CLS*, 130 S. Ct. at 2995. With respect to selective enforcement, the Supreme Court unmistakably *did* call into question this Court's prior disposition: It found that the issue had not been addressed, and that it should be addressed on remand. The Court elaborated:

> When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves.

*Id*. at 2995 n.28. Remanding for consideration of the selective enforcement argument, the Court plainly indicated that the argument deserved further attention.

Hastings' position, however, turns the Supreme Court's finding on its head. Because this Court *should have* reached the selective enforcement issue—even if it did not—Hastings urges that the issue be treated as though it has already been decided. This is what Hastings artfully characterizes as a decision "by necessary implication." Opp. 16. But the Supreme Court made clear that such "implicative" treatment was insufficient, and the Court remanded for the express purpose of fully and definitively resolving the selective enforcement issue. This is hardly an instance, then, of "endless change" undermining the "finality and efficiency" of judicial decisions. Opp. 15. There has been no final resolution of the selective enforcement issue to the Supreme Court's satisfaction, and the scope of the proceedings on remand is limited to the terms of the Court's instruction.

Under these circumstances, the law-of-the-case doctrine hardly precludes this Court from addressing selective enforcement and, if anything, compels it to do so. Although the doctrine holds that "one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case," the issue here was *not* previously resolved—even if it should have been. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995). At best, this Court's previous decision simply assumed that the all-comers policy was being neutrally

enforced. Hastings admits as much, explaining that "this Court rested its disposition of CLS's appeal squarely on the parties' stipulation regarding Hastings' open membership policy." Opp. 9. The parties stipulated only to the fact that Hastings *had* an all-comers policy; they never stipulated that the policy was neutrally enforced. Excerpts of Record (hereinafter "E.R.") 341. As the Supreme Court's remand makes clear, the bare words of the stipulation cannot resolve the question of pretext. That Court read the stipulation, and if the words provided an answer to the question here, the Court would not have remanded.

Even more fundamentally, the law-of-the-case doctrine cannot bar consideration of selective enforcement because the Supreme Court *expressly directed* that the issue be decided on remand. The Supreme Court's mandate, in other words, is itself law of the case. Because the Supreme Court held that this Court can address the selective enforcement issue on remand, any conclusion that the issue cannot be addressed would violate the Supreme Court's order and would effectively seek to overrule it. The Supreme Court, however, has long warned that "whatever was before this court, and disposed of by its decree, is considered as finally settled." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). The Court of Appeals "cannot vary it, . . . or review it, even for apparent error." *Ibid.* Because the Supreme Court held that the selective enforcement issue could be

addressed on remand, "the circuit court is bound by the decree as the law of the case." *Ibid*.

## II. CLS Raised The Selective Enforcement Issue At Every Stage Of This Litigation.

The only threshold issue for this Court is whether CLS preserved its selective enforcement argument. Hastings addresses this decisive issue only in the final few pages of its response—and then, only half-heartedly.

After thoroughly reviewing the record, Justice Alito concluded that CLS preserved its selective enforcement argument: "CLS consistently argued in the courts below that Hastings had applied its registration policy in a discriminatory manner." *CLS*, 130 S. Ct. at 3005 n.1 (Alito, J., dissenting). Although declining to review the record itself, the majority did not dispute Justice Alito's finding. *Id*. at 2995. And in our motion to this Court, we explained in detail how CLS had raised selective enforcement both in the district court and on appeal. Mot. 5-9. Pointing to many examples in the record of Hastings' disparate treatment of other student groups, CLS argued unambiguously that "Hastings forbids student groups to organize around religious ideals, but allows groups to organize around other ideals." Brief of Appellant 57. Indeed, CLS devoted an entire section of its appellate brief to the argument that Hastings "treats similarly situated student organizations differently." *Id*. at 63. Hastings itself characterized this argument as

a "repeated allegation" in its response brief. *See* Brief of Appellees 31-32. At every stage, the record is replete with claims of selective enforcement.

Hastings' response confirms it. Hastings makes no effort to argue that the detailed recounting in Justice Alito's opinion and in our motion to this Court does not accurately reflect the record. Hastings does not even dispute the fact that CLS has consistently raised selective enforcement at every stage of this litigation. Rather, Hastings' only response is to suggest that the issue has not adequately been preserved because CLS did not use the term "pretext." Opp. 17. This is a meaningless semantic game. The terms "pretext" and "selective enforcement" are merely two different ways of saying the same thing.

## III. Further Proceedings Are Necessary To Resolve The Substantive Question Of Whether The All-Comers Policy Is Being Selectively Enforced.

The selective enforcement of a facially neutral rule governing access to a speech forum is unconstitutional. *See CLS*, 130 S. Ct. at 3016-3018 (Alito, J., dissenting). CLS has amassed a strong record showing that Hastings' asserted policy has morphed to suit the litigation demands of the moment, and that the policy Hastings purports to follow has not been neutrally enforced. Hastings attempts to avoid all of these issues by relying on the parties' joint stipulation. But as we have explained, CLS never stipulated that the all-comers policy has always been in force, or that it has been applied consistently to groups other than CLS.

