CA No. 06-15956
DC No. 04-4484-JSW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

FRANK H. WU, et al.,

Appellees.

On Remand From The United States Supreme Court,
Reviewing Ruling of March 17, 2009, by Panel of
Chief Judge Kosinski, Judge Hug, and Judge Bea,
On Appeal From Judgment Of The United States District Court
For The Northern District of California,
Hon. Jeffrey S. White

APPELLEES' OPPOSITION TO MOTION TO REMAND TO DISTRICT COURT FOR FURTHER PROCEEDINGS

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INTRODUCTION

This case is here on remand from the United States Supreme Court. In its decision, the High Court affirmed this Court's holding that Hastings College of the Law's requirement that registered student organizations comply with the law school's open membership or "all-comers" policy is "a reasonable, viewpoint-neutral condition on access to the student-organization forum." *Christian Legal Society v. Martinez*, 561 U.S. ____, 130 S. Ct. 2971, 2978 (June 28, 2010). The Court declined to decide an additional argument that Appellant Christian Legal Society ("CLS") raised there after it had granted certiorari: that Hastings had used its policy as a "pretext" to "target" religious student groups such as CLS. 130 S. Ct. at 2982-84, 2995. The majority of the Court found that contention "runs headlong into the stipulation of facts [CLS] jointly submitted with Hastings at the summary-judgment stage," which unambiguously stated that Hastings' all-comers policy applies to all registered student organizations. *Id.* at 2982. Viewing that stipulation as "conclusive," the Court majority "reject[ed] CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written," and therefore declined to address CLS's arguments regarding that latter policy. *Id.* at 2983-84 & n.9. In particular, the Court declined to address CLS's "pretext argument" and instead directed that on remand, "the Ninth Circuit may consider CLS's pretext argument *if, and to the extent*, it is preserved." *Id.* at 2995 (emphasis added; footnote omitted).

By its motion ("Mot."), CLS now asks this Court to remand the case to the district court for further proceedings on "pretext," including reopened discovery and a new trial. Among other things, CLS wants to reopen the case and engage in broad-ranging discovery, such as "depositions of Hastings administrators and students, past and present." Mot. at 10. CLS bases its motion largely on observations in the dissenting opinion, largely ignores the majority's rejection of those very contentions, and completely

ignores the prior proceedings and disposition by this Court. Its motion should be denied, for two independent reasons.

First, while CLS styles its motion as "in accordance with the Supreme Court's instructions" (Mot. at 1), in fact it flies in the face of the express terms of the Supreme Court's direction that this Court, on remand, may consider CLS's "pretext argument" only "if, and to the extent, it is preserved." That carefully phrased mandate—which differs in important respects from the language that the Supreme Court customarily uses in remanding a case—instructs this Court that it may resolve CLS's "pretext argument" only if CLS *preserved* that argument in the lengthy litigation that preceded the High Court's decision. CLS's request that this Court remand the case to the district court so that it may seek to reopen discovery to engage in a free-ranging inquisition of "Hastings administrators and students, past and present" (Mot. at 10) and conduct a trial is flatly inconsistent with the High Court's narrowly limited mandate. And in any event, CLS did not preserve any "pretext argument"; indeed, it did not use the word "pretext" in its briefs to this Court on the prior appeal or even in the district court. *See* Part I, *infra*.

Second, and equally important, this Court and the district court have already conclusively decided against CLS the very issues it now seeks to pursue. Nothing in the Supreme Court's decision remotely calls into question this Court's prior disposition, which is law of the case. This Court could grant CLS's request only if it effectively concluded that its prior disposition of the case—a straight affirmance, with no remand for any further factual proceedings on pretext or anything else—was wrong, even though this Court *did* remand in *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009), for a similar factual inquiry, even though the applicability of the *Truth* case was specifically addressed by the parties in letter briefs and by this Court in its decision, and even though CLS did not challenge this Court's judgment in this case on the ground that a remand was necessary (for any reason) in a petition for rehearing or

in the Supreme Court. *See* Part II(A), *infra*. To the extent that CLS now seeks to recast this long-running litigation and raise additional factual or legal issues that it did not preserve on the prior appeal, it waived the right to do so, and is not entitled to a second bite at the apple. *See* Part II(B), *infra*.

