No. 08-1130

IN THE

Supreme Court of the United States

TRUTH, *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 FOR *AMICUS CURIAE* THE FELLOWSHIP OF CHRISTIAN ATHLETES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE [1]

Founded in 1954, the Fellowship of Christian Athletes ("FCA") is the largest Christian campus ministry in the world and the largest Christian sports organization in America. In the past year alone, FCA was on 7,125 campuses across the globe. FCA's campus ministry is led by student-athletes and coaches on middle school, high school, and college campuses. The programs of the campus ministry include club meetings, Bible studies, assembly programs, chapel programs, a drug free program, and an FCA membership program, called "Team FCA." While FCA campus meetings are open to anyone who possesses an interest in athletics, in order to be a member of Team FCA, an individual must sign the "Competitor's Creed," which declares that the person is a Christian and desires to live out the tenets of Christianity in the realm of athletics. Because FCA reserves its membership in Team FCA for adherents to the group's religious principles, FCA is deeply concerned about the crippling effect of the lower court's holding on the right to expressive association guaranteed by the First Amendment and the Equal Access Act.

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1. Counsel of record for the parties in this case have received timely notice of the intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

When the government controls the membership of expressive associations, it controls the message of those associations. That is the import of this case. The lower court allowed the school district to use its non-discrimination policy against religious students who were attempting to exercise their fundamental right to associate with others who held similar views. The school district allowed secular groups to reserve membership for adherents to the groups' core principles, but it denied a religious group the same opportunity. Thus it was the government—not the religious group—which engaged in viewpoint discrimination. In so doing, the school district violated the students' rights to expressive association, in contravention of the First Amendment and the Equal Access Act.

The lower court held that the school district's actions were appropriate because the court misapplied a free speech public forum analysis to an expressive association right, utilizing only a "reasonableness" test to determine the constitutionality of the school district's imposition on the membership of the student-initiated religious group. Thus the lower court created not only a Circuit split, but a conflict with decisions of this Court, which have required a strict scrutiny analysis of expressive association claims. Furthermore, the decision below will have a chilling effect on religious expression because it paves the way for state and local governments to exclude religious student groups—and, in fact, *all* religious organizations which reserve membership for adherents—

from limited public forums on the grounds that their membership criteria "discriminate" on the basis of religion. For these reasons, this Court should intervene and grant the petition for certiorari.

ARGUMENT

I. THE DECISION BELOW ALLOWS PUBLIC SCHOOLS TO ENGAGE IN VIEWPOINT DISCRIMINATION IN VIOLATION OF THE FREEDOM OF EXPRESSIVE ASSOCIATION PROTECTED BY THE FIRST AMENDMENT AND THE EQUAL ACCESS ACT.

A. The Freedom of Expressive Association Is a Fundamental Right Intimately Tied to Other First Amendment Freedoms and Possessed by All Citizens, Including Students in Public Schools.

This Court has declared the right of expressive association a fundamental right, recognizing the essential link between the most important of our individual liberties and the right to associate with others who hold similar views. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State

unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). The fundamental nature of the right of expressive association has garnered it the highest level of protection. The right cannot be limited by the government unless the limitation serves a compelling government interest unrelated to the suppression of ideas, and the government interest cannot be furthered through means which are significantly less restrictive of the associational or expressive freedom. *Roberts*, 468 U.S. at 623.

Moreover, this essential right, like all fundamental rights guaranteed by the Constitution, is possessed by all persons, including students in state-operated schools. The law is clearly settled that students "do not shed their constitutional rights at the schoolhouse gate." *See generally Morse v. Frederick*, 127 S. Ct. 2618, 2621 (2007); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 844 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). One of the principal purposes of public schools is to train students to become valuable, contributory members of a democratic society. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 265 (1990) ("'[P]ublic schools are vitally important in the preparation of individuals for participation as citizens, and as vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system.'" (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality)). Therefore, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

B. Expressive Association Is a Component of the Equal Access Act.

Congress recognized that students' rights to expressive association were so essential and so intricately tied to the freedom of religion that it included protections for expressive association in the Equal Access Act ("the Act"). The Act, which was passed in 1984 to protect the religious freedom rights of public secondary school students, makes it "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum 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). Congress passed the Act in response to findings that there was widespread confusion among school administrators about the state of the law of religious liberty, a confusion which led many to ban student-initiated religious clubs. S. Rep. No. 98-357, at 11 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2348, 2357.