Those non-stipulated issues may have been irrelevant to the Supreme Court's narrow holding that the all-comers policy is facially constitutional. *See CLS*, 130 S. Ct. at 2982 n.6 (treating as decisive the parties' "agreement that the all-comers policy *currently* governs"). They are highly relevant, however, to the selective enforcement question before this Court on remand.

Far from a freewheeling effort to "relitigate issues it has already conclusively lost," Opp.12, CLS's request for further proceedings is a wholly appropriate recognition of the fact that this appeal arises on cross-motions for summary judgment. Hastings has ignored this procedural posture, suggesting that CLS is asking for a "new trial" when in fact there has never been a trial in the first place. Opp. 1. Rather, because the district court granted summary judgment to Hastings and denied CLS's motion for summary judgment, this Court has three logical alternatives. First, if and only if the Court concludes that the record contains no facts from which a reasonable jury might conclude that Hastings has enforced its policy in a selective manner, it may affirm the district court's grant of summary judgment. Significantly, Hastings does not even propose this course of action; the record obviously contains at least enough evidence to preclude this course. Second, if the Court concludes that the record evidence conclusively shows that CLS was entitled to summary judgment, it may reverse the district court's denial of summary judgment to CLS and order that court to enter judgment

in favor of CLS. We discuss that course of action in Part A, below. Third, if evidence in the record permits but does not compel a finding of selective or discriminatory action, this Court should remand to the district court for trial. We discuss that course of action in Part B.

### A. Further briefing would establish that CLS is entitled to summary judgment.

As Hastings correctly points out, CLS has always maintained that there are no disputed material facts in this case: Hastings' shifting definition and inconsistent enforcement of its all-comers policy is obvious from the existing record. Further briefing would therefore demonstrate that CLS is entitled to summary judgment. The evidence of inconsistency and selectivity is formidable:

- CLS is the only student group at Hastings ever denied recognition. E.R. 348.
- Even CLS's predecessor was recognized for years, notwithstanding its use of a Statement of Faith, until the content of that belief statement was amended to address nonmarital sexual conduct. E.R. 341-42, 383.
- Hastings first announced its all-comers policy in the midst of litigation, after CLS had pointed out the discriminatory nature of its written policy. *CLS*, 130 S. Ct. at 3004 (Alito, J., dissenting).
- Hastings has never reduced its all-comers policy to writing, instead maintaining a written policy that singles out religious belief. E.R. 48.

- Hastings unveiled a new version of its policy yet again in its brief in the Supreme Court, now allowing student groups to discriminate on the basis of "conduct" and other factors. *CLS*, 130 S. Ct. at 3004 (Alito, J., dissenting).
- Other student groups have been recognized despite having by-laws limiting leadership or membership in ways that contradict the all-comers policy. E.R. 270-326.

All of this undisputed evidence demonstrates that Hastings' unequal application of its all-comers policy to CLS was unconstitutional. As Justice Alito put it, "If the record here is not sufficient to permit a finding of pretext, then the law of pretext is dead." *CLS*, 130 S. Ct. at 3018 (Alito, J., dissenting).

### B. Even if CLS were not entitled to summary judgment, disputed issues of material fact would require remand to the district court for further proceedings and trial.

But even if the evidence is not sufficient to compel a finding of selective enforcement on this record, it is surely enough to defeat Hastings' request for summary judgment. To defeat summary judgment, the non-movant need only establish that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also* Fed. R. Civ. P. 56. CLS has easily satisfied that standard with significant circumstantial evidence that the all-comers policy has been inconsistently defined and enforced. *Cf. Noyes v. Kelly Servs.*, 488 F.3d 1163 (9th Cir. 2007) (noting that plaintiff alleging

religious discrimination in employment faces no onerous burden to establish a triable issue of fact as to pretext). To rebut CLS's evidence of selective enforcement, Hastings has done little more than ask that it be taken at its word. Indeed, Justice Ginsburg's only response to Justice Alito's discussion of selective enforcement was to suggest that Hastings' dean is a "distinguished legal scholar" and a "well respected school administrator" whose "veracity" in announcing Hastings' all-comers policy should not be doubted. *CLS*, 130 S. Ct. at 2995 n.29. Perhaps so. But that is a classic credibility determination unsuited for the appellate courts and properly made only by a jury at trial. *See Liberty Lobby*, 477 U.S. at 255 (explaining that "[c]redibility determinations" are "jury functions"). At a minimum, then, the selective enforcement issue cannot be resolved against CLS on summary judgment, and CLS is entitled to a full airing of the issue in the district court.

## CONCLUSION

For the reasons explained above, CLS respectfully requests that this Court hold that CLS preserved the issue of selective enforcement or pretext. It also respectfully requests that this Court either order additional briefing on the issue, reverse the grant of summary judgment in Appellees' favor and remand for entry of judgment in favor of CLS, or reverse and remand to the district court for trial.

Dated: August 19, 2010.

Respectfully submitted,

s/ Gregory S. Baylor
Gregory S. Baylor
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2010, I electronically filed the foregoing REPLY TO OPPOSITION TO MOTION TO REMAND FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE SUPREME COURT'S INSTRUCTIONS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by United States Postal Service to the following non-CM/ECF participants:

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