For both of these reasons, the Court should deny CLS's motion to prolong this litigation by remanding it to the district court. Instead, it should direct the parties to file such supplemental briefs as it may deem necessary and then summarily reaffirm its prior ruling in Hastings' favor.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CLS brought this action seeking only forward-looking declaratory and injunctive relief and challenging the constitutionality of Hastings' open membership policy, which conditions public funding for and official recognition of student groups on their agreement to open eligibility for membership and leadership to all students. In an extensive joint stipulation of facts filed with the district court, in its briefs to that court and on appeal to this Court, and in its petition for certiorari to the United States Supreme Court, CLS repeatedly and consistently agreed that Hastings had implemented its written Nondiscrimination Policy by requiring all registered student organizations to comply with its open membership or "all comers" policy. Thus, CLS stipulated that "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, *regardless of [her] status or beliefs*." 130 S. Ct. at 2982 (emphasis added). As the High Court majority recognized, CLS's current argument is inconsistent with its prior stipulation, which is "conclusive." Moreover, the issue CLS now seeks leave to raise on remand already has been resolved conclusively against it by the district court on an undisputed factual record, and this Court's prior affirmance of the district court's judgment in that regard is law of the case. To the extent that CLS seeks to raise new issues that it did not

raise on the prior appeal, it waived the right to do so. Accordingly, there is nothing left to remand to the district court.

A. The Parties' Joint Stipulation of Facts and the Undisputed Record Before The District Court.

This Court decided this case in the prior appeal on the premise that "[t]he parties stipulate that Hastings imposes an open membership rule on all student groups–all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Memo. (Mar. 17, 2009). That premise was amply supported by the record before the Court, and was not challenged by CLS in a petition for rehearing to this Court or in its petition for a writ of certiorari to the Supreme Court.

In the district court, the parties entered into an extensive joint stipulation of facts for purposes of facilitating that court's disposition of the case on cross-motions for summary judgment. ER 335-425. In that stipulation, CLS agreed as follows:

> Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.

130 S. Ct. at 2982 (quoting Joint Stip., 341 ER ¶18). Likewise, CLS stipulated that "In order to become a registered student organization, a student organization's bylaws must provide that its membership is *open to all students* and the organization must agree to abide by the Nondiscrimination Policy." 340 ER ¶17 (emphasis added).

Indeed, at the hearing on the parties' cross-motions for summary judgment, in response to a question by the district judge regarding Hastings' application of its Nondiscrimination Policy, CLS's counsel read the first stipulation quoted above into the record and asserted that Hastings "does not have a nondiscrimination policy. It has a non-association policy" pursuant to which it "has

prohibited *every* registered student organization from making member selections based on beliefs." ER 628 (emphasis added).

Nothing in the record supports CLS's hindsight claim in the High Court that Hastings devised its all-comers policy as a "pretext" for discriminating against religious student organizations. CLS made no such argument in the district court or in this Court on the prior appeal; indeed, the term "pretext"—on which CLS focuses today—does not even appear anywhere in its lower court briefs. Moreover, as the Supreme Court majority observed, the parties' joint stipulation was "corroborate[d]" by substantial evidence in the record:

> The Law School's then-Chancellor and Dean testified, for example, that "in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." App. 343. Hastings' Director of Student Services confirmed that RSOs must "be open to all students"—"even to students who may disagree with [an RSO's] purposes." *Id.*, at 320 (internal quotation marks omitted). See also *id.*, at 349 ("Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization.").

