No. 08-1130

In The
Supreme Court of the United States

TRUTH, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

v.

KENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF STAND TRUE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

Stand True is a national Christ-centered campus ministry that is committed to providing its members, who include high school students, with a forum to grow in their expression, understanding, and acceptance of the Christian faith.[1] Stand True is concerned that the Ninth Circuit's ruling will require its members to alter and modify their policies, membership requirements, and speech or face exclusion from high school campuses.

Stand True offers a nationwide perspective that is not available to a single, local group like Truth. Stand True discusses the confusion imposed by the conflicting decisions of the Second and Ninth Circuits. It speaks to the imposition on and curtailment of speech engendered by rules that restrict the ability to impose membership requirements. Stand True addresses the Equal Access Act's intended application to expressive associations and the consequences to student groups that arise if the Act is denied its full

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[1] Pursuant to Supreme Court Rule 37.6, the *Amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *Amicus* paid for or made a monetary contribution toward the preparation and submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file, and consented to this brief being filed. The letters of consent dated March 31, 2009 and April 7, 2009 are on file with the Clerk of Court in accordance with Supreme Court Rule 37.3(a).

reach. These matters are relevant to the Court's decision to grant Truth's Petition and will not be fully addressed by the parties.

I. SUMMARY OF ARGUMENT

Twenty-five years ago, Congress promised high school students that their right to associate—whether to discuss Plato, debate the costs and benefits of socialism, or explore the place of religion in their lives—would be protected from content-based discrimination by school officials unless necessary to ensure school discipline and well-being. Congress made this promise in the Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-4074 (1984), making it illegal for high schools that offered their space to students "to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a).

Regrettably, this promise has gone unfulfilled for generations of high school students, and it has been made illusory by the decision of the Ninth Circuit. Although other student groups are given the right to define their membership, religious groups in the Ninth and Second Circuits—the only courts to have considered the issue—cannot. In the Ninth Circuit, a religious group, even if open to all, is not allowed to ask that its voting members agree to the tenets that

define the purpose and the nature of the group. In the Second Circuit, that right is limited; a court is allowed to determine, based on its own views, what membership criteria are appropriate. *See Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996).

The promise of the EAA has been denied in another respect. Congress enacted the EAA to clarify the rights of high school students. It did not intend for high school students to be caught up in years of litigation while school officials and courts wrangled over the meaning of the EAA. However, except for the narrow agreement that some form of restriction can be imposed, the Ninth and Second Circuit decisions conflict, leaving schools and courts with no single standard.

The courts conflict on the meaning of "content of the speech," as that phrase is used in the EAA. The Ninth Circuit considers membership selection not to be speech at all, but to be conduct that a school can regulate without fear of violating the EAA. In contrast, the court in *Hsu* concluded that, as to certain officers, membership requirements could be imposed as an essential component of the content of the speech of the religious group. The Second Circuit recognized that membership criteria defines and dictates the content of the speech of a group.

Likewise, the courts are at loggerheads as to the meaning of "equal access" and "discrimination." The Ninth Circuit holds that the right to determine

group membership must give way to a "neutral" non-discrimination policy. But unlike Respondents' Key Club and National Honor Society that can discriminate against those who are not of "'good character,'" App. 11a-12a, or the EarthCorps that can insist that its members meet the criteria of "interest and dedication toward environmental issues," App. 11a, or the Gay-Straight Alliance that can ask its members to commit to "'fight[ing] heterosexism and other forms of oppression,'" *id.* (alteration in original), a religious group in the Kent School District cannot ask that its voting members share the views of the group. The "neutral" policy denies equal access and discriminates against Petitioners based on their religious views and the content of their speech.

The Second Circuit agrees. The "equal access" requirement of the EAA is not met simply because a policy is applied "neutrally." Such a policy discriminates against religious groups. It denies them the same rights to associate—to include *and* to exclude based on the group's expressed beliefs—that are extended to non-religious groups.

