No. _____

In the Supreme Court of the United States

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

Petitioner,

v.

NELL NEWTON, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker,* 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is the Christian Legal Society Chapter of the University of California, Hastings College of the Law.

Respondents are Nell Newton, Chancellor and Dean of the University of California, Hastings College of the Law; Jacqueline Ortega, Director of Student Services for the University of California, Hastings College of the Law; Donald Bradley, Tina Combs, Maureen E. Corcoran, Marci Dragun, Carin T. Fujisaki, Claes H. Lewenhaupt, James E. Mahoney, Brian D. Monaghan, and Bruce L. Simon, the Board of Directors of the University of California, Hastings College of the Law, in their official capacities.

Respondent-Intervenor is Hastings Outlaw, a student organization at the University of California, Hastings College of the Law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Christian Legal Society Chapter of the University of California, Hastings College of the Law, states that it is an unincorporated student organization and is a chapter of the national Christian Legal Society, which is a 501(c)(3) organization, incorporated in Illinois, with no parent or publicly held company owning 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Ninth Circuit is unreported and reprinted in Appendix (App.) 1a-3a. The opinion of the district court is unreported and reprinted in App. 4a-70a.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its panel decision on March 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND UNIVERSITY REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found in App. 71a. The College's policies governing the registration of student organizations are set forth in App. 72a-98a.

STATEMENT OF THE CASE

This case involves the Hastings College of the Law's denial of recognition to a student organization, the Christian Legal Society ("CLS"), because the organization draws its officers and voting members from among those who share the group's core religious commitments. The court below held that Hastings' application of its Nondiscrimination Policy to deny CLS recognition did not violate the group's First and Fourteenth Amendment rights. App. 2a-3a. The material facts of this case are undisputed.

1. Hastings' Registration of Student Organizations

Each year, Hastings grants "Registered Student Organization" ("RSO") status to a broad range of student groups. It does so to promote "the expression of a variety of viewpoints." App. 82a. RSO status is available to any group of Hastings students, staff, or faculty, even a "group" composed of a single individual. App. 82a-83a. During the 2004-05 academic year (when the instant dispute arose), Hastings recognized approximately sixty

RSOs. CLS is the only group from which Hastings has ever withheld recognition.

RSOs form to express viewpoints on topics such as politics, religion, culture, and human sexuality. App. 109a-150a. RSOs include Respondent-Intervenor Hastings Outlaw (a group advocating for the interests of homosexual and bisexual students), the Black Law Students Association, the Clara Foltz Feminist Society, Silenced Right: National Alliance Pro-Life Group, Law Students for Choice, Hastings Republicans, Hastings Democratic Caucus, and the Vietnamese American Law Society. App. 109a-150a.

RSO status gives groups access to meeting space and to means of communicating with the campus community. App. 7a-8a, 85a. Among these channels of communication are: (1) participating in the annual Student Organizations Fair where student organizations recruit first-year students; (2) placing announcements in the law school newsletter; (3) posting announcements on bulletin boards; (4) sending fliers through law school mailboxes; (5) emailing messages to all members of the law school community through the student government; and (6) appearing in lists of student organizations in law school publications. RSO status also allows a group to apply for student activity fee funding and travel funds. App. 7a-8a.

Hastings disclaims all sponsorship of RSOs. It requires them to inform their members and third parties that they are not sponsored by the College. App. 83a, 85a-86a.

To seek RSO status, a group submits a registration form, a licensing agreement for use of the College name and logo, and its constitution to the Office of Student Services. App. 83a-84a. Hastings requires groups to include its Nondiscrimination Policy in their constitutions. The Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

App. 8a-9a, 88a.

Although the Nondiscrimination Policy enumerates only nine protected categories, Hastings asserts that it requires RSOs to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." App. 9a. Hastings explains "for

example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." E.R. 341.

Hastings has recognized many groups whose constitutions provide that their officers and voting members should agree with their organizations' missions and viewpoints. For instance, Silenced Right states, "So long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." App. 143a. Hastings Democratic Caucus mandates that "any full-time student at Hastings may become a member . . . so long as they do not exhibit consistent disregard and lack of respect for the objective of the organization." App. 118a. Respondent-Intervenor Outlaw's constitution states that officers may be removed for "working against the spirit of the organization's goals and objectives." App. 138a. The Vietnamese American Law Society provides membership to any Hastings student "so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization." App. 147a. The Association of Trial Lawyers of America at Hastings directs that members must "adhere to the objectives of the Student Chapter as well as the mission of ATLA." App. 110a. The Hastings Motorcycle Riders Club expects members to "own[] or ride[] a motorcycle or scooter, or ha[ve] an interest in such activities." App. 132a.

2. Christian Legal Society

Founded in 1961, Christian Legal Society is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. Its purposes include providing a means of society, fellowship, and nurture among Christian lawyers; encouraging, discipling, and aiding Christian law students; promoting justice, religious liberty, and biblical conflict resolution; and encouraging lawyers to furnish legal services to the poor. App. 99a-100a.

In furtherance of its purposes, the national Christian Legal Society maintains attorney and law student chapters across the country. Petitioner CLS is the law student chapter of the national organization at Hastings. App. 99a-108a. The mission of the CLS chapter is to maintain a vibrant Christian law fellowship that enables its members, individually and as a group, to fulfill Christ's mandate to love God and to love their neighbors as themselves. App. 99a.

