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Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1518

**Re: *Lopez v. Candaele, et al.*, No. 09-56238
Hon. Gould, Ikuta, and N.R. Smith, Circuit Judges
Argued: March 3, 2010 in Pasadena, CA
Response to Defendants-Appellants' Citation of Supplemental Authority**

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), Plaintiff-Appellee Jonathan Lopez submits this response to Defendants-Appellants' citation of *Christian Legal Society v. Martinez*, 2010 WL 2555187 (June 28, 2010). *Martinez* narrowly held that a university requirement that student groups open membership and leadership to any student as a condition to gain funding does not violate the First Amendment. 2010 WL 2555187, *5. *Martinez*'s holding is inapposite to this case, but it contains dicta supporting affirmance of the injunction.

Unlike *Martinez*, the College's policy "wield[s] the stick of prohibition" on any student viewpoint deemed "offensive" or "harassing." *Id.* at *12. This is a direct viewpoint-discriminatory burden on speech because it allows subjective definition of what qualifies for punishment. (Answering Br. at 25-28, 37-39.) By contrast, the Court found *Martinez*'s policy did not exclude any particular viewpoint. *Id.* at *19. The College punishes students for "offending" others, but in *Martinez* students could "express any viewpoint they wish—including a discriminatory one." *Id.* n.26.

Contrary to the College's position, *Martinez* does not suggest deference to colleges when reviewing policies that restrict speech. "[A] public educational institution exceeds constitutional bounds . . . when it restricts speech . . . simply because it finds the views expressed by a group to be abhorrent." *Id.* at *13. When students' rights are at stake, the Court instructs that there should be *no* deference: "This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and *we owe no deference to universities when we consider that question.*" *Id.* at *14 (emphasis added). Educational policy is different and not at issue here, but a court may not abdicate its responsibility to uphold free speech under the guise of "decent respect." *Id.* at *14 & n.16.

Martinez says nothing about “jurisdictional analysis.” There are no jurisdictional issues here because the College will reinstate the policy unless this Court affirms the injunction. Moreover, the district court did not abuse its discretion in finding that the challenged policy was still in effect even after the preliminary injunction hearing and that it restricted Lopez’s speech. (Answering Br. at 56-60.)

Very truly yours,

/s/David J. Hacker

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