In the opinion below, the court upheld the decision of the Kent School District to deny Truth, a student-initiated Bible club, the right to associate for expressive purposes with those who held to the group's Christian ideals. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 651 (9th Cir. 2008). The court held that membership criteria designed to protect the identity of the religious group did not fall within the Act's protection for the "content of the speech." *Id.* at 645. In limiting "content" to spoken words, the lower court did not appreciate the fact that

expressive association is intricately tied to the freedoms of speech and religion and is, in its own right, protected by the Act.

In fact, the legislative history of the Act plainly demonstrates that Congress intended to protect more than just religious speech. The first heading under the "Legal Authority" section of the Act's Senate Report reads, "Public School Students Have First Amendment Rights of Free Speech and Association." S. Rep. No. 98-357, at 21, 1984 U.S.C.C.A.N. 2367. Under that heading, the Report goes on to cite this Court's decision in *Widmar v. Vincent*, 454 U.S. 263, 269 (1981), noting that "[r]eligious discussion and worship are 'forms of speech and association protected by the First Amendment.'" S. Rep. No. 98-357, at 22, 1984 U.S.C.C.A.N. 2368. The Report essentially equates the rights of free speech and expressive association:

> Closely related to the right of free speech is the right of association. In *NAACP v. Alabama*, the Court held that the freedom to associate and debate ideas and beliefs is itself beyond debate. Since that time, numerous decisions have protected public school students' speech from classification based on subject matter.

S. Rep. No. 98-357, at 23, 1984 U.S.C.C.A.N. 2369. Clearly, the intent of Congress was to include the right of expressive association within the protections of the Act, safeguarding the right of religious students to freely associate with those who share similar views.

C. When a Religious Group Seeks to Protect Its Identity by Reserving Membership in the Group for Those Who Share the Group's Core Beliefs, This Is Not Invidious Discrimination, But Is the Essence of Expressive Association.

In holding that a school may apply its non-discrimination policy to bar religious groups from reserving membership for adherents, the lower court equated the application of membership criteria based on the ideology of the group with invidious discrimination. *Truth*, 542 F.3d at 644 ("States have the constitutional authority to enact legislation prohibiting invidious discrimination."). However, far from comprising invidious discrimination, the ability of a religious group to reserve membership for adherents simply is necessary to maintain the group's core values and religious mission. It is necessary for the same reason it was necessary for the EarthCorps at Kentridge High School to require its members to show "interest and dedication toward environmental issues" and for the Gay-Straight Alliance to require its members to be "willing to work towards the goals of the club" of "bringing GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning] issues into the open, while working to decrease homophobia." *Truth*, 542 F.3d at 640. Forced inclusion of members who do not share a group's belief obviously dilutes the group's message and changes the identity of the group. In a thoughtfully written law review article, Joan Howarth underscores the problem with the lower court's reasoning. Dean Howarth writes:

> Few of us would spend much energy defending the right of a person who eats bacon for breakfast, burgers for lunch, and steak for

> dinner to become the President of the Vegetarian Society. Turning over the core values of the Vegetarian Society to meat-lovers could compromise its agenda beyond recognition. That, in short, explains why the First Amendment protects the right of expressive associations to exclude from membership and leadership those who do not support the core values of the association.

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 892 (2009).

Protecting the group's ideological message through the use of membership criteria is "expressive activity that should be protected by First Amendment principles, not simplistically rejected with the label 'conduct.'" Howarth, *supra*, at 918. The primary purpose of the membership criteria is to promote the group's purposes, not to discriminate. It is because of this simple, yet vitally important, principle that religious organizations are routinely exempted from nearly all non-discrimination laws. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Cal. Gov't Code § 12926(d); Wash. Rev. Code § 49.60.040(3). For example, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), this Court upheld the right of a Mormon religious entity to dismiss from employment an individual who was not a member of the Mormon Church. The religious entity in that case argued that it was protected by Section 702 of the Civil Rights Act, which exempts religious employers from Title VII's prohibition of religious discrimination

in employment. *Id.* at 331. This Court held that the exemption had a permissible legislative purpose to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 339.