CLS welcomes all Hastings students to attend and participate in its meetings and other activities. CLS wants persons who are not CLS members to come, listen, and participate in hopes they will be persuaded to agree with CLS's religious viewpoints. For example, CLS sponsors speakers to address integrating Christian faith with legal practice at lectures that are open to all. The chapter invites students to attend Good Friday and Easter Sunday church services where Christian beliefs are presented. The group also hosts several dinners

throughout the school year, all of which are open to any student, without regard to his or her beliefs or conduct. App. 13a.

CLS, however, does not allow nonmembers to vote on chapter decisions or lead the group. CLS has only one category of membership: voting membership. Voting members are eligible to choose the group's officers, stand for election to officer positions, amend the group's constitution, vote on chapter business, and teach weekly Bible studies. Covering a variety of topics, the Bible studies are centered on the Christian beliefs reflected in CLS's Statement of Faith.

A student who wishes to become a voting member of CLS must affirm a commitment to the group's foundational principles by signing the national CLS Statement of Faith. App. 12a, 100a-102a. A shared devotion to Jesus Christ is reflected in the Statement of Faith, the affirmation of which indicates a member's commitment to beliefs commonly regarded as orthodox in the Protestant evangelical and Catholic traditions. App. 11a-12a, 100a-101a. An individual raised in a faith other than Christianity is eligible for voting membership if he or she affirms the Statement's orthodox Christian tenets. Conversely, a person raised as a Christian is not eligible if he or she no longer can affirm the Statement of Faith. App. 100a-103a.

In light of contemporary controversies regarding human sexuality within various religious denominations, national Christian Legal Society reaffirmed in March 2004 its understanding of

biblical principles of sexual morality and explained how that understanding derives from its Statement of Faith. It stated, "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." App. 11a-12a.

A person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership. A person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership. CLS individually addresses each situation that arises in a sensitive Biblical fashion. App. 11a-12a.

3. Hastings' Denial of RSO Status to Christian Legal Society

Early in the 2004-05 school year, CLS chapter vice president Dina Haddad inquired of the Hastings Director of Student Services, Judy Chapman, about the process for registering CLS as an RSO. Haddad informed Chapman that the group was a local chapter of the national Christian Legal Society. Handing Haddad a copy of the College's Nondiscrimination Policy, Chapman cautioned her that national organizations like the Christian Legal Society often have membership or leadership policies

that conflict with the Nondiscrimination Policy. App. 12a-13a.

Shortly thereafter, Haddad applied to the Office of Student Services for travel funds to cover a portion of the costs for her and CLS president Isaac Fong to attend Christian Legal Society's 2004 annual conference. Chapman granted Haddad and Fong $250.00. App. 12a-13a.

Haddad submitted CLS's registration materials, including its constitution, to the Office of Student Services. After reviewing the CLS constitution, Chapman determined that the constitution likely ran afoul of Hastings' Nondiscrimination Policy and referred the matter to Hastings' General Counsel, Elise Traynum, for review. App. 12a-13a. Traynum subsequently concluded that CLS's constitution violated the religion and sexual orientation provisions of Hastings' Nondiscrimination Policy. App. 12a-13a.

CLS provided Chapman a letter prepared by counsel that explained that all students are welcome to attend and participate in CLS's meetings. The letter described CLS's shared belief in certain core religious principles, as well as the application of those principles to the subject of human sexuality, and explained how compliance with these principles was among the criteria for choosing officers and voting members. App. 12a-13a. The letter did not persuade Hastings to change course.

As the only group from which Hastings has ever withheld recognition, CLS cannot meet as an

officially recognized student organization. It cannot utilize the various means by which RSOs communicate with the campus. In addition, CLS is denied student activity fee funding and travel funds. After Hastings denied recognition, Chapman informed Haddad that the $250.00 previously granted for travel had been withdrawn. App. 12a-13a.

Denying CLS access to communication channels, reserved meeting space, and funding places CLS at a singular disadvantage in comparison to other student groups, all of whom are free to communicate their messages and viewpoints while receiving the benefits of official recognition.

4. Jurisdiction and Proceedings in the District Court

CLS filed suit in district court under 42 U.S.C. § 1983, challenging Hastings' denial of recognition as a violation of the group's expressive association, free speech, free exercise of religion, and equal protection rights.[1] The district court had jurisdiction under 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

The district court granted Hastings Outlaw leave to intervene. Outlaw claimed two interests: (1) its members must be able to become officers and voting

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[1] This petition will emphasize the clear circuit conflict with respect to the expressive association claim. However, CLS also pursues in this Court each of its other constitutional claims, including the claim that Hastings' refusal to recognize CLS was viewpoint discriminatory and unreasonable in light of the purposes of the speech forum, violated the Free Exercise Clause, and violated the Equal Protection Clause.

members of any group on campus, including CLS; and (2) its members do not want their student activity fees supporting an organization they find offensive.

On cross-motions for summary judgment, the district court ruled in favor of Hastings and Outlaw. The court held that the Nondiscrimination Policy did not regulate CLS's speech, but rather its conduct. App. 27a (citing *United States v. O'Brien,* 391 U.S. 367 (1968)).

The court then offered a number of alternative holdings. First, it held that even if the Policy regulates speech, it still passes constitutional muster. The court determined that Hastings "created a limited public forum and, thus, the restrictions on access to this forum are permissible so long as they are viewpoint-neutral and reasonable." App. 30a. The court acknowledged that the Nondiscrimination Policy "may affect a group with a certain perspective or belief system" but this fact "does not render the policy viewpoint based." App. 34a. Moreover, "Hastings' requirement of compliance with its Nondiscrimination Policy is a reasonable regulation," because it is "consistent with and furthers [Hastings'] educational purpose." App. 38a.

