



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 Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit*

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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Pursuant to Rule 15.8 of this Court, petitioners file this supplemental brief to bring to this Court's attention a new authority that underscores the need to grant review in this case.

One week after petitioners filed their petition for writ of certiorari, the Ninth Circuit rendered its decision in *Christian Legal Society Chapter of the University of California v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) ("*Kane*").¹ *Kane*, similar to the facts described in this petition, involved University of California, Hastings College of the Law ("UC Hastings") denying Christian Legal Society ("CLS") "registered" club status, and appurtenant benefits, including access to school facilities for meetings and office space, eligibility for funding from the school, and access to a number of channels of communication on campus. *Christian Legal Society Chapter of the Univ. of Cal. v. Kane*, 2006 WL 997217, *1 (N.D. Cal. 2006).

The *Kane* decision is significant because the Ninth Circuit premised its holding entirely on the precedent established in *Truth*, confirming that *Truth* is not a narrow decision limited to its facts, but one that fundamentally alters the legal landscape for the expressive associational freedoms of student clubs.

As a precondition for registration, UC Hastings forces student clubs to abide by the law

¹ This decision is reprinted in the Appendix ("App.") attached to this supplemental brief.

school's non-discrimination policy. *Id.* at *2. The non-discrimination policy requires every registered student club to permit any student to participate, become a member, or become a leader, irrespective of that student's beliefs and irrespective of the effect on the group. *Id.* at *3. Accordingly, UC Hastings concluded that the CLS Statement of Faith for voting members and code of conduct requirements for officers violated its non-discrimination policy, and denied CLS's application for status as a registered student organization on that singular basis. *Id.*

CLS challenged its exclusion from the law school's forum for student organizations, claiming UC Hastings violated the group's First Amendment right to expressive association, among other claims. *Id.* at *4. The district court granted summary judgment in the law school's favor, and CLS appealed the decision. *Id.* at *27.

One week following the oral argument for the appeal, the Ninth Circuit issued an unpublished two-sentence decision summarily rejecting the expressive association claim and affirming the district court's ruling. App. 2a.² For this decision, the panel cited one isolated authority, *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), and upheld the constitutionality of the law school's non-discrimination policy as viewpoint neutral and reasonable. App. 2a. The *Truth* decision - representing the binding precedent in the circuit -

² The decision offers little reasoning and is fittingly designated "not for publication." App. 1a-2a.

foreclosed any meaningful legal analysis of the expressive association claim.³

The *Kane* decision reveals that the *Truth* opinion is not limited to the facts of the case. Far from it, *Kane* exposes the overreaching impact of *Truth* in three distinct ways – each compounding the constitutional shortcomings that saturate the *Truth* decision.

First, *Truth*'s rationale goes beyond the high school setting and expands its restrictions to cover university student groups as well – where First Amendment protection is supposed to be at its apex. See, e.g., *Keyishian v. Bd. of Regents of the Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”) (citation omitted). In the Ninth Circuit, college students, along with high school students, have lost their expressive association rights.

Second, while *Truth* involved a student club's selection of general members, schools may use *Truth*'s rationale to restrict how clubs select officers and voting members. These positions must now be open to non-adherents.

³ One of the three judges on the *Kane* panel, Judge Bea, wrote an opinion dissenting from the Ninth Circuit's denial of en banc review in *Truth*. In this opinion, Judge Bea strongly criticized the *Truth* panel's misapplication of this Court's expressive association jurisprudence. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 855-57 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc). But despite his misgivings about the analysis in *Truth*, Judge Bea was compelled to adhere to *Truth* as binding authority in the Ninth Circuit.

Finally, as illustrated in *Kane*, *Truth's* rationale allows schools to demand every student club permit any student to join and/or lead the club, no matter how significantly that student might alter the club's identity and message. Thus, a school may force the Young Democrats Club to allow a Republican to be its president or require the vegetarian club to grant voting privileges to meat-eaters. There could be no greater intrusion on a group's expressive association; yet, as long as a school forces every student club to accept all comers, the policy is *per se* viewpoint-neutral and reasonable – and hence constitutional – under the flawed legal framework formed by the Ninth Circuit in *Truth*.

Kane demonstrates that the *Truth* decision is not a one-time aberration, but a ruling that signifies lasting and adverse consequences to the right to expressive association in various contexts. And, because this result conflicts with holdings of this Court, and other circuits, *Truth's* petition for writ of certiorari ought to be granted.

Respectfully Submitted,

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