Supreme Court, U.S.
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No. ________

IN THE
SUPREME COURT OF THE UNITED STATES

TRUTH, an unincorporated association, et al.,

Petitioners,

v.

KENT SCHOOL DISTRICT, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Truth, a Christian student group, applied for charter club status at Kentridge High School in Respondent Kent School District to secure access to facilities, funding, and other benefits. Other non-curricular student groups enjoy this status at the school. Truth's application was denied, however, because its membership criteria require students to possess a true desire to study the Bible and grow in a relationship with Jesus Christ. While the school district generally allows chartered student clubs to maintain group identity and expression by limiting membership to those who adhere to the group's ideology, the district's nondiscrimination policy denies religious groups this same privilege. This petition presents the following questions:

1. Did the Ninth Circuit err in holding, in conflict with decisions of this Court and the Second Circuit, that schools could circumvent the basic protections of the Equal Access Act by excluding religious groups under a nondiscrimination policy?

2. Did the Ninth Circuit err in holding, in conflict with decisions of this Court and the Seventh and Eighth Circuits, that an infringement on expressive association triggers a deferential reasonableness standard, rather than strict scrutiny?

LIST OF PARTIES

Petitioners are Plaintiffs Truth, an unincorporated association, Sarice Undis, and Julianne Stewart. Respondents are Defendants Kent School District, Barbara Grohe, Superintendent of Kent School District, Mike Albrecht, Principal of Kentridge High School, and Eric Anderson, Vice Principal of Kentridge High School, in their official capacities.

CORPORATE DISCLOSURE STATEMENT

Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

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DECISIONS BELOW

The district court's ruling granting summary judgment in respondents' favor is unreported and reprinted in Appendix (App.) 111a-147a. The initial Ninth Circuit panel opinion is reported at 499 F.3d 999 and reprinted in App 74a-110a. The substituted Ninth Circuit panel opinion is reported at 524 F.3d 957 and reprinted in App. 39a-73a. The amended Ninth Circuit panel opinion is reported at 542 F.3d 634 and reprinted in App 1a-38a. The order denying Truth's petition for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 551 F.3d 850 and are reprinted in App. 148a-164a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its panel decision on August 24, 2007. The panel withdrew its judgment, entered its substituted judgment, and denied Truth's petition for rehearing and rehearing en banc as moot on April 25, 2008. The panel amended its judgment to add a two-judge concurrence on September 9, 2008. Truth's second petition for rehearing en banc was denied on December 22, 2008. Petitioners obtained an extension of time, up and until March 10, 2009, to file petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The text of the Equal Access Act, codified at 20 U.S.C. §§ 4071-4074, is set forth in App. 165a-170a.

STATEMENT OF THE CASE

A. Factual Background

In the fall of 2001, Sarice Undis and Julianne Stewart attended Kentridge High School in the Kent School District in the State of Washington. They resolved to start a Christian club named Truth and applied to the Associated Student Body (ASB) for charter club status. App. 3a-4a. Kent School District Policy 2153 allows non-ASB-chartered student groups to meet informally on campus before and after school, provided they secure principal's approval, but "[u]nchartered clubs are not permitted to exist" at the school. App. 3a, 9a-10a. Conversely, chartered groups receive a variety of benefits, including access to campus facilities for meetings during instructional time, access to school bulletin boards, and eligibility for funding from the ASB. App. 9a-10a. In addition to a number of curriculum-

related groups, the school grants charter club status to a broad range of non-curriculum clubs, including Gay-Straight Alliance, Girl's Honor, Men's Honor, Key Club, Multicultural Student Union, Future Business Leaders of America, National Honor Society, Snowriders, and Earth Corps. App. 11a-12a.

The ASB Council entertained Truth's charter application during a September 2001 meeting, and several students objected. In lieu of a vote, the Council abstained until they could consult with Assistant Principal Eric Anderson. Anderson brought the issue to Principal Mike Albrecht, and they, in turn, informed Undis that the school would need to confer with the District's attorney about the matter and inform her of the decision. App. 4a.

School officials did not act on Truth's charter application during the entirety of the 2001/2002 school year. Undis repeatedly asked Anderson – at least ten separate times – about the status of the charter, but on each occasion, Undis was told that no decision had been made. App. 4a.

The school also declined to take up Truth's charter application during the summer and fall of 2002. App. 4a. Following the Ninth Circuit's ruling in *Prince v. Jacoby* – a case where the Ninth Circuit upheld a Christian club's right to obtain ASB recognition – Truth's attorney, Robert Tyler, faxed a letter to Principal Albrecht, insisting that the school approve Truth's charter. The school did not approve the charter, but requested that Truth submit a new application. App. 5a.