Second, the court held that Hastings' application of its Nondiscrimination Policy did not violate CLS's right of expressive association. App. 42a. Contradicting the Seventh Circuit's opinion in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the court held that this Court's decisions

in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), did not apply because Hastings' rule governed access to a speech forum and to the benefits of recognition.

Third, the court held that even if *Dale* and *Hurley* applied, "there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become[s] a member or officer, [] by their presence alone, would impair CLS's ability to convey its beliefs." App. 59a.

The district court also rejected CLS's Free Exercise Clause and Equal Protection Clause claims.

5. Proceedings in the Court of Appeals

CLS appealed to the Ninth Circuit, which, after briefing, postponed oral argument pending its resolution of *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007), *withdrawn*, 524 F.3d 957 (9th Cir. 2008), *amended by* 542 F.3d 634 (9th Cir. 2008), *reh'g denied*, 551 F.3d 850 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 10, 2009) (No. 08-1130). Because the court below based its ruling solely on the *Truth* decision, it is necessary to review the various opinions in *Truth* in order to understand the ruling below.

In *Truth*, a school district denied recognition to a high school Bible club, named Truth, partly because it limited voting membership and officer positions to those who shared the group's religious beliefs and

limited non-voting "general" membership to those who "desire[d] . . . a relationship with Jesus Christ." *Truth*, 499 F.3d at 1009. Truth's general members could not vote on club matters, hold office, or lead club meetings, including Bible study or prayer. *Id.* at 1009, 1014. Like the CLS chapter in the instant case, Truth would allow non-members to freely attend meetings and activities.

In its first opinion, the Ninth Circuit ruled that the school district could deny Truth recognition because of its general membership requirement. *Id.* at 1015. It did not reach the voting membership and leadership issue. *Id.* The court held that requiring Truth to accept "general members" who did not "desire . . . a relationship with Jesus Christ" would *not* affect Truth's expression. *Id.* at 1014-15. The court explained that "[t]he First Amendment interest implicated by [*Hurley* and *Dale*] is not present here. The general members do not control the club's Bible study and prayer functions. They do not lead the club in its activities. They cannot vote." *Id.* at 1014.

The Ninth Circuit then distinguished *Walker*, 453 F.3d 853, on the basis that, unlike the CLS chapter in that case, Truth had no "First Amendment interest with respect to the denial of . . . recognition on account of *the general membership restrictions*." *Truth*, 499 F.3d at 1015 (emphasis added).

While Truth's petition for rehearing en banc was pending, the panel withdrew its initial opinion and substituted a new opinion. The substituted opinion no longer separately analyzed Truth's expressive

association claim. Instead, the Ninth Circuit considered *only* whether the school district's application of its nondiscrimination policy to Truth's general membership requirements was viewpoint neutral and reasonable in light of the purpose served by the speech forum, holding that it was. *Truth*, 524 F.3d at 973.

Truth again petitioned for rehearing en banc. While that petition was pending, the panel amended its substituted opinion, adding a two-judge concurrence that addressed the lack of expressive association analysis in the prior opinion. Acknowledging that "[e]xpressive association may be burdened when the state requires a group to change its membership criteria," the concurrence nonetheless asserted that when the government restricts access to a limited public forum in a way that interferes with a group's expressive association, "we apply the lesser standard of scrutiny," i.e., viewpoint neutrality and reasonableness. *Truth,* 542 F.3d at 651, 652 (Fisher & Wardlaw, JJ., concurring).

Likewise, the concurrence attempted to distinguish *Walker*, claiming that "[a]lthough the Seventh Circuit applied strict scrutiny in addressing this [expressive association] claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." *Id.* at 652 n.1 (Fisher & Wardlaw, JJ., concurring) (citing *Walker*, 453 F.3d at 866). In other words, the concurrence asserted that the label attached to the speech forum

dictated whether a court should undertake expressive association analysis.

The Ninth Circuit subsequently denied en banc review. In dissent, Judges Bea and O'Scannlain observed that *Truth* "clearly establishe[d] a circuit conflict" with *Walker*. *Id.* at 857 (Bea & O'Scannlain, JJ., dissenting from denial of reh'g en banc). The dissent observed:

> [t]he essential problem with the majority is that it applies a *Rosenberger* "free speech" analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* "freedom of association" case (which deals with the formulation of the content of such speech).

Id. at 853 (Bea & O'Scannlain, JJ., dissenting from denial of reh'g en banc).

Having disposed of *Truth*, the Ninth Circuit scheduled oral argument in this case. One week after oral argument, the court issued a two sentence opinion citing *Truth,* 542 F.3d 634, and affirming the decision of the district court. App. 2a-3a. Applying "the lesser standard of scrutiny" utilized in *Truth*, the Ninth Circuit held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable." App. 2a-3a. Without analysis, the Ninth Circuit extended *Truth* from the high school to the law school context and disregarded its own repeated distinction in *Truth* between "general membership" and officers and voting membership. The court did not analyze whether Hastings' refusal

to recognize CLS infringed its right of expressive association.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case squarely conflicts with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), on the issue of whether a religious student group—indeed, an indistinguishable chapter of the same national organization—may draw its officers and voting members from among those who share its core religious commitments. The decision also conflicts with the Second Circuit's decision upholding, under the federal Equal Access Act, 20 U.S.C. §§ 4071-4074, the right of a high school religious student group to require its officers to affirm its religious viewpoints. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872-73 (2d Cir. 1996). *See also id.* at 856-57 (calling the Equal Access Act "an analog to the First Amendment[]").