For these reasons, a grant of certiorari is warranted. There is both an intractable conflict and a need for a single, uniform interpretation of the EAA. Students, such as Petitioners, should not have to spend their four years of high school fighting for recognition under a statute that was intended to secure and clarify their rights.

II. ARGUMENT

Amicus acknowledges that there are reasons independent of the EAA that justify the grant of the Petition. Focusing solely on the EAA, there are three reasons to grant Petitioners' writ.

First, there is a clear, irreconcilable conflict between the Second and Ninth Circuits. The Ninth Circuit disavows a conflict, but one exists in three respects: a) in contrast to the Second Circuit, the Ninth Circuit concluded that the term "content of the speech" as used in the EAA is not implicated by a non-discrimination policy; b) again in contrast to the Second Circuit, the Ninth Circuit concluded that there is no discrimination and "equal access" is assured when a policy simply applies to all groups, regardless of its differing impact; and c) the Ninth Circuit failed to question whether a non-discrimination policy as applied to Petitioners or any similar group is necessary to school discipline and student well-being justifying Respondents' refusal to recognize Petitioners as a student group. *See infra* Section II.A.

Second, there is clearly a need for a single, uniform interpretation of the EAA. Under the present system, both school officials and courts do not have answers (or they have competing answers) to the questions of how much deference should be afforded to a student group's membership criteria, the extent to which a school's decision to recognize a student group is guided by the EAA, specifically sections

4071(c)(4) and 4071(f), and how much a court may impose its own sense of what is proper. *See infra* Section II.B.

Finally, whether because of self-editing, the short period of time students attend high school, and/or the natural inclination of students to conform, the issue of whether a school's non-discrimination policy justifies the decision in this case rarely arises. *Amicus* knows of only two cases, *Hsu* and Petitioners', that have dealt with this issue. The conflict noted here and by Petitioners has been 12 years in the making. Generations of high school students have been without the full protections afforded by the EAA. Those in the Ninth Circuit now face a bleaker future. *See infra* Section II.C.

A. The Ninth Circuit's Interpretation of the Equal Access Act Conflicts with That of the Second Circuit in Three Respects.

The Ninth Circuit insists that there is no conflict between its decision and *Hsu*, noting "[o]ur decision is not inconsistent with that of the Second Circuit." App. 27a. However, *Hsu* and this case present the same essential facts with two very different outcomes.

Both cases involve high school religious groups that sought to gather in order to "praise God" in "Christian fellow-ship," *Hsu*, 85 F.3d at 849, and "grow in a relationship with Jesus Christ." App. 7a. Both groups welcomed all high school students to

attend meetings and events, but imposed certain membership restrictions designed to ensure that the content of the groups' meetings would be consistent with the groups' religious beliefs. App. 7a-8a; *Hsu*, 85 F.3d at 849. In *Hsu*, the group required that its officers "be 'professed Christians either through baptism of confirmation'" so that the group would "'serve the function we desire for it to serve.'" *Hsu*, 85 F.3d at 849, 851. In this case, the group sought to impose a restriction on its membership. Those who professed to accept Christian beliefs could be full voting members. Those who did not were allowed to attend meetings, but not vote. Only voting members could select or serve as officers. App. 7a-8a. Both cases involved application of non-discrimination policies that prohibited discrimination on the basis of "creed" and "religion." App. 9a-11a; *Hsu*, 85 F.3d at 850. Finally, both involved a school's decision to deny official recognition of the religious group.

Faced with the same challenge under the same statute—the EAA—the courts reached irreconcilably different conclusions as to the meaning of "content of the speech," as to the meaning of "equal access" and "discrimination," and as to the weight to give the school's interest in enforcement of a non-discrimination policy.