Along the same lines, government action which *mandates* the membership of a religious organization, strips the organization of its very identity and hinders its ability to carry out its religious mission. "'[T]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.'" *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (quoting *Roberts*, 468 U.S. at 623 (1984). While the lower court failed to recognize this, the justices who dissented to the denial of the rehearing en banc did. The dissenters noted that the majority concurrence failed to discuss the seminal case of *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981), in which this Court upheld the right of the Democratic National Convention to exclude delegates (to vote for the Democratic candidate) who were not publicly professed and registered Democrats. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 854 (9th Cir. 2008) (Bea, J., dissenting) (citing *Democratic Party*, 450 U.S. at 109). This Court noted, "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party*, 450 U.S. at 122 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)). Applying the reasoning of *Democratic Party*, the dissenters below argued, "A full opportunity for

professed Christians to participate in the direction of Club affairs is 'diluted' if members of other faiths—or persons without any religious faith—must have a voice in the group's expression." *Truth*, 551 F.3d at 854 (Bea, J., dissenting).

D. A School's Application of Its Non-Discrimination Policy to a Student Group's Membership Criteria Which Dilutes the Core Ideology of the Group Amounts to Viewpoint Discrimination in Violation of the Freedom of Expressive Association Protected by the First Amendment and the Equal Access Act.

When a school district uses its non-discrimination policy to control the membership of religious groups, but leaves secular groups untouched, it dilutes the message of the religious groups, while allowing the secular groups to retain their full identities. A government regulation which restricts only religious, and not secular, organizations is not neutral, but is viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831 (1995) (holding that University's denial of funding for religious student organization's newspaper on Establishment Clause grounds in public forum was impermissible viewpoint discrimination). At Kentridge High School, for example, thirty secular student organizations received official recognition from the school. Many of these organizations defined their membership criteria with respect to their core beliefs. Yet, Truth, a religious group, was denied this right. Forbidding a religious organization from establishing itself based on its belief *because the belief is religious* is viewpoint discrimination. *See* Howarth, *supra*, at 914.

The very purpose of non-discrimination policies is to provide equal rights to religious (and other protected) groups and to prevent against the societal harm that occurs when certain groups are granted most-favored status. But there is no societal harm when a religious group seeks to have its members identify with the group's beliefs, while keeping its meetings open to all. The harm occurs when the government enforces a non-discrimination policy *against* a religious group in such a way as to mandate who the group's members may be, while allowing non-religious groups to freely choose their members. This action takes the very policy that was designed to protect religion and, instead, makes it a weapon to squelch religion. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."); *Truth*, 551 F.3d at 854 (Bea, J., dissenting) ("[T]he school district here 'at the very least' forces the Christian Bible study group to send a message that its agenda, discussions, and meetings can be framed, and their content determined, by non-Christians." (quoting *Dale*, 530 U.S. at 653)).

E. The Decision Below Targeting the Religious Viewpoints of Student Organizations Departs from This Court's Expressive Association Jurisprudence and Creates a Conflict Among the Circuits.

The lower court's decision allowing the school district to mandate the membership criteria of religious student groups "flies directly in the face of Supreme Court precedent," conflicting with this Court's decisions in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Democratic Party*, 450 U.S. 107 (1981), which all upheld the right of expressive associations to be free from government interference. *Truth*, 551 F.3d at 854 (Bea, J., dissenting). In addition, the decision has created a split with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, a case which "is on all fours" with *Truth*, 551 F.3d at 854 (Bea, J., dissenting), the Seventh Circuit held that a public law school's refusal to provide official recognition to the Christian Legal Society because the Society required members to sign a statement of faith violated the Society's expressive association rights. *Id.* Furthermore, the lower court's interpretation of student rights under the Equal Access Act is at odds with the Second Circuit's decision in *Hsu v. Roslyn Union Free School District No.* 3, 85 F.3d 839 (2d Cir. 1996), which concluded that Congress intended the Equal Access Act to protect the free association rights of religious students. Because of the vital nature of the expressive association right, the intervention of this Court is necessary to resolve the confusion which will result from the lower court's decision.

II. THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON ALL RELIGIOUS ORGANIZATIONS WHICH USE PUBLIC FACILITIES.

A. The Indication by the Lower Court That a Public School's Recognition of Student Organizations Within the School's Limited Public Forum Diminishes the Organizations' First Amendment Right of Expressive Association Is Constitutionally Flawed.

In the decision below, the lower court noted that Truth was seeking to associate as a "school-sponsored group." *Truth*, 542 F.3d at 648 (emphasis omitted). The court reasoned that, by electing to sponsor student groups, the school had created a limited public forum. *Id.* The court then applied this Court's limited public forum test, which provides that the government may not exclude speech in a limited public forum unless its reasons for doing so are "viewpoint neutral and 'reasonable in light of the purpose served by the forum.'" *Id.* at 649 (quoting *Rosenberger*, 515 U.S. at 829). Acknowledging that "'[v]iewpoint discrimination is . . . an egregious form of content discrimination,'" *id.*, the lower court nonetheless held that the school's non-discrimination policy was reasonable and viewpoint neutral because the restriction was not "based solely on the group's religious viewpoint." *Id.* at 649–50.

The fallacy in the lower court's analysis is that the limited public forum test applies to free speech claims, but governmental intrusion on an organization's membership implicates the organization's expressive

association right. "By applying the limited public forum test to the Club's right to decide who its members [would] be, the [lower court] lessened the scrutiny placed on restrictions of the right of expressive association."[2] *Truth*, 551 F.3d at 852 (Bea, J., dissenting). *Rosenberger's* "reasonableness" criterion is a significantly less stringent standard than this Court's strict scrutiny test for expressive association claims. *See Dale*, 530 U.S. at 648 (2000) (forbidding the government from restricting the right of expressive association unless the regulation serves "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms" (quoting *Roberts*, 468 U.S. at 623)); *see also NAACP v. Alabama*, 357 U.S. at 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

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2. Even if, *arguendo*, a limited public forum analysis were proper, an application of a school's non-discrimination policy that burdens a religious organization's right of association, while allowing non-religious organizations to exclude members based on the organizations' purposes is not viewpoint neutral. *See* Part I.D., *supra*.

B. The Lower Court's Improper Application of Public Forum Analysis to Expressive Association Rights Will Have a Chilling Effect, Not Just on Religious Student Groups, But on All Religious Organizations That Use Public Facilities.

1. By Eviscerating the Freedom of Expressive Association, the Decision Below Will Correspondingly Weaken Religious Freedom.

The importance of the expressive association right in a free society cannot be overstated. The right to associate freely with others who share similar ideas protects both individual liberties and the diversity of thought that is essential in a democratic society. *See NAACP v. Alabama*, 357 U.S. at 460 ("[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Roberts*, 468 U.S. at 622 (noting that individual First Amendment freedoms "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed"); *Id.* ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."). Because the right of expressive association is inseparable from the individual fundamental liberties which form the foundation of a democratic society, weakening the right of association, as the lower court has done, necessarily weakens the fundamental freedoms tied to the right.

The deterioration of fundamental freedom, in particular religious freedom, was what Congress was trying to prevent when it passed the Equal Access Act, which in part protected the right of religious students to associate with others who shared their views. *See* Part I.B., *supra*. In the years leading up to the passage of the Act, confusion over the state of the law pertaining to the expression of religion in schools led school districts increasingly to treat religious students like second-class citizens. *See* S. Rep. No. 98-357, at 12–14, 1984 U.S.C.C.A.N. 2358–60. Despite the fact that school districts widely permitted extracurricular non-religious speech, many schools banned student-initiated extracurricular religious clubs, student newspaper articles on religious topics, religiously-themed student art, and even student community service activities, including a dance to benefit the American Cancer Society. S. Rep. No. 98-357, at 11–12, 1984 U.S.C.C.A.N. 2357–58. Schools refused to allow students to sit in groups of two or more and have religious conversations, forbade students from saying silent individual prayers before eating their lunches, and even prohibited students from praying together in a car on a school parking lot. *Id.* The first freedom protected in the Bill of Rights—religious freedom—had been nearly erased for students in our nation's schools. The Committee concluded that if, by passing the Act, "local authorities could take a truly neutral stance toward religious speech, students would lose the tragic perception that the government is affirmatively hostile to religious expression, a perception that could, in the next generation, lead to the national disaster of intolerance of religion." S. Rep. No. 98-357, at 21, 1984 U.S.C.C.A.N. 2367.