130 S. Ct. at 2982 n.7.

B. The District Court's Opinion.

CLS did not explicitly argue in the district court that the policy was merely a "pretext." Pointing to a few bylaws of other student groups, CLS did contend in the district court that Hastings had applied its policies differently to religious student groups than to other student organizations. That is not necessarily the same thing as a "pretext" argument, and it bears repeating that CLS never used the word "pretext" in its district court briefs. In any event, the district court flatly rejected the different-treatment argument based on the undisputed factual record. In particular, the court found that "*[CLS] has not presented any evidence that it has been treated differently*

from other student groups." ER 762 (emphasis added). The district court found that "CLS has not presented any evidence demonstrating that Hastings exempts other registered student organizations from complying with the Nondiscrimination Policy." *Id.* at 763. Finally, it found that CLS had not submitted any evidence "demonstrating any discriminatory intent by Hastings." *Id.*

Similarly, the district court rejected as unsupported CLS's contention that "Hastings has provided exemptions to the Nondiscrimination Policy to other student organizations while refusing to grant CLS an exemption." ER 760. In particular, the district court addressed at length the bylaws of two registered student organizations at Hastings submitted by CLS, the Vietnamese American Law Society and La Raza, and concluded that "the evidence fails to demonstrate that Hastings exempted other organizations from complying with the Nondiscrimination Policy." *Id.* at 761. In reaching that conclusion, the district court relied on the uncontradicted declaration of Hastings' then-Director of Student Services, which established that although student organizations' bylaws occasionally refer to the organizations' interests or goals, she did not interpret such references as an attempt to establish a test or criteria for membership, and that other than CLS, she was unaware of any "registered student organization at Hastings that has ever attempted to restrict its membership based on either students' beliefs or agreement with the group's objectives." *Id.* at 760 (quoting declaration).[1]

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[1]As to one of those groups, La Raza, Ms. Chapman's uncontradicted testimony established that La Raza's officers had "confirmed that any Hastings student may become a voting member of La Raza," and that the group was in the process of revising its bylaws to make that clear. ER 761. As a result, as CLS conceded in the district court, any arguable defect was "fixed" by the time of the hearing on the parties' cross-motions. ER 629 ("They fixed that one. I'm not talking about La Raza, because they fixed it").

The district court also rejected CLS's contention that Hastings had discriminatorily applied its policies to it because of its status as a religious organization or the religious content of its speech. Thus, the district court found that "Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations." ER 740 (emphasis in original); *see also id.* at 747 ("Hastings has denied CLS official recognition based on CLS's conduct—its refusal to comply with Hastings' Nondiscrimination Policy—not because of CLS's philosophies or beliefs"). Moreover, the court expressly found "there is no evidence in the record to support CLS's argument that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective." *Id.* at 742. To the contrary, the district court found, "the evidence in the record demonstrates otherwise." *Id.* (discussing history of predecessor Christian student group at Hastings).

Although it filed a motion to alter or amend the district court's judgment in one limited respect (*see* ER 719-22 (order denying motion)), CLS did not challenge any of these factual findings. Nor, as discussed below, did it assert on appeal to this Court that the district court had erred in granting summary judgment because there were any disputed issues of fact remaining for trial.

C. The Prior Appeal To This Court.

On appeal to this Court, CLS squarely put Hastings' all-comers policy at issue. As the Supreme Court observed, "[i]n its briefs before the District Court and the Court of Appeals, CLS several times affirmed that Hastings imposes an all-comers rule on RSOs." 130 S. Ct. at 2982 n.5.

As was true in the district court, CLS did not use the word "pretext" in its briefs to this Court. Moreover, on appeal to this Court, CLS all but abandoned its prior contention that Hastings had somehow applied its policies differently to religious student organizations than to other student groups. While CLS did briefly

assert that Hastings "allows other registered student organizations to require that their leaders and/or members agree with the organization's beliefs and purposes" (Brief of Appellant (Sept. 27, 2006) at 14-15), it did not squarely challenge the district court's contrary factual findings. Nor did it contend that there were any material disputed issues of fact that should have prevented that court from granting Hastings' motion for summary judgment.