The Ninth Circuit's ruling also conflicts with two independent lines of this Court's cases. First, this Court has consistently protected an expressive association's First Amendment right to deny leadership and membership to persons who could adversely affect the association's ability to express its message. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). *See also Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

Second, this Court has consistently required public universities to recognize disfavored student organizations, including religious groups, under the First Amendment's protection of both the rights of expressive association and free speech. *See Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). *Cf. Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990). Simply by requiring religious groups to open their leadership and voting membership to persons of different or anti-religious beliefs, public education officials could easily circumvent this Court's critical protection of religious groups' access to public educational facilities from which they have too often been discriminatorily excluded. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar*, 454 U.S. 263.

In addition, the impact of the decision is substantial. It affects approximately three million students at hundreds of higher educational institutions in the Ninth Circuit. Many colleges and universities undermine the freedom of student religious groups to choose their leaders and members, often resulting in litigation. Because of the Ninth Circuit's decision, national organizations like CLS cannot maintain uniform national membership criteria for all their chapters.

This Court should grant the petitions in both this case and in *Truth v. Kent School District*, No. 08-1130 (Mar. 10, 2009), in order to fully resolve this

burgeoning national problem and provide guidance to the courts below.

A. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *CHRISTIAN LEGAL SOCIETY v. WALKER*, 453 F.3d 853 (7th Cir. 2006).

In *Christian Legal Society v. Walker*, the Seventh Circuit confronted a case with identical material facts and legal claims. It came to a diametrically opposite result from that reached by the Ninth Circuit in this case.

The dean of Southern Illinois University School of Law derecognized the Christian Legal Society chapter because he believed its requirement that officers and voting members share its religious viewpoints violated the school's antidiscrimination policy. *Walker*, 453 F.3d at 857-58. The chapter sued, raising expressive association and free speech claims. The Seventh Circuit properly applied this Court's precedents to the expressive association claim before separately applying forum analysis to the free speech claim. *Id.* at 861-67.

With regard to CLS's expressive association claim, the Seventh Circuit correctly applied *Dale*, 530 U.S. 640, and *Hurley*, 515 U.S. 557, to determine whether the law school's application of its antidiscrimination policy to the chapter "affect[ed] in a significant way the group's ability to advocate its viewpoint." *Walker*, 453 F.3d at 861-63 (internal citations and quotations omitted). "To ask this

question," according to the court, "[wa]s very nearly to answer it." *Id.* at 862. The court concluded, "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. Indeed, "[t]he only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id.*

Following *Dale*, the Seventh Circuit then correctly applied strict scrutiny. *Id.* "In order to justify interfering with CLS's freedom of expressive association, [the law school]'s policy must serve a compelling state interest that is not related to the suppression of ideas and that cannot be achieved through a less restrictive means." *Id.* The court held that the school had identified no interest in applying its policy to the chapter. *Id.*

Walker is on all fours with this case. Yet the Ninth Circuit reached a contrary result. Diverging from this Court's expressive association jurisprudence, the Ninth Circuit failed to consider whether Hastings' application of its Nondiscrimination Policy to CLS "affect[ed] in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Nor did the Ninth Circuit apply the requisite level of scrutiny—strict scrutiny. Instead, following the erroneous approach of *Truth v. Kent*, the court refused separately to consider *all* of CLS's claims—expressive association, free speech, free exercise of religion, and equal protection—and asked only

whether Hastings' application of its policy to CLS was "viewpoint neutral and reasonable." App. 2a-3a.

In conflict with *Walker* (and the controlling Supreme Court precedent underlying *Walker*), the Ninth Circuit's decision merits this Court's review. It creates a circuit split such that chapters of the same national organization have vastly different constitutional rights based on where in the country they are located.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *HSU v. ROSLYN UNION FREE SCHOOL DISTRICT NO. 3,* 85 F.3d 839 (2d Cir. 1996).

The Ninth Circuit's decision also creates a conflict with the Second Circuit's decision in *Hsu*, 85 F.3d 839, that a school could not require a student religious group to extend officer positions affecting its religious message to those who did not share its core religious commitments.

The school district conditioned its recognition of a high school Bible club on the club's willingness to open its officer positions to students who disagreed with the club's Christian beliefs. *Id.* at 850. The club sued under the Equal Access Act and the First Amendment. *Id.* The school district primarily argued that it was "applying its nondiscrimination policy neutrally to all after-school clubs." *Id.* at 859. Because *all* clubs were forbidden from discriminating on the basis of religion in the selection of their officers, the school district argued,

the club was receiving "equal access" consistent with the Equal Access Act. *Id.* at 859-60.

Rejecting this contention, the Second Circuit held that the district violated the club's rights under the Act. The court explained that, like the First Amendment, "the Act contains an implicit right of expressive association." *Id.* at 856-57, 859. Relying on *Roberts v. U.S. Jaycees*, 468 U.S. 609, the Second Circuit considered whether the district's refusal to allow the club to limit its leadership to Christians would "impair the ability of the original members to express only those views that brought them together." *Id.* at 859 (internal quotations and emphasis removed). The court held that "when an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school's decision to deny recognition to the club because of the exclusion" violates the Equal Access Act. *Id.*

The Second Circuit stated that to "focus on the even application of [the school district's] nondiscrimination rule misses the point." *Id.* Rather, the proper question is whether application of the nondiscrimination policy "impede[s] [the club] from expressing the beliefs that it was formed to express." *Id.* at 860.

