



No. 08-1268

IN THE
SUPREME COURT OF THE UNITED STATES

KENT SCHOOL DISTRICT, et al.,

Cross-Petitioners,

v.

TRUTH, an unincorporated association, et al.,

Cross-Respondents.

*On Conditional Cross-Petition for Writ of
Certiorari to the United States Court of
Appeals for the Ninth Circuit*

**RESPONSE TO CONDITIONAL CROSS-
PETITION**

BENJAMIN W. BULL
GARY MCCALED
JORDAN LORENCE
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

NATHAN W. KELLUM
Counsel of Record
ALLIANCE DEFENSE FUND
699 Oakleaf Office Lane
Suite 107
Memphis, TN 38117
(901) 684-5485

Counsel for Cross-Respondents

QUESTION PRESENTED

The Ninth Circuit, in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), seemingly diverged from other circuits in determining that the official-policy requirement set out in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) does not apply to claims for prospective relief. In the instant case, the Ninth Circuit cited *Chaloux* and held *Monell* inapplicable on that basis. But since Truth actually challenges an official policy, specifically, the nondiscrimination policy relied upon by the school district to deny access to a forum open to other non-curricular clubs, the cross-petition begs the following question: Is this case an appropriate vehicle to resolve the issue over *Monell's* official-policy requirement?

LIST OF PARTIES

In this conditional cross-petition, Cross-Petitioners are Defendants Kent School District, Barbara Grohe, Superintendent of Kent School District, Mike Albrecht, Principal of Kentridge High School, and Eric Anderson, Vice Principal of Kentridge High School (“District”). Cross-Respondents are Plaintiffs Truth, an unincorporated association, Sarice Undis, and Julianne Stewart (“Truth”).

CORPORATE DISCLOSURE STATEMENT

Truth states that it has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES..... ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION..... 6

TABLE OF AUTHORITIES

Cases

<i>Chaloux v. Killen</i> 886 F.2d 247 (9th Cir. 1989)	i, 2, 4, 5
<i>City of Canton v. Harris</i> 489 U.S. 378 (1989)	4
<i>Gernetzke v. Kenosha Unified Sch. Dist. No. 1</i> , 274 F.3d 464 (7th Cir. 2001)	4
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978).....	<i>passim</i>

Statutes

20 U.S.C. §§ 4071-4074	1, 2, 3
42 U.S.C. § 1983	4, 5, 6
Washington Revised Code § 49.60.215 (West 2006).....	1

STATEMENT OF THE CASE

As explained in detail in its petition for a writ of certiorari in *Truth v. Kent School District*, No. 08-1130 (filed Mar. 10, 2009), Truth is a Christian student club that was denied associated student body (ASB) status at Kentridge High School in the Kent School District because Truth's membership criteria require students to possess a true desire to study the Bible and grow in a relationship with Jesus Christ. App. 11a.

Kent School District Policy 3210 addresses "nondiscrimination" and mandates equal treatment in student clubs "without regard to ... creed," among other things. App. 9a, 171a. The term "creed" prohibits selective membership on the basis of religious beliefs. App. 9a. In addition to its own policy, the District relies on Washington State nondiscrimination law, Washington Revised Code § 49.60.215 (West 2006), that likewise precludes religious-oriented choices. App. 10a-11a. According to the District, these nondiscrimination policies require it to deny ASB recognition to Truth. App. 11a.

Truth brought suit under the Equal Access Act, 20 U.S.C. §§ 4071-4074, and the First and Fourteenth Amendments. The district court granted District's motion for summary judgment on Truth's constitutional claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and on standing and ripeness grounds. App. 121a-130a. The court also ruled against the club on its Equal Access Act

claim, finding that Truth was not covered by the Act's protection. App. 130a-135a. And, in an alternative holding, the district court deduced that Truth could not prevail on its expressive association claim. App. 135a-147a.

The Ninth Circuit panel affirmed the outcome, but on different grounds. It first dismissed the District's arguments on standing and ripeness, finding that Truth's denial of charter club status is an injury-in-fact that is directly traceable to the District's nondiscrimination policy. App. 86a-91a. The panel then reversed the district court's *Monell* ruling, citing *Chaloux v. Killen*, 886 F.2d 247 (9th Cir. 1989) and holding *Monell* inapplicable to claims for prospective relief. App. 91a-92a.

The panel went on to scrutinize the District's nondiscrimination policy under both the Equal Access Act and the First Amendment. Recognizing the District's reliance on the nondiscrimination policy as basis for excluding Truth, the Ninth Circuit upheld the policy under the Act as a facially content-neutral measure. App. 93a-100a. And despite pegging strict scrutiny as the appropriate standard, the panel rejected Truth's expressive association claim because it could not perceive a "First Amendment interest." App. 100a-107a.

Truth filed a petition for rehearing and rehearing en banc. The Ninth Circuit responded by withdrawing its opinion and issuing a substituted one. App. 39a-73a. The panel's analysis on the Equal Access Act remained substantially the same, but not so for Truth's expressive association claim.