To the contrary, CLS explicitly asserted that "[t]here are no material issues of fact in this case." *Id.* at 19. It raised its free exercise and equal protection arguments as virtual afterthoughts at the tail end of its brief, devoting all of one page to each of those claims. *Id.* at 62, 63. And in its reply brief, CLS abandoned its equal protection claim altogether, while again highlighting Hastings' "all-comers" policy. Reply Brief (Feb. 1, 2007) at 1 ("To be an officially recognized student organization, Hastings College of the Law claims that CLS must 'allow *all* students to become members and officers'") (citing Hastings' brief).

As CLS points out in its motion (at 10), in *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009), which involved a school nondiscrimination policy similar to Hastings', this Court reversed summary judgment and remanded to the district court for further proceedings on the "limited issue" whether the school district had arbitrarily or discriminatorily granted exemptions from its policy to non-religious groups while denying them to religious groups. *See id.* at 648. This Court will recall that because of the similarity of the issues posed in the two cases, it deferred oral argument in this case pending issuance of the mandate in *Truth*. Once *Truth* was handed down, the parties addressed it in several Rule 28(j) letters to this Court, and oral argument focused primarily on that case. As CLS now effectively concedes, the issue on remand in *Truth* was indistinguishable from the one it now seeks to pursue. Yet *at no time in this Court*—not in its briefs, its Rule 28(j) letters, or at oral argument—*did CLS ever assert that the Court should remand the*

case for further proceedings as it had in Truth, or that the district court had erred in granting summary judgment because of the presence of disputed factual issues concerning Hastings' purportedly selective enforcement of its policies. To the contrary, as noted, CLS explicitly admitted that "[t]here are no material issues of fact in this case."

Unsurprisingly in light of this record, this Court rested its disposition of CLS's appeal squarely on the parties' stipulation regarding Hastings' open membership policy. In its order affirming summary judgment for Hastings, this Court observed,

> The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable.

Mem. (Mar. 17, 2009) at 2 (citing *Truth*, 542 F.3d at 649-50).

CLS did not file a petition for rehearing or rehearing en banc taking issue with the basis on which this Court had resolved the case.

D. Proceedings Before the Supreme Court.

In its petition for certiorari, CLS continued to adhere to the same position, representing flatly, "The material facts of this case are undisputed." Pet. for Cert. (filed May 5, 2009) at 2. CLS's petition extensively highlighted this Court's decision in *Truth*, recognizing that this Court had based its ruling in the instant case "solely" on that decision. *Id.* at 12-16. Indeed, CLS explicitly urged the High Court to grant certiorari both in this case and in *Truth*. *Id.* at 17-18, 39-41. While CLS argued the two cases involved "complementary facts" (*id.* at 39), it made no mention of the remand in *Truth*, nor did it argue that this Court had erred in the instant case in failing to order a similar remand.

After the Supreme Court granted certiorari, CLS abruptly changed course. As the majority observed, CLS attempted to "escape" from its stipulation regarding Hastings' open membership

policy and "to shift its target" to Hastings' written Nondiscrimination Policy, which prohibits discrimination on enumerated grounds including religious and sexual orientation. 130 S. Ct. at 2984. CLS asserted that Hastings had applied *that* Policy—rather than the open membership policy to which it had stipulated—in a manner that "targeted" or discriminated against religious student organizations. *Id.* at 2982. CLS also argued that Hastings "selectively enforces its all-comers policy" as a "pretext" for discriminating against religious student organizations. *Id.* at 2995. As noted above, the Supreme Court majority declined to decide that issue on the ground that it was inconsistent with CLS's stipulation, which it found was binding on CLS under controlling authority and under the district court's local rules. *Id.* at 2982-84. The majority rejected the dissent's contrary view, accusing the dissent of repeatedly "rac[ing] away from the facts to which CLS stipulated." *Id.* at 2983. Indeed, the majority observed, "[t]he dissent's pretext discussion presents a one-sided summary of the record evidence, an account depending in large part on impugning the veracity of a distinguished legal scholar and a well respected school administrator." *Id.* at 2995 n.29 (citations omitted). Nevertheless, the majority indicated that on remand, "the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved." *Id.* at 31-32 (footnote omitted).