But now, twenty-five years later, the decision below has eviscerated the expressive association protections of the Equal Access Act and the First Amendment. This reversal of course will dilute, or eliminate altogether,[3] student religious expression, allowing the government to control religious speech through the imposition of membership requirements that will destroy the identity of religious groups. *See Truth*, 551 F.3d at 853 (Bea, J., dissenting) ("The School District told the Club that it could not be recognized because it required its members to comply 'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible.' Thus, it was telling the Club how its expression must be determined." (citation omitted)).

Furthermore, the multiple conflicts in the law resulting from the lower court's decision once again will engender confusion among school authorities that will lead to the same type of hostility for religion that Congress was trying to avoid when it passed the Equal Access Act, a hostility which in the first instance had relegated student religious expression to the "secret and clandestine." S. Rep. No. 98-357, at 11, 1984 U.S.C.C.A.N. 2357. Even where open intolerance is not exhibited, a perception among students that the government is affirmatively hostile to religious expression will have a chilling effect on the right of expressive association of religious students, just as it did when Congress first passed the Act. In anticipation of receiving unfavorable treatment, religious students

3. Now eight years after Petitioners attempted to form a Bible club at Kentridge High School, not one of the twenty-nine student groups at the school is a religious group.

may refrain from even seeking use of institutional facilities to preserve their rights of association. In either event, whether school authorities act out of overt hostility or out of confusion about the law, student-initiated religious groups will be prevented from carrying out their mission and conveying their message.

2. Student-Initiated Religious Groups Have a Vital Role to Play in Helping Adolescents Cope with the Many Pressures They Face.

Student-initiated religious groups have an important role to play in providing spiritual support for students facing the difficult issues of our time. Students in the nation's schools are dealing with drug abuse, violence, teen sex, and suicidal urges, not to mention stressful family situations, depression, and alienation. *See* S. Rep. No. 98-357, at 12, 1984 U.S.C.C.A.N. 2358. During the past decade, a vast body of research has demonstrated that religious practice promotes well-being in adolescents. For example, adolescents show lower rates of drug and alcohol abuse the more frequently they engage in religious activities. Patrick F. Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, No. 1992, Executive Summary Backgrounder (Heritage Foundation, Washington D.C.), Dec. 18, 2006, at 8, *available at* www.heritage.org/research/religion/bg1992.cfm (citing Marvin D. Free, Jr., *Religiosity, Religious Conservatism, Bonds to School, and Juvenile Delinquency Among Three Categories of Drug Users*, Vol. 15, No. 2, Deviant Behavior, at 151–70 (1994); Barbara R. Lorch & Robert H. Hughes, *Religion and Youth Substance Use*, Vol. 24, No. 3, Journal of Religion

and Health, at 197–208 (Sept. 1985); Byron R. Johnson, *A Better Kind of High: How Religious Commitment Reduces Drug Use Among Poor Urban Teens*, Report No. 2000-2, Manhattan Institute for Policy Research, Center for Research on Religion and Urban Civil Society (2001), *available at* www.manhattan-institute.org/html/cr_12.htm). The connection between increased religious practice and reduced drug use, in particular, is especially prevalent in adolescents living in the inner city. Fagan, *supra*, at 14 (citing Sung Joon Jang & Byron R. Johnson, *Neighborhood Disorder, Individual Religiosity, and Adolescent Use of Illicit Drugs: A Test of Multilevel Hypotheses*, Vol. 39, No. 1, Criminology, at 109–44 (Feb. 2001)). Furthermore, religious involvement has the same buffer effect against youth crime in these communities. Fagan, *supra*, at 15 (citing Lisa D. Pearce & Dana L. Haynie, *Intergenerational Religious Dynamics and Adolescent Delinquency*, Vol. 82, No. 4, Social Forces, at 1553–72 (June 2004).