1. Definition of "Content of the Speech."

In *Hsu*, the Second Circuit drew heavily on this Court's First Amendment jurisprudence to define the

phrase "content of the speech" as used in the EAA. 85 F.3d at 856-59. Drawing from cases like *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), the Second Circuit recognized that the religious group sought to control its membership in an effort to define and protect the content of its speech. *See Hsu*, 85 F.3d at 856-59. The Second Circuit acknowledged this Court's consistent message that "a regulation that prevents a group from excluding certain people 'may impair the ability of the original members *to express only those views* that brought them together.'" *Id.* at 859 (quoting *Roberts*, 468 U.S. at 623); *see also, e.g.*, *id.* at 856 ("[T]he message a group imparts sometimes depends upon its ability to exclude certain people. . . ."). The court then concluded that the membership requirements were protected as speech under the EAA. "As in *Hurley*, the Club's decision to exclude is based on its desire to preserve the content of its message." *Id.* at 857.

In contrast stands the Ninth Circuit's decision. Except in its special concurrence, App. 35a-38a, the court makes no reference to the right of groups to determine their membership. It does not discuss, or even mention, the fact that there is a correlation between the composition of a group and the content of its speech. *Roberts*, *supra*, is only cited for the proposition that states are empowered "to enact legislation prohibiting invidious discrimination." App. 21a.

Instead, the Ninth Circuit's analysis turns entirely on the idea that group selection is conduct that can be regulated.[2] It distinguishes *Widmar v. Vincent*, 454 U.S. 263 (1981), which it recognizes was the inspiration for the EAA, on the grounds that the right to exclude a group is properly exercised when a group's "'*activities* . . . violate reasonable campus rules.'" App. 24a (quoting *Widmar*, 454 U.S. at 277 (emphasis added)). It points to the fact that Congress did not intend for the EAA to ban burdens placed on the *activities* of student groups. App. 24a-25a. Finally, the court invokes *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006), in support of its conclusion that schools are entitled to regulate the membership requirements of its student groups as conduct because "the [school's] policies do not implicate any rights that Truth might enjoy under the Act." App. 27a.

This conflict is apparent despite the Ninth Circuit's denial. *Hsu* is not "readily distinguishable" on the grounds that Petitioners sought to impose

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[2] While the special concurrence mentions the right of expressive association, the court does not seek to determine whether Respondents' policies negatively impact Petitioners' expressive association rights or whether Petitioners' membership requirements are necessary to preserve or protect the content of its speech. The impact on Petitioners' speech is not relevant to the court because the concurrence concludes that Respondents are imposing a viewpoint-neutral restriction to a limited public forum. App. 35a-38a.

membership restrictions while the group in *Hsu* only imposed restrictions on its *leadership*. App. 27a-28a.

The *Hsu* court clearly recognizes that *membership* restrictions have a bearing on the content of a group's speech as reflected by its citations to *Roberts*, *Hurley, Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988). *See Hsu*, 85 F.3d at 858-59. In fact, the court made this quite clear when, quoting *N.Y. State Club Ass'n*, 487 U.S. at 13, it recognized that an association "'might be able to show that it is organized for specific expressive purposes and that it *will not be able to advocate its desired viewpoints* . . . if it cannot confine its *membership* to those who share the same sex . . . or the same religion.'" *Hsu*, 85 F.3d at 859 (second emphasis added).

Additionally, the Second Circuit expressly considered whether the membership provisions could be considered conduct. While acknowledging that "the exclusion resembles conduct in at least one sense," the court did not rest its decision on the issue of conduct. "[C]onduct that is expressive can receive the same protection as 'pure speech.'" *Id.* at 856 n.13.

In this respect, at the very least, the Ninth Circuit's understated initial impression was correct. Its decision "is in some tension with that of the Second Circuit." *See* App. 98a-99a.

2. Definition of "Equal Access" and "Discrimination."

As for what constitutes "equal access" and "discrimination" under the EAA, the conflict is more succinctly stated although not expressly recognized by the Ninth Circuit. The Ninth Circuit adopts the view that a policy that applies to all groups cannot be discriminatory or violate the "equal access" provision of the EAA. It quotes the EAA's statutory history which it apparently interprets to mean that Congress recognized that content-neutral policies may cause "'not all student groups [to] receive exactly the same privileges.'" App. 26a (quoting S. Rep. No. 98-357, at 39 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2348, 2385).