ARGUMENT

I.

CLS'S REQUEST TO REMAND THE CASE TO THE DISTRICT COURT FOR FURTHER DISCOVERY AND TRIAL IS CONTRARY TO THE SUPREME COURT'S EXPRESS DIRECTION ON REMAND.

In its motion to remand, CLS asserts that it intends to introduce additional evidence it did not previously present in the district court, and to seek to reopen discovery so that it may "seek to take

depositions of Hastings administrators and students, past and present, regarding when, if ever, an all-comers policy was adopted or applied, as well as the precise nature of the various exceptions to the policy and whether those exceptions are applied evenhandedly." Mot. at 10. While CLS contends its motion is "in accordance with the Supreme Court's instructions" (*id.* at 10), in fact it flies in the face of the High Court's express direction on remand.

In remanding the case to this Court, the High Court majority employed unusual and carefully crafted language. In addition to directing generally that the case be remanded "for further proceedings consistent with this opinion" (130 S. Ct. at 2995), the Supreme Court added the following specific directions:

> On remand, the Ninth Circuit *may* consider CLS's pretext argument *if, and to the extent, it is preserved*.

Id. (emphasis added; footnote omitted). This conditional and narrowly limited direction makes it clear that the High Court authorized—but did not require—this Court to resolve that additional issue *only* "if, and to the extent," this Court found that CLS had preserved the "pretext" argument on the prior appeal.[2] Nothing in the High Court's mandate remotely sanctioned a freewheeling remand to the district court for the purpose of starting the case over from square one by allowing the parties to reopen discovery, introduce new evidence, and hold a new trial. To the

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[2]The unusual phrasing of the Court's remand order warrants emphasis. The Supreme Court routinely employs only the general remand phrase "for further proceedings consistent with this opinion." *See, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. ___ , 130 S. Ct. 3138, 3164 (2010) (opinion of Roberts, C.J., for the Court, decided the same day as the instant case). In a review of the Court's cases over the past five Terms, we have been able to identify only *one* other case in which the Court added similar limiting language directing a court of appeals to determine a specific issue only "to the extent that point was properly preserved." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200-01 (2010). There, petitioners did not oppose the respondent city's request for a remand to the Seventh Circuit to resolve the limited issue in question: "whether the judgment must be modified in light of our decision." *Id.* at 2201.

contrary, as the High Court's explicit use of the term "preserved" makes clear, it directed this Court to decide the issue *on the basis of the record already before it from the prior appeal*, not to allow the parties to create an entirely new record or to hold a trial.

Indeed, CLS's stated intention to seek discovery regarding the history of the all-comers policy is unambiguously precluded by the majority opinion. In response to the dissent, which "spills considerable ink attempting to create uncertainty about when the all-comers policy was adopted" (130 S. Ct. at 2982 n.6), the majority emphasized that issue is entirely irrelevant:

> What counts, however, is the parties' unqualified agreement that the all-comers policy *currently* governs. CLS's suit, after all, seeks only declaratory and injunctive—that is, prospective—relief.

Id. (emphasis in original). Whether in this Court or the district court, CLS is not free to relitigate issues it has already conclusively lost, including the contours of the policy that governs this case. There is a fundamental tension between the fact that CLS's lawsuit seeks only *forward-looking* declaratory and injunctive relief (*id.*) and that CLS now seeks *backward-looking* discovery.