Religious practice also has an inverse relationship with the level of teen sexual activity. Fagan, *supra*, at 7 (citing Lynn Blinn-Pike, *Why Abstinent Adolescents Report They Have Not Had Sex: Understanding Sexually Resilient Youth*, Vol. 48, No. 3, Family Relations, 295–301 (July 1999); John O.G. Billy, *Contextual Effects on the Sexual Behavior of Adolescent Women*, Vol. 56, No. 2, Journal of Marriage and Family, at 387–404 (May 1994)). In a 2002 review of the academic studies on the effects of religion, ninety-seven percent of the studies reported substantial correlations between increased religious involvement and a lower likelihood of promiscuous sexual behaviors. Fagan, *supra*, at 7 (citing Byron R. Johnson et al., *Objective Hope—Assessing the Effectiveness of Faith-Based*

Organizations: A Systematic Review of the Literature, 2002 Manhattan Institute for Policy Research, Center for Research on Religion and Urban Society, *available at* www.manhattan-institute.org/pdf/crrucs_objective_hope.pdf).

Finally, religious involvement corresponds to positive mental health in adolescents. Studies have shown that teens who have a high level of spiritual support from those in their community and who attend religious services are the least likely to suffer from depression. Fagan, *supra*, at 10 (citing Loyd S. Wright et al., *Church Attendance, Meaningfulness of Religion, and Depressive Symptomatology Among Adolescents*, Vol. 22, No. 5, Journal of Youth and Adolescence, at 559–68 (Oct. 1993)). In contrast, a lack of religiosity correlates with an increased risk of suicide. Fagan, *supra*, at 10 (citing Frank Tovato, *Domestic/Religious Individualism and Youth Suicide in Canada*, Vol. 24, No. 1, Family Perspective, at 69–81 (1990)). One explanation for this is that religious commitment and practice lead to increased self-esteem and social support. Fagan, *supra*, at 9–10 (citing Johnson et al., *Objective Hope*, *supra*). Indeed, one study of high-school students from West Virginia found that the "'ego strengths of hope, will, purpose, fidelity, love, and care' increased as the students lived out their religious beliefs more intently." Fagan, *supra*, at 10 (citing C.A. Markstrom, *Religious Involvement and Adolescent Psychosocial Development*, Vol. 22, No. 2, Journal of Adolescence, at 205–21 (Apr. 1999)).

The empirical evidence linking religious involvement to the increased well-being of adolescents bolsters the proposition that the government should protect the

expressive association rights of religious students. Schools should not ignore the spiritual dimensions of the problems that face adolescents. A student dealing with the pressures associated with drug or alcohol use, violence, teen sexuality, or depression, for example, ought to have the option of seeking spiritual guidance or support by attending a meeting of a student-initiated religious group of her choosing and hearing the message of that group, undiluted from the effects of a government mandate which forces the group to accept members which do not support the group's core beliefs.

3. The Decision Below Will Allow the Government to Exclude from Limited Public Forums All Religious Organizations Which Reserve Membership for Adherents.

Because the lower court applied public forum analysis to an expressive association claim, the import of the decision will be felt, not just by public school students, but by any religious or ideological organization which gathers in a limited public forum. For example, organized churches which currently meet during off-school hours for worship in schools across the country will be excluded from these limited public forums because their membership criteria "discriminate" on the basis of religion. This is not a stretch, but merely the logical implication of the decision below. In intruding on the students' rights to expressive association, the school district in this case relied not only on its own non-discrimination policy, which regulated "students in all aspects of the academic and activities program," it also relied on what the court held was the "relevant [state] non-discrimination law"—the regulation of unfair

practices in public accommodations. *Truth*, 542 F. 3d at 639–40 (citing Wash. Rev. Code § 49.60.215). Following the logic of the lower court, then, any state or local government which provides a limited public forum in which organizations are permitted to assemble will be able to rely on state or local anti-discrimination law to prevent religious organizations from selecting their members.