In distinct contrast, the Second Circuit looked to both the facial neutrality of the school's non-discrimination policy *and* its effect. According to the court, this was essential because the EAA "mandates that students be given 'equal access,' not that the School's internal rules be administered uniformly." *Hsu*, 85 F.3d at 860. As noted by the court, there are many examples where a "uniform" policy results in discrimination and the denial of equal access. *Id.*

Viewed through this lens, the court concluded that the non-discrimination policy could not pass muster as "uniform" or "neutral" (in the words of the Ninth Circuit). The non-discrimination policy deprived the religious group of "the same latitude that other clubs may have in determining who is qualified

to lead the Club." *Id.* at 861. It prohibited the religious group from doing that which all other groups were entitled to do: "protect its character by restricting eligibility for leadership to those who show themselves committed to the cause." *Id.*

3. Deference Owed to School Policy.

Finally, there is the issue of what deference to afford a school's non-discrimination policy. The Ninth Circuit opinion uncritically assumes that deference is owed to schools. It does not question the necessity, wisdom, and efficacy of applying the non-discrimination policy to Petitioners. According to the court, the non-discrimination policy is reasonable because it "advance[s] the school's basic pedagogical goals," "instilling the value of non-discrimination." App. 32a. This is enough for the court.

The Second Circuit acknowledges a school's obligation to "protect[ ] the rights of other students, and for maintaining 'appropriate discipline in the operation of the school.'" *Hsu*, 85 F.3d at 862 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).[3] However, in contrast to the Ninth

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[3] Neither the Ninth nor the Second Circuit seeks to justify the non-discrimination policies under the two provisions of the EAA that allow a school to deny equal access. 20 U.S.C. § 4071(c)(4) gives schools the right to ensure that meetings "do[ ] not materially and substantially interfere with the orderly conduct of educational activities within the school." 20 U.S.C. § 4071(f) allows schools to make those decisions necessary "to

(Continued on following page)

Circuit's unquestioning acceptance of school policy, the Second Circuit analyzed whether the non-discrimination policy as applied to the religious group warded off the harms that it was intended to prevent. While recognizing the autonomy that should be afforded educators, the court also found that the non-discrimination policy could not be justified solely on the basis that discrimination is bad—the apparent conclusion of the Ninth Circuit. "[H]igh school students are subjected to discrimination and selection all the time[,]" by way of sports and grades, among other things. *Hsu*, 85 F.3d at 871. The court further noted that non-discrimination policies were intended to protect against invidious discrimination which was not at work in the case. There was no evidence of animus towards others or a desire to stigmatize. *Id.* at 868-72.

In light of the above, there is a conflict that has no means of being squared without this Court's attention. The conflict strikes at what the EAA means at its most fundamental level—what it means to provide equal access and what it means to discriminate on the basis of the "content of the speech" of a group.

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maintain order and discipline on school premises [or] to protect the well-being of students and faculty." The EAA does not permit a school to deny equal access in any other circumstance.

B. A Single, Uniform Standard Is Needed.

Currently, school officials and courts are given three choices when called on to apply the EAA. They can adopt the Ninth Circuit's view, which allows wholesale denial of group recognition. They can adopt the Second Circuit's view, which is more liberal in its reading of the EAA, but allows schools and courts to edit membership decisions based on their own sense of propriety without reference to 20 U.S.C. §§ 4071(c)(4) and 4071(f). Alternatively, school officials and courts can cast about for some third standard.

The EAA was not intended to generate this level of confusion and the delay that attends it.

1. Congress Intended the Equal Access Act to Clarify the Rights of High School Students.

Congress enacted the EAA to "extend[] the reasoning of *Widmar* [*v. Vincent*, 454 U.S. 263 (1981)] to public secondary schools." *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 235 (1990). Its purpose was "to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and the free exercise of religion which accrue to public school students who desire to voluntarily exercise those rights. . . ." S. Rep. No. 98-357, at 3.