It has long been established that a federal court of appeal's jurisdiction is limited by the terms of the Supreme Court's mandate. *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948) ("In its earliest days, [the Supreme] Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. The rule of these cases has been uniformly followed in later days"). Thus, as the High Court long ago declared,

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; *or give any other or further relief*; or review it, even for apparent error, upon any matter decided on

> appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (emphasis added).[3]

This Court routinely and unquestioningly complies with this long-established rule. Thus, where the Supreme Court reverses a decision of this Court with respect to one issue, this Court may issue a new opinion in which it disposes of the remaining issues raised on appeal that it did not reach in its first decision. *See United States v. Shabani*, 48 F.3d 401, 402 (9th Cir. 1995). What this Court may *not* do, however, is what CLS asks it to do here: ignore the Supreme Court's direction that it decide a single remaining issue "if, and to the extent" it was preserved on a prior appeal, and instead remand the entire case to the district court for further proceedings including reopened discovery and a trial.[4]

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[3]In its own cases, this Court follows the same "rule of mandate," which it recognizes serves "an interest in consistency, finality and efficiency," as well as "in preserving the hierarchical structure of the court system." *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007). The rule is jurisdictional: if a district court strays beyond its authority on remand, it commits reversible error. *Id.*; *see, e.g.*, *United States v. Carpenter*, 526 F.3d 1237, 1240-41 (9th Cir. 2008) (district court's approval of settlement vacated where district court disregarded Ninth Circuit mandate to allow intervenors to fully participate in settlement proceedings), *cert. denied sub nom. Elko Cty. v. Wilderness Soc'y*, 129 S. Ct. 1612 (2009).

[4]To be sure, when the Supreme Court has articulated a new legal standard and declined to apply it to the facts in a case in which it is unquestionably presented, it is not unusual for this Court on remand from the Supreme Court to remand a case to the district court to allow that court to exercise its discretion to allow the parties to supplement the record by introducing new evidence or to entertain a motion to reopen discovery that may be relevant to that new standard. *See Betz v. Trainer Wortham & Co., Inc.*, No. 05-15704, 2010 U.S. App. LEXIS 13821 (9th Cir. July 7, 2010) (remanding to district court for further proceedings in light of GVR order). Here, however, the High Court did not articulate any new standard, nor did it direct this Court to reconsider its prior ruling in light of its decision. Rather, it narrowly directed this Court that it "may" consider an argument only if, and to the extent, it was preserved on the prior appeal.

II.

CLS'S REQUEST IS DIRECTLY CONTRARY TO THIS COURT'S DISPOSITION OF THE PRIOR APPEAL WITHOUT ANY REMAND.

There is a second, perhaps even more fundamental, reason why CLS's request for a remand to the district court for further proceedings and broad-ranging discovery on "pretext" should be rejected: if CLS were correct that its "pretext argument" was raised and preserved in the prior proceedings, then CLS would have been entitled to such a remand in the initial appeal before this panel (just as the Court did in the *Truth* case). Yet, unlike in *Truth*, this Court disposed of the prior appeal by simply affirming the district court's dismissal of the case on summary judgment (and not remanding for any further proceedings on "pretext" or otherwise), CLS did not challenge that aspect of this Court's judgment by a petition for panel or en banc rehearing in this Court or in its petition for certiorari to the Supreme Court, and the law of the case doctrine prevents this Court from taking a different course here. Indeed, as a practical matter, the only way that this Court could grant CLS's current motion for a remand for further proceedings on its pretext argument is to conclude that the panel was *wrong* in simply affirming the district court's judgment in the initial appeal. That would be a remarkable action for the Court to take if CLS had asked for it in a petition for panel rehearing on the heels of this Court's prior decision, and it would be a truly extraordinary action to take given that CLS did not even make such a request. Further, to the extent that CLS seeks on remand to raise new issues that it did not preserve on that prior appeal, it waived those issues.