The panel jettisoned this Court's expressive association jurisprudence and applied public forum analysis instead, upholding the District's nondiscrimination policy as a reasonable, viewpoint-neutral restriction in a limited public forum. App. 67a-71a.

Truth filed a second petition for rehearing en banc. Subsequently, the panel amended their second opinion to add a two-judge concurring opinion, which expounded on the thinking of these two judges in applying forum analysis to Truth's expressive association claim. App. 35a-38a. The Ninth Circuit eventually denied Truth's en banc petition, over the dissent of Judges Bea and O'Scannlain. App. 148a-164a.

Truth timely filed its petition for writ of certiorari, asking this Court to review the Ninth Circuit's adverse holdings on Equal Access Act and expressive association claims. The District has now filed a conditional cross-petition concerning the Ninth Circuit's treatment of *Monell*.

ARGUMENT

There appears to be a disagreement among the circuits about the application of *Monell* - and the requirement of an official policy for municipal liability - in respect to claims for prospective relief. But the present case does not turn on this issue. The harm suffered by Truth arose from the District's nondiscrimination policy, an official policy of the District. Thus, this Court need not resolve the

possible circuit split over *Monell* to reach the constitutional issues raised in Truth's petition.

Monell held that a local government is among those persons to whom 42 U.S.C. § 1983 applies, but only to the extent that the unconstitutional conduct implements or executes an official policy or custom. 436 U.S. at 690-91. As a result, vicarious liability does not attach under § 1983. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Local governments can only be held responsible for their employees' unconstitutional conduct when there is a "direct causal link" between an official policy and the challenged conduct. *Id.*

Subsequent to this Court's holding in *Monell*, the Ninth Circuit in *Chaloux* opined that this requirement does not apply to claims for prospective relief. 886 F.2d at 250-51. Other circuits have apparently applied *Monell's* official-policy requirement regardless of the relief sought. *See, e.g., Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001).

The District invoked *Monell* as a defense in this case, disputing liability for Truth's injuries on the grounds that "[n]o District policy is implicated in this case." Cross-Petition, p. 10. On appeal, the Ninth Circuit rejected the argument out of hand, citing *Chaloux* as binding precedent and finding *Monell* inapplicable, because Truth seeks prospective relief. App. 19a-20a.

But the Ninth Circuit could have just as easily dismissed the District's argument because an official

policy triggers Truth's § 1983 action. In fact, the District has effectively conceded its *Monell* defense in repeatedly pointing to the nondiscrimination policy as the singular basis for denying Truth's charter applications – contradicting its bald and curious assertion that “no District policy is implicated here.” The Ninth Circuit highlighted the District's reliance on the nondiscrimination policy throughout its opinion:

- “The District has argued that [its] non-discrimination policies require it to deny ASB recognition to Truth.” App. 11a.
- “The District asserts that ... its own non-discrimination policies mandate that it deny ASB recognition to Truth. ... [So] we do not see how the District might approve the same or a similar charter request in the future.” App. 15a.
- “Here, the harm [Truth is alleging] is traceable to the District's [non-discrimination] policies, which the District has argued compel it to deny ASB recognition to Truth.” App. 16a.
- “Relying on its non-discrimination policies, the District points to three aspects of Truth's charter that justify its decision to deny the club ASB recognition.” App. 20a.

In following precedent of another panel, the Ninth Circuit was obliged to acknowledge *Chaloux*, but a cursory view of the record reveals the existence of an official policy. For this reason, the cross-petition is not particularly well-suited to resolve any

circuit split about the interpretation of this Court's holding in *Monell*. In order to reach the constitutional issues in Truth's petition, this Court need only recognize that *Monell's* official-policy requirement has been met through the presence of the District's nondiscrimination policy and move on to the constitutional issues at stake.

CONCLUSION

While circuit courts do seem to quibble over the applicability of *Monell's* official-policy requirement to claims for prospective relief, this issue has no bearing on Truth's § 1983 claim (or petition for writ of certiorari). The District relies on its nondiscrimination policy as the reason for excluding Truth from the forum, and the existence of this official policy eliminates the need for this Court to consider the *Monell* issue. The cross-petition ought to be denied.

Respectfully Submitted,

<p>Benjamin W. Bull, Esq. Gary McCaleb, Esq. Jordan Lorence, Esq. ALLIANCE DEFENSE FUND 15100 N. 90th Street Scottsdale, AZ 85260 (480) 444-0020</p>	<p>Nathan W. Kellum, Esq. (counsel of record) ALLIANCE DEFENSE FUND 699 Oakleaf Office Lane Suite 107 Memphis, TN 38117 (901) 684-5485</p>
<p>Robert H. Tyler, Esq. Jennifer L. Monk, Esq. ADVOCATES FOR FAITH AND FREEDOM 24910 Las Brisas Road, Suite 110 Murrieta, CA 92592 (951) 304-7583</p>	<p>Timothy Chandler, Esq. ALLIANCE DEFENSE FUND 101 Parkshore Drive, Suite 100 Folsom, CA 95630 (916) 932-2850</p>
	<p>Keith A. Kemper, Esq. ELLIS, LI & MCKINSTRY Two Union Square Seattle, WA 98101 (206) 682-0565</p>