Legislators emphasized that they intended the EAA to prohibit discrimination based on speech,

associational rights, and religion. Senator Dole announced that the EAA would "clarify what should be obvious—that student groups do not shed their first amendment rights to free speech and association simply because they want to meet for religious purposes." 130 Cong. Rec. 19,243 (1984). Senator Denton, one of its authors, said that the EAA meant that "secondary school students engaging in religious speech have the same rights to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy." 130 Cong. Rec. 19,216. And in general, denial of the right to associate was viewed as equivalent to a denial of the freedom of speech. *See* S. Rep. No. 98-357, at 24 (denying official recognition to religious groups abridges the associational rights implicit in the freedoms of speech, assembly, and petition); 130 Cong. Rec. 19,233 ("Therefore, if you and I have a right to voluntarily associate ourselves, to use the facility to hold a meeting on that subject, would the Senator want to deny that right to students in a high school?" (statement of Sen. Hatfield)); 130 Cong. Rec. 19,238 ("[T]o prohibit the use of school facilities by voluntary student religious groups on the same basis as other groups seeking to speak freely in our society is precisely contrary to the plain language of the First Amendment." (statement of Sen. Durenberger)).

The plain language of the EAA also makes clear that its purpose is to protect the freedom of speech and association to the extent provided by the First Amendment, subject only to a school's need to ensure

that meetings do not interfere with school activities, discipline, order, and the well-being of students and faculty. 20 U.S.C. §§ 4071(c)(4), 4071(f). Congress knew when it enacted the EAA that the "content" of a group's speech is measured by more than what a group actually says. It knew that this Court recognized the correlation between the content of the speech of a group and the members it selects. *See Rotary Club of Duarte,* 481 U.S. at 548 (upholding application of non-discrimination law after determining that it did not "affect in any significant way the existing members' ability to carry out their various purposes"); *Roberts*, 468 U.S. at 628 (considering whether the non-discrimination policy changed the content of the group's speech); *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions. . . ."); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (refusing to impose non-discrimination policy because "[t]he Boy Scouts has a First Amendment right to choose to send one message but not the other"); *Hurley*, 515 U.S. at 574-75 (refusing to require parade organizers to accept certain groups because forced association would appear to make speaker proponent of point of view); *N.Y. State Club Ass'n*, 487 U.S. at 12-13 (applying analysis of *Rotary Club of Duarte* and *Roberts*).

Neither the legislative history nor the plain language of the EAA reflects Congressional intent to deviate from this accepted view. *See N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress" was aware of federal court interpretations of law and "expect[s] its enactment[s] to be interpreted in conformity with them." (internal quotation marks omitted, second and third alterations in original)). Indeed, were "content of the speech" narrowly defined to mean only those words that a group might utter, as underscored by this Court's views, the freedoms that the EAA was intended to protect would be a dead letter, something Congress could not have intended.

2. The Equal Access Act Provides the Mechanism for Refusing to Recognize Student Groups but Neither Court Applied It.

Given this, the *Hsu* court's decision to edit the leadership requirements established by the religious group stands in opposition to the wording and intent of the EAA. Neither the EAA nor the cases that the *Hsu* court used as interpretative analogs allow the judicial redacting of a group's membership requirements due to some disagreement as to their necessity. *Dale*, 530 U.S. at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

This is not to say that a school must simply accept a group or its membership criteria. The EAA allows schools to consider whether a group would disrupt the school or threaten its mission. 20 U.S.C. §§ 4071(c)(4), 4071(f). But neither the Ninth Circuit nor the Second Circuit invoked these provisions to deny entirely and edit partially the membership requirements of the student groups at issue. App. 1a-38a; *Hsu*, 85 F.3d at 857-58.[4]

In sum, the writ should be granted so that the purpose and intent of the EAA can be realized and so that schools and courts are not caught up in endless debates about its scope and interpretation.[5]

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[4] As for the issue of neutrality and uniformity, as the Second Circuit rightly concluded, a uniform or neutral policy cannot be the sole aim of the EAA. It cannot be that Congress would in other instances enact statutes seeking to prevent discrimination and thereby "proscribe[ ] not only overt discrimination but also practices that are fair in form, but discriminatory in operation," and then make an exception in the EAA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII); *cf. Romer v. Evans*, 517 U.S. 620 (1996) (rejecting argument that law put gays and lesbians in same position as others given the impact of the law).