A. This Court's Prior Ruling Is Law of the Case.

"Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal. 'The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.'" *Jeffries v. Wood*, 114 F.3d 1484,

1489 (9th Cir. 1997) (en banc) (citations omitted). When an appellate court decides an issue, whether explicitly or by necessary implication, that decision generally is not open to relitigation in subsequent proceedings in the same case. *Chevron USA, Inc. v. Lingle*, 363 F.3d 846, 849 (9th Cir. 2004); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392-93 (9th Cir. 1995) ("Under law of the case doctrine, . . . , one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case") (citations omitted). Thus, a decision by this Court is binding upon any subsequent Ninth Circuit panel hearing a new appeal in the matter, as well as upon the district court on remand. The doctrine applies whether the prior panel's opinion in the same case resulted in a published or (as here) an unpublished opinion. *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 917 (9th Cir. 2001) (published disposition); *Planned Parenthood of the Columbia/Williamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1017 (9th Cir. 2008) (unpublished disposition of prior interlocutory appeal).

The law of the case doctrine is founded in a "sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). "An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Jeffries*, 114 F.3d at 1489 (citation and internal quotations omitted). The rule thus promotes finality and efficiency by recognizing that endless change "would create intolerable instability for the parties." *Ridgeway v. Montana High Sch. Ass'n*, 858 F.2d 579, 587 (9th Cir. 1988). As a result, the prior decision should be followed unless the decision is clearly erroneous and its enforcement would work a "manifest injustice," intervening controlling authority makes reconsideration appropriate, or substantially different evidence was adduced at a subsequent trial. *Jeffries*, 114 F.3d at 1489; *Old Person*

v. Brown, 312 F.3d 1036, 1039 (9th Cir. 2002) (on second appeal after remand to district court, "none of the three exceptions applies" and "[w]e are bound by the opinion of the prior panel as the law of the case").

This Court's disposition of the prior appeal is law of the case. In affirming the district court's summary judgment—without any remand—this Court expressly rested its disposition of the case on the parties' joint stipulation concerning Hastings' open membership policy, which as the High Court majority observed was amply supported by the undisputed record. In affirming the summary judgment and expressly basing its decision on *Truth*, this Court found by necessary implication that CLS failed to show that the district court erred in rejecting its selective application claim. *See Planned Parenthood of the Columbia/ Williamette Inc.*, 518 F.3d at 1017 (having affirmed district court's judgment on prior appeal in all respects but for punitive damages, court "necessarily affirmed the compensatory damages awards and post-judgment interest on those damages," so challenge to post-judgment interest on entire damages award was barred by law of the case); *Chevron USA, Inc.*, 363 F.3d at 850-53 (state's argument was barred by law of the case where court had "implicitly" addressed and rejected it on prior appeal). This Court could not have reached that conclusion, had it found disputed issues of fact bearing on Hastings' purported selective enforcement of its policies. Had it done so, it would have had to remand the case to the district court to resolve those disputed issues—just as it had done in *Truth*, which was the central focus at oral argument and the basis for the Court's disposition of the case.

Thus, were this Court to accept CLS's contention that a remand is necessary to decide whether Hastings selectively applied its all-comers policy, it effectively would have to find that its initial panel decision—since affirmed by the Supreme Court—was simply wrong. Such a result cannot be squared with the fundamental principles underlying the law of the case doctrine.

B. CLS Waived The "Pretext" Claim By Failing To Raise It On The Prior Appeal.

To the extent that CLS seeks on remand to raise new factual or legal issues that it did not raise on the prior appeal, that attempt of course would be barred by the doctrine of waiver.

A party who fails to bring an issue to the attention of the appellate court in one appeal is precluded from raising it in a subsequent appeal in the same case. *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008) ("We have held that we 'need not and do not consider a new contention that could have been but was not raised on the prior appeal'") (citation omitted); *Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24-25 (9th Cir. 1996) ("Since appellant failed to raise this issue in its first appeal, it is waived") (citations omitted).