The Ninth Circuit adopted the very analysis the Second Circuit rejected in *Hsu*. The Ninth Circuit held that Hastings' allegedly evenhanded application of its policy to *all* student groups rendered its treatment of the CLS chapter constitutional. App.

2a-3a. The court below failed to consider whether application of the Policy to CLS impedes the expression of its religious beliefs, contradicting the Second Circuit's approach in *Hsu* and leading to a contrary result. Nor did the court analyze Hastings' interest in prohibiting CLS from selecting leaders and voting members on the basis of religion.

That the Second Circuit based its decision on the Equal Access Act rather than the First Amendment does not diminish the conflict between *Hsu* and the decision below for two reasons. First, as this Court observed in *Mergens*, the Act is an extension of *Widmar*'s free speech protection of college religious student groups to secondary school religious student groups. 496 U.S. at 234-35. Similarly, the *Hsu* court deemed the Act "an analog to the First Amendment[]" and concluded "the Act contains an implicit right of expressive association." 85 F.3d at 856-57, 859. Second, the Ninth Circuit itself conceded the conceptual similarity of the Equal Access Act to the First Amendment when it rejected *law students' First Amendment claims* based in part on its holding in *Truth* denying *high school students' their Equal Access Act right* to require that their group's general members agree with the group's basic religious viewpoint.

Because the Ninth Circuit improperly ignored the policy's impermissible impact on CLS's expressive association rights, its decision directly conflicts with that of the Second Circuit.

C. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS PROTECTING THE RIGHT OF AN EXPRESSIVE ASSOCIATION TO CONTROL ITS MESSAGE IN *BOY SCOUTS OF AMERICA v. DALE*, 530 U.S. 640 (2000), AND *HURLEY v. IRISH-AMERICAN GAY, LESBIAN & BISEXUAL GROUP OF BOSTON*, 515 U.S. 557 (1995).

The freedom of association "has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy*, 408 U.S. at 181; *Roberts*, 468 U.S. at 622. "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 68 (2006). This Court's "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar,* 454 U.S. at 269, citing *Healy,* 408 U.S. at 180.

The right of expressive association protects an organization's liberty to define and control its leadership and membership. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *La Follette*, 450 U.S. at 122 n.22 (quotation omitted). *See also Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000). Expressive association protects the right of anti-war groups to refuse voting

membership to ROTC candidates, environmental groups to deny leadership positions to persons who dispute the existence of global warming, Democratic groups to reject Republicans as voting members, or Jewish groups to deny leadership to Holocaust deniers.

In *Dale*, this Court held unconstitutional the application of New Jersey's Law Against Discrimination to force the Boy Scouts to accept a self-identified homosexual person as an assistant scoutmaster. 530 U.S. at 654. The key inquiry is whether compliance with a governmental regulation will "significantly affect" the association's ability "to advocate public or private viewpoints." *Id.* at 650. This Court thus considered whether "Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior." *Id.* at 653 (quotation and citation omitted). This Court directed the lower courts to "give deference to an association's assertions regarding the nature of its expression . . . [and its] view of what would impair its expression." *Id.* The Court concluded that the Scouts sought to "teach[] that homosexual conduct is not morally straight," *id.* at 651 (quotation and citation omitted), and that forcing the Scouts to include a homosexual scout "would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Id.* at 654.

This Court then examined whether the government's application of its nondiscrimination law to the Scouts satisfied strict scrutiny.

Specifically, the government must demonstrate that the regulation "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 648. This Court held that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659.

Similarly, in *Hurley*, this Court unanimously held that Massachusetts could not apply its antidiscrimination law to require a veterans organization to include a pro-homosexual contingent in its parade. *Hurley*, 515 U.S. at 566. The Court concluded that the application of the law to the parade organizers interfered with "the choice of a speaker not to propound a particular point of view." *Id.* at 575. The homosexual advocacy group, according to this Court, could be "refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81. Applying strict scrutiny, this Court determined that no "legitimate interest [had] been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade." *Id.* at 578.

The court below engaged in *no analysis* of CLS's primary claim that requiring it to accept as leaders and voting members persons who reject its religious viewpoint would affect its message and thereby violate its freedom of expressive association. App.

2a-3a. This Court's decisions in *Dale* and *Hurley*, however, require the application of strict scrutiny. *See Walker*, 453 F.3d at 861-63.

The district court below *did* engage in expressive association analysis. However, that court's analysis directly contradicted this Court's approach in *Dale, Hurley,* and *Healy v. James* in four distinct ways. App. 38a-62a. First, the district court attempted to distinguish *Dale* by claiming that "CLS was not being forced, as a private entity, to include certain members or officers" but merely losing the benefits of recognition unless it accepts as leaders and voting members persons who do not agree with its religious viewpoints. App. 40a. In *Healy,* however, this Court rejected a university's claim that denial of recognition was "indirect interference" with expressive association and, therefore, constitutionally permissible. *Healy*, 408 U.S. at 183.

Second, deeming CLS's expression to be conduct rather than expression, the district court applied the test from *United States v. O'Brien,* 391 U.S. 367 (1968). App. 43a-46a. In *Dale,* this Court explicitly rejected the *O'Brien* test as "inapplicable." *Dale*, 530 U.S. at 659.