[5] The Ninth Circuit's limited remand provides no basis for denying or delaying review. The court remanded the case so that the district court could determine whether Petitioners would be eligible for an exemption to the non-discrimination policy that allows gender-specific groups. This exemption is provided for by law. 20 U.S.C. § 1681. It does not appear to apply to Petitioners, as the court noted. Moreover, Petitioners are seeking recognition based on religious beliefs, which has been definitively denied, and not gender. *See* App. 28a-29a & n.2.

C. This Court Should Not Wait for Another Case.

In the 25 years since the enactment of the EAA, *Amicus* has located only two circuit court cases that have weighed the rights of students under the EAA against the non-discrimination policies of schools or states.[6] This is so despite the fact that there are hundreds of thousands of high school students entering and graduating from high schools each year and the fact that every state has a non-discrimination policy.

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[6] Appellate courts have been called on to interpret and apply the EAA, but not in the manner that this case presents. *See Straights & Gays for Equality v. Osseo Area Sch.-Dist. No. 279,* 540 F.3d 911, 915-16 (8th Cir. 2008) (determining whether certain groups are curricular or non-curricular); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 221-25 (3rd Cir. 2003) (holding that student activity period was "non-instructional time"); *Prince v. Jacoby*, 303 F.3d 1074, 1078, 1084-90 (9th Cir. 2002) (allowing religious group access as a separate "class" of club violated EAA); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 466-67 (7th Cir. 2001) (finding that principal's decision to disallow Bible Club from including a cross in its mural did not violate EAA and was protected by EAA's "order and discipline" clause); *Ceniceros ex rel. Risser v. Bd. of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 880-81 (9th Cir. 1997) (finding that lunch period is "non-instructional time"); *Pope ex rel. Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1249-54 (3rd Cir. 1993) (holding that groups need not be student-initiated to trigger EAA and that district admitted other non-curricular groups); *Garnett ex rel. Smith v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993) (holding that EAA preempts state law regarding student groups' access to high schools).

For at least 12 of those 25 years, students in the Second Circuit have been allowed a limited set of the rights Congress promised. In the Ninth Circuit, not even this is available to students. If history is a guide, there will be few opportunities to correct the limitations imposed by the Ninth and Second Circuits, leaving over 25% of the high school students in this country without the full protections Congress sought to provide.[7]

Nor is it likely that a spate of new cases will crop up. This Court has long recognized that, faced with a decision-making body that has wide authority to grant access to a forum, people will naturally censor their preferred form of expression to avoid being denied access. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

In addition, the EAA is intended to protect a temporally transient group of people who this Court and Congress have recognized are not fully adult. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *cf.* 20 U.S.C. §§ 4071(c)(4), 4071(f). It is little wonder that there are not more cases of this type. Such challenges outlast a student's high school

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[7] As of 2007, there were 23,436 public secondary schools in the United States educating over 15 million students. Thomas D. Snyder, et al., *Digest of Educational Statistics 2008* at 15, 19 (March 2009). Over one quarter of the total enrollment is within the Second and Ninth Circuits. *Id.* at 62-63 (4,297,345 students in public secondary schools in the states and territories comprising the Second and Ninth Circuits as of fall 2006).

years and cast them in the role of a non-conformist discriminator. Few would willingly accept this mantle.

III. CONCLUSION

For the foregoing reasons, *Amicus* respectfully request that this Court grant Petitioners' writ of certiorari.

Respectfully submitted,

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