As discussed, CLS did not argue "pretext" in the district court or to this Court; it never even used that familiar legal term in its briefs. To the extent that CLS claims to have argued pretext *indirectly* by way of any *selective-enforcement* claim on the prior appeal based on other groups' bylaws, it never sought a reversal and remand to address that issue. It therefore waived any challenge to the summary judgment on that ground.[5] Moreover, as discussed above, in granting Hastings' cross-motion for summary judgment, the district court expressly found CLS failed to prove its factual contentions that Hastings had selectively applied its policies so as to "target" religious student groups for unfavorable treatment.[6] At no time did CLS squarely challenge that ruling—not in its motion to

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[5]Of course, an indirect argument would *not* be sufficient to preserve an issue on appeal. As this Court has repeatedly admonished, it "review[s] only issues which are argued specifically and distinctly in a party's opening brief." *Independent Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (citation and internal quotations omitted).

[6]Indeed, in asserting that if this Court remands the case to the district court, it intends to ask that court to reopen discovery and to allow it to introduce new evidence, CLS effectively concedes that it failed to prove its claim the first time around.

alter or amend the district court's judgment, not on appeal to this Court, and not in a petition for rehearing of this Court's decision. Indeed, in its opening brief on appeal to this Court, it explicitly contended that "[t]here are no material issues of fact in this case." It made the same assertion in its petition for certiorari. Having failed to seek a remand for further factual development on the prior appeal, CLS may not properly urge that contention now for the first time.[7] Nor may CLS raise for the first time, before this Court or the district court, any other issue that it did not raise on the prior appeal.

In short, CLS is not entitled to "a second bite at the appellate apple." *Kesselring*, 95 F.3d at 24; *see also Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1049 (9th Cir. 2005) ("Insofar as [appellant's contention] overlaps with these previously litigated claims, we will not entertain a second attempt to litigate these issues") (citation omitted). It is far too late for CLS to attempt to reopen factual issues that have long since been resolved against it by the district court on summary judgment and affirmed on appeal. This Court's disposition of the prior appeal is law of the case. Accordingly, the further remand to the district court that CLS seeks by its motion is inappropriate and would serve no legitimate purpose. This Court should finally bring an end to this long-running litigation by summarily reaffirming the district court's summary judgment in Hastings' favor. *Cf. FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19-20 (9th Cir. 1995) (per curiam) ("Having reconsidered the case as instructed by the Supreme Court, we reach the same

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[7]CLS's failure explicitly to raise that issue on the prior appeal does not free it to do so for the first time here. "To hold otherwise would allow appellants to present appeals in a piecemeal and repeated fashion, and would lead to the untenable result that 'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999), quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (Friendly, J.).

conclusion as we did last time") (on remand from Supreme Court, republishing relevant language from prior opinion).

Like any losing litigant, CLS can of course seek appropriate future relief in a new action if warranted by a change in circumstances or other events, subject of course to settled preclusion and related principles. But having filed and litigated a case that it has now lost before the Supreme Court, CLS should not be permitted to reopen and recast this case at this juncture for the purpose of gaining open-ended discovery from "past and present" Hastings administrators and students (Mot. at 10) into historical events based on a "prextext" argument that was not adequately raised or preserved below and that is fundamentally at odds with the way that this Court disposed of the case in the prior appeal. Important constitutional principles are at stake in the case that CLS brought to the Supreme Court. That case has now been resolved by the Supreme Court. The Court should be reluctant to send this case back for a whole new round of litigation in what would amount in effect to an entirely new case in which the school—and its administrators and students, "past and present"—would be subjected to further burdens and costs. CLS has provided the Court with no persuasive reason to take that step.

CONCLUSION

For the foregoing reasons, the Court should deny CLS's motion to remand this case to the district court and, after any further briefing it deems appropriate, should reaffirm its prior ruling.

Respectfully,

DATED: August 9, 2010. **CROWELL & MORING LLP**

By /s/
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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010, I electronically filed the foregoing **APPELLEES' OPPOSITION TO MOTION TO REMAND TO DISTRICT COURT FOR FURTHER PROCEEDINGS** 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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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on August 9, 2010.

/s/
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