Third, the district court below ruled that even if *Dale* and *Hurley* applied to CLS's expressive association claim, "there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become[s] a member or officer, [] by their presence alone, would impair CLS's ability to convey its beliefs." App. 59a. Of

course, to the contrary, this Court in *Dale* instructed lower courts to "give deference to an association's assertions regarding the nature of its expression . . . [and its] view of what would impair its expression." *Id.* at 653.

Fourth, the district court below simply asserted that Hastings had "a compelling interest . . . in contrast to *Dale*." App. 61a. In *Dale*, this Court mandated that the government *demonstrate* that the application of a nondiscrimination law to an expressive association "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quotation omitted). The district court failed to require Hastings to make such a showing.

The decision below cannot be reconciled with this Court's protection in *Dale* and *Hurley* of expressive associations' control of their messages through selection of leaders and members.

D. THE NINTH CIRCUIT'S DECISION EVISCERATES THIS COURT'S PROTECTION OF RELIGIOUS STUDENT GROUPS' ACCESS TO UNIVERSITY FACILITIES AND FUNDING IN *WIDMAR v. VINCENT*, 454 U.S. 263 (1981), AND *ROSENBERGER v. RECTOR OF THE UNIVERSITY OF VIRGINIA*, 515 U.S. 819 (1995).

For decades, religious student groups have struggled to secure fair treatment from public university administrators. They have turned to the federal courts—including this Court—to vindicate their constitutional rights. Upholding the First Amendment, this Court has protected the rights of religious student groups. This Court should not tolerate the decision below's adoption of a ready road map for circumventing this Court's protection of religious speech.

Specifically, the Ninth Circuit's ruling renders toothless this Court's decisions in *Rosenberger* and *Widmar*, in which this Court protected the right of religious student groups to recognition. In *Widmar*, this Court held that a university violated the free speech rights of a religious student group when it conditioned access to meeting space on not engaging in "religious worship or religious teaching." *Widmar*, 454 U.S. at 265. *See Mergens,* 496 U.S. at 234-35. In *Rosenberger*, this Court held that a university violated the free speech rights of an evangelical Christian publication when it denied student activity funds because of the publication's "religious editorial viewpoints." *Rosenberger*, 515 U.S. at 834-37. *Cf.*

Mergens, 496 U.S. at 247 (Equal Access Act required school officials to grant religious student group official recognition).

Ironically, when public universities marginalize student religious groups, they undercut the rationale for encouraging the formation of student groups in the first place. As this Court has recognized, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas." *Widmar*, 454 U.S. at 272 n.10. *See also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (purpose of University's student activity fee forum was "facilitating the free and open exchange of ideas by, and among, its students"); *Rosenberger*, 515 U.S. at 834 (purpose of university's forum was to "encourage a diversity of views from private speakers"). By ensuring the inclusion of religious voices in *Widmar* and *Rosenberger*, this Court has enhanced and enriched the discussion of controversial issues on campus.

The same dynamic is at work in this case. Punishing religious student groups for organizing around shared religious commitments decidedly does not facilitate the free and open exchange of ideas. Groups like CLS require adherence to their core viewpoints in order to safeguard the integrity and coherence of their distinctive messages. Such a practice is not invidious discrimination, but instead a good faith effort to maintain expressive identity. It is no different than the Hastings Democratic Caucus insisting that its members support Democratic Party ideals or the Hastings Motorcycle Club requiring that members profess a commitment to riding

motorcycles. To penalize a religious group like CLS for maintaining its religious identity is patently unreasonable. Yet the Ninth Circuit allows a university to withhold recognition of a religious student group unless it surrenders its ability to protect its religious identity and viewpoint, thereby stifling the free exchange of ideas on campus. *Rosenberger*, 515 U.S. at 831-32 (when university denies funding to religious publications, "debate is skewed in multiple ways").

Whether Hastings attempts to deny access to CLS through the exclusion of *speech* from a religious perspective, as in *Widmar* and *Rosenberger*, or the exclusion of *leadership* and *membership* criteria incorporating a religious perspective, the effect is the same: denial of recognition to a student organization because of its religious viewpoint. Accordingly, Hastings' use of its Nondiscrimination Policy to deny CLS registration is nothing more than "a thinly-veiled attempt to circumvent *Widmar* because of disagreement with its equal-access-for-religion result." Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675 (1996). *Cf. Mergens,* 496 U.S. at 245 (warning against allowing school districts to circumvent equal access).

E. PUBLIC UNIVERSITY OFFICIALS' DENIAL OF RECOGNITION TO RELIGIOUS STUDENT GROUPS BECAUSE THEY REQUIRE THEIR LEADERS AND VOTING MEMBERS TO SHARE THEIR RELIGIOUS VIEWPOINTS IS A RECURRING AND PERVASIVE NATIONWIDE PROBLEM.

The Ninth Circuit has given public university officials the green light to derecognize religious student groups simply because they require their officers and voting members to agree with their core religious convictions. Within the Ninth Circuit alone, the decision below affects over three million students enrolled at approximately 317 public institutions of higher learning, or approximately 23% of the nation's college, university, and graduate students.[2] This case will reverberate nationally because it has been closely watched. *See, e.g.,* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups,* 42 U.C. Davis L. Rev. 889, 892 n.4 (2009) (collecting selected articles on topic); Ryan C. Visser, Note, *Collision Course?:* Christian Legal Society v. Kane *Could Create a Split over the*

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[2] These figures are calculated from the 2000 United States census. U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) - Sample Data, QT-P19. School Enrollment: 2000, at http://factfinder.census.gov (click "get data" under "Decennial Census," then click "Census 2000 Summary File 3 (SF 3) - Sample Data," then click "Enter a Table Number," then enter "QT-P19" and press Enter, then select State, and select Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and click Show Result; see figures for college, undergraduate, graduate, and professional school students at public schools).

Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies, 30 Hamline L. Rev. 449 (2007); Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations,* 118 Harv. L. Rev. 2882 (2005); Patricia A. MacLean, *Law School Need Not Support Religious Club that Discriminates*, National Law Journal, Mar. 23, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429159976 (last visited Apr. 9, 2009); Burton Bollag, *Choosing Their Flock*, Chronicle of Higher Education, Jan. 28, 2005, *available at* http://chronicle.com/free/v51/i21/ 21a03301.htm (last visited Apr. 30, 2009).

Unfortunately, the clear circuit split here is not the product of a few outlying universities. To the contrary, several similar cases have reached federal court. In February 2009, relying on the Ninth Circuit's ruling in *Truth,* a district court held that California State University could deny recognition to four Christian organizations because they required members and officers to agree with the groups' religious viewpoints. *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg,* 597 F. Supp. 2d 1075 (S.D. Cal. 2009), *docketed on appeal sub nom. Alpha Delta Chi-Delta Chapter v. Reed,* No. 09-55299 (9th Cir. Feb. 27, 2009).

In November 2008, relying on the district court decision below and the *Truth* decision, a magistrate judge recommended that the district court deny a constitutional challenge to the University of Montana School of Law's derecognition of a CLS

chapter because of its religious requirements for membership and leadership. *Christian Legal Soc'y v. Eck,* No. 07-154 (D. Mont. Nov. 14, 2008). The district court has not issued a final decision.

In a case currently pending in the Eleventh Circuit, the University of Florida denied recognition to Beta Upsilon Chi ("BYX"), a religious student organization, because it required voting members and officers to affirm its orthodox Christian viewpoint. Denying a preliminary injunction, the district court held that the university's denial of recognition did not violate BYX's rights of expressive association and free speech. *Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen,* 559 F. Supp. 2d 1274 (N.D. Fla. 2008). The Eleventh Circuit granted an injunction pending appeal and heard oral argument on December 10, 2008. *Machen,* No. 08-13332 (11th Cir. Jul. 30, 2008). (After argument, the University claimed to change its policy and filed a motion to dismiss the appeal as moot, which is pending.)

In 2007, a district court granted a preliminary injunction against the University of Wisconsin to prevent it from requiring a Catholic organization to include non-Catholics as members. *Univ. of Wis.-Madison Roman Catholic Found. v. Walsh,* No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007).

A district court granted a preliminary injunction against the University of North Carolina when it denied recognition to a Christian student organization because the group required its officers

and members to agree with its religious viewpoints. *Alpha Iota Omega Christian Fraternity v. Moeser,* No. 04-765, 2005 WL 1720903, at *1 (M.D.N.C. Mar. 2, 2005). After the university adopted a new policy allowing all groups to "limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs," the case was dismissed as moot. *Alpha Iota Omega Christian Fraternity*, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006).

CLS student chapters across the nation have had to resort to litigation after being threatened with loss of access to campuses because of alleged discrimination based on religion or sexual orientation. For example, at Washburn University School of Law, a student, who explicitly rejected CLS's statement of faith, filed a religious discrimination complaint against the CLS chapter because it refused to allow him to lead its Bible studies after he led a study contrary to CLS's religious viewpoints. The university restored recognition only after CLS filed suit. *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley,* No. 04-4120 (D. Kan. Sept. 16, 2004).

The University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to a statement of faith. Paulsen, *supra*, at 675. Although it relented in response to a letter from a faculty member, the university subsequently denied another religious group recognition because it refused to state in its constitution that its

membership was open to all students regardless of religion or sexual orientation. *Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn. Oct. 24, 2003). The university then changed its policy to allow religious student groups to "require their voting membership and officers to adhere to the organization's statement of faith and its rules of conduct." Student Unions & Activities, *Registration and Classification of Student Groups, in Student Unions & Activities Policy Handbook, available at* http://www.sao.umn.edu/groups/handbook/classification.php (last modified Apr. 15, 2008).

Even a law school that had a nondiscrimination policy that specifically exempted religious groups insisted that a CLS chapter pledge not to discriminate on the basis of religion. After suit was filed, the University of Toledo Law School reaffirmed its religious exemption and agreed that religious groups could cite to the Bible in their constitutions. *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson,* No. 05-7126 (N.D. Ohio Jun. 16, 2005).

In the early 1990's, state universities began to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act,* 21 J.C. & U.L. 369 (1994). Professor Bainbridge

described the University of Illinois's derecognition of CLS when its student leaders "refused to sign a University pledge to refrain from discrimination on the basis of sexual orientation." *Id.* at 370.

In a similar dispute, Arizona State University College of Law eventually conceded that CLS's practice did not constitute discrimination on the basis of sexual orientation and granted recognition to religious groups that limited voting membership and leadership to students sharing the same religious beliefs. *Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow,* No. 04-2572 (D. Ariz. Nov. 17, 2004).