Lest anyone think that such a result is unlikely to occur in a country that has, throughout its history, offered many protections for religion, he or she need only examine the evidence of hostility toward religious organizations that is already exhibited by local governments across the country. For example, earlier this year, North Pointe Church in Binghamton, New York was denied the ability to rent a facility on the Broome Community College campus (part of the State University of New York system), despite the fact that the College had made its facilities open to the public for a wide array of expressive activity. Complaint at 6–8, *North Pointe Church v. Moppert*, No. 3:09-cv-00219-GTS-DEP (N.D.N.Y. filed Feb. 23, 2009). Almost immediately after the church filed suit, the College chose to change its policy to prevent *any group* from renting the school's facilities on weekends, rather than simply changing its position to protect the church's right of association. Jennifer Mesko, *College Won't Let Church—Or Anyone Else—Rent Space*, CitizenLink, Mar. 4, 2009, http://www.citizenlink.org/content/A000009531.cfm. In 2004, a school committee in Peabody, Massachusetts denied the Living Hope Church of the Nazarene the right to use a school facility under the same terms and conditions afforded other outside groups. Complaint at 4–9, *Living*

Hope Church of the Nazarene v. City of Peabody, No. 1:04-cv-12452-MLW (D. Mass. filed Nov. 19, 2004). In 2002, the City of Van, Texas made its community center available to a wide array of organizations, including the Kiwanis Club and groups meeting for family reunions and scouting events. Only religious groups were denied this opportunity. *Moore v. City of Van*, 238 F. Supp. 2d 837, 839 (E.D. Tex. 2003). The city's mayor stated that the center was "'not available for any type of religious service meetings.'" *Id.* at 840 (quoting Pls.' Ex. D). In 2001, South Coast Community Church in Marion, Massachusetts was denied after-hours access to school facilities, even though the school district had permitted its facilities to be used for a variety of purposes, including a YMCA after school day care program, scouting meetings, and city recreation department sporting events. Complaint at 3–7, *Taylor v. Marion Sch. Comm.*, No. 1:01-cv-11066-MLW (D. Mass. filed June 20, 2001). The school denied access to the church pursuant to its building use policy, which stated, "'[D]iscussions of subjects relating to religious doctrine must be barred.'" *Id.* at 5. In 2000, Kern County, California implemented a use policy for county buildings, which called for an "hourly usage fee" for "'religious activities such as a service, confirmation, first communion, etc.,'" even though activities such as "'youth activities, pot lucks, special events, etc.'" required no such fee to be paid. *ACLJ Files Religious Discrimination Lawsuit against California County after Church Charged Usage Fee*, Business Wire, Feb. 13, 2003, http://www.allbusiness.com/government/government-bodies-offices-regional-local/5709900-1.html (citing Complaint, *New Life Assembly v. Kern County*, No. 1:03-cv-05200-AWI-LJO (E.D. Cal. filed Feb.

13, 2003)). The New Life Assembly church sued the County after it was charged the usage fee, even though organizations such as Toastmasters, Lion's Club, Kiwanis Club, and Mexican-American Pioneers were permitted to use county facilities without paying the fee. *Id.* The decision below does nothing to discourage instances of religious discrimination such as these; rather, it merely provides another vehicle for religious intolerance.

As a result of the lower court's misapplication of public forum analysis to a religious organization's expressive association claim, many churches which provide significant benefits to their communities will be forced to choose between altering their very identities and not meeting at all. Thousands of churches across the country cannot afford to build facilities large enough to meet their needs, in which case their only option is to make use of a limited public forum, such as a school building or community center. Yet when the government conditions a church's ability to meet in a public facility on strict adherence to a non-discrimination requirement, despite the fact that churches routinely receive religious exemptions from such policies in other contexts, it forces the church to choose between diluting its core message and closing its doors. "[T]he choice between two unconstitutional choices is 'no choice at all.'" *Branch v. Smith*, 538 U.S. 254, 302 (2003) (quoting *New York v. United States*, 505 U.S. 144, 146 (1992)).

CONCLUSION

For the foregoing reasons, Truth's petition for a writ of certiorari should be granted.

Respectfully submitted,

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