Unfortunately, other student groups sometimes actively pressure a law school to deny CLS the same recognition they enjoy. For example, in 2003, a member of the Outlaw chapter at Ohio State University's Moritz College of Law filed a formal complaint demanding that the law school derecognize the CLS chapter because its officers and members signed a statement of faith agreeing, among other things, to comply with scriptural standards of sexual morality. *See* Jeff Polesovsky, *GLBT Group Files Formal Complaint Against CLS,* The Lantern, Nov. 18, 2003, *available at* http://www.thelantern.com/main.cfm?include=detail&storyid=560959 (last visited Apr. 9, 2009). When university officials threatened to withdraw recognition, CLS filed suit. *Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook,* No. 04-197 (S.D. Ohio 2004). In response, the university amended its policy to allow religious student groups to "adopt a nondiscrimination statement that is

consistent" with their sincerely held religious beliefs. Ohio Union, Student Organization Registration Guidelines, at 7, *available at* http://ohiounion.osu.edu/studentorgs/orgs_manage.asp#newreq (last visited Apr. 9, 2009).

Recently, the Iowa Campaign for Human Rights student group at University of Iowa School of Law circulated a petition urging the university to deny funds to the CLS chapter. Adam Sullivan, *UI Christian Legal Society's Funding Under Fire*, Daily Iowan, Mar. 3, 2009, *available at* http://www.dailyiowan.com/2009/03/03/Metro/10365.html (last visited Apr. 30, 2009). On other occasions over the past six years, the university or the student government has threatened to penalize CLS.

CLS also has faced recognition issues at the law schools of Florida State University, the University of Oklahoma, the University of Pittsburgh, the University of New Mexico, the University of Idaho, and the University of South Carolina.

Other religious student groups have faced similar threats of derecognition. For example, the Muslim Student Association at Louisiana State University was derecognized in 2003 after thirty years on that campus. LSU required all groups to place a nondiscrimination policy regarding religion and sexual orientation in the groups' constitutions, which the Muslim group refused to do because of its religious beliefs. Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17,

2005), *available at* http://www.thefire.org/index.php/article/5436.html (last visited Apr. 30, 2009).

In addition to its lawsuit in the Eleventh Circuit against University of Florida, BYX was forced to litigate after the University of Georgia denied recognition on the ground that the Christian group required its officers and members to agree with its core religious viewpoints. *Beta Upsilon Chi v. Adams,* No. 06-104 (M.D. Ga. 2006). BYX has experienced recognition threats at Louisiana State University, Auburn University, and the University of Missouri.

ReJOYce in Jesus Campus Fellowship was threatened with denial of recognition by Georgia Institute of Technology because the group required its voting members to affirm its statement of faith. The Georgia Attorney General issued an opinion that the university's failure to recognize the religious student group violated its free speech rights. Ga. Op. Att'y Gen. 97-32 (1997). The group experienced a similar problem at the University of California, Berkeley.

DiscipleMakers Christian Fellowship was forced to file suit against Pennsylvania State University after university officials insisted that the group discriminated on the basis of religion in officer positions. In settlement, the university agreed to exempt religious groups from the nondiscrimination requirement. *DiscipleMakers v. Spanier,* No. 04-2229 (M.D. Pa. 2005).

The Christian Medical and Dental Association ("CMDA") chapter at the University of North Dakota was threatened with derecognition by the student government because CMDA requires its officers to share its religious viewpoints. CMDA also encountered problems at the College of Medicine and Dentistry of New Jersey and at Virginia Tech.

The conflict between the decision below and the Seventh Circuit's *Walker* decision means that national religious organizations, including CLS, cannot maintain uniform national membership criteria across their different campus chapters. In reality, religious student organizations are again being expelled from the public university campus—the quintessential "marketplace of ideas."

F. THE COURT SHOULD GRANT THE PETITIONS IN BOTH THIS CASE AND IN *TRUTH v. KENT SCHOOL DISTRICT*, NO. 08-1130 (MAR. 10, 2009).

The Bible club in *Truth* filed a petition for a writ of certiorari in this Court on March 10, 2009. *Truth*, No. 08-1130 (Mar. 10, 2009). *See supra* at pp. 12-15. The complementary facts in *Truth* and this case militate in favor of granting both petitions so that this Court can fully resolve the problem and provide guidance to the lower federal courts.

The *Truth* case, of course, involves a high school, rather than a university. Therefore, the Equal Access Act applies in *Truth,* whereas the Act is inapplicable to universities and graduate schools. 20 U.S.C. § 4071(a). This Court may well decide *Truth*

solely on *federal statutory* grounds applicable only to *secondary* schools, leaving unresolved the circuit conflict over *First Amendment* protection at the *university* level of a religious group's right to draw its officers and voting members from among those who share its core religious commitments. It would be an odd result if religious associations were protected under the Equal Access Act in secondary schools, but their First Amendment protection at the college level was left uncertain.

Furthermore, this case directly raises an issue that *Truth* expressly left open: whether requiring a religious student group to accept *officers and voting members* who disagree with the group's core religious commitments violates the First and Fourteenth Amendments. The *Truth* decision is explicitly limited to the club's "general membership restrictions." *Truth,* 542 F.3d at 644, 647. To be sure, the Ninth Circuit erred in *Truth* by diminishing the associational import of Truth's "general members"; it most certainly erred in the instant case, where CLS had elevated associational interests in its voting members and leaders, who elect officers, stand for election, amend the group's constitution, lead Bible studies, vote on chapter business, organize group activities, and invite guest speakers for weekly meetings and campus-wide events. Without explanation, the Ninth Circuit in this case extended its *Truth* decision to CLS's selection of voting membership and leadership.

By granting both petitions, the Court would have before it the full breadth of the issues upon which the circuit courts have split and which continue to

vex school administrators and lower courts. The Court could provide meaningful guidance to lower courts, as well as national student organizations and education officials carefully watching this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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