Stewart promptly submitted another charter application for Truth. The second charter included voting membership, and required such members to "profess[] belief in the Bible and in Jesus Christ." It also required officers to "believe in and be committed to biblical principles." App. 5a.

Three more weeks passed with the school still not taking any action on Truth's charter. Tyler then sent another letter to the school, again demanding that the school approve Truth's charter. App. 6a.

Approximately one month later, the ASB Council discussed Truth's second charter. Some students balked at Truth's name, claiming that it "implies that every other religion at Kentridge is a lie." Others said that they believed approving the charter would violate principles of "[c]hurch and state" and that the voting membership should be open to all. The Council declined to take a vote on the charter. App. 6a.

The ASB Council met again on April 1, 2003 to consider the matter. Anderson was present and explained that the school would make the final decision on Truth's charter even if the ASB Council approved the application. If the Council denied the charter, Truth would have no right to exist on campus. Following these comments, the ASB Council voted to deny Truth's charter application. App. 6a.

Two days later, Truth, along with Undis and Stewart, filed this action, alleging violations of the Equal Access Act and the First and Fourteenth Amendments. App. 6a. The next week, on April 9,

Anderson delivered a letter to Stewart, inviting Truth to submit yet another charter to the ASB Council. App. 9a.

Stewart complied with the request. The third charter provided a more expansive description of Truth, expounding on the club's purpose: to "study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship wherein our faith may be expressed to those in the club as well as those outside of the club." The application set out that meetings are open to everyone, but a member must have "a true desire to study the Bible and grow in a relationship with Jesus Christ," and be willing to "comply[] in good faith and Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." App. 7a. Voting members and officers are required to sign a statement of faith, stating that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," that "salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as [his or her] personal Savior, through His death on the cross for . . . sins, is . . . faith made real." App. 7a-8a.[1]

Truth crafted membership criteria to reflect their core beliefs. App. 174a. Through the criteria, Truth seeks to protect the group's purpose, identity, and expression, like many of the existing ASB-chartered student clubs at Kentridge, including:

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[1] Truth's third charter application, and accompanying constitution, is found at App. 173a-180a.

- Key Club, which requires members to be "interested in service, qualified scholastically, of good character, possessing leadership potential;"

- Earth Corps, whose members must have an "interest and dedication toward environmental issues;" and

- Gay-Straight Alliance, whose members "must be willing to work toward the goals of the club," which include "working to decrease homophobia" and fighting "heterosexism." App. 11a-12a.[2]

At its April 25 meeting, the ASB Council deliberated on Truth's third charter. The Council rehashed concerns about Truth's name, membership restrictions, and presence of a religious club at the school. In the end, the Council voted to deny the charter, listing four reasons for the decision: "Name," "Pledge to vote," "Segregating," and "Religious club in school." App. 8a.

In defending the Council's action, the District relies on its nondiscrimination policy. App. 9a. Kent District Policy 3210 states that the "district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color,

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[2] Earth Corps' charter application is found at App. 181a-183a and Gay-Straight Alliance's charter application and constitution is found at App. 184a-191a.

national origin, sex, . . . or physical, sensory or mental disabilities." App. 9a, 171a.[3] The District interprets "creed" to preclude religious student groups from establishing the same type of membership criteria that non-religious groups are allowed to adopt. App. 9a.

B. Proceedings Below

1. Cross-Motions for Summary Judgment and District Court Opinion

On cross-motions for summary judgment, the district court ruled in favor of the respondents. The court granted summary judgment on Truth's constitutional claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), concluding that the District took no action on Truth's charter. App. 121a-130a. Turning to the Equal Access Act, the court determined that Truth had not shown their "general membership policy is protected speech," triggering the Act's protection. App. 130a-135a. Then, going back to Truth's expressive association claim, the court offered an alternative holding. Pointing to this Court's expressive association cases, the court required the District to demonstrate that their interference with membership criteria furthered a "compelling state interest unrelated to

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[3] The District claims that this policy is derived from Washington's public accommodations nondiscrimination law, Wash. Rev. Code § 49.60.215 (West 2006) (prohibiting discrimination based on "race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person."). App. 10a-11a.

the suppression of ideas . . . [which] cannot be served through less restrictive means." App. 135a-147a. And, the court held that the District satisfied this stringent standard because its "compelling interest in preventing discrimination based on religion justifies intruding upon the Club's right to expressive association." App. 142a. The district court declined to evaluate Truth's remaining constitutional claims on the belief that they were all "subsumed" in Truth's expressive association argument. App. 147a.

2. Appeal and Ninth Circuit's Initial Opinion

The Ninth Circuit panel initially affirmed the decision of the district court, but on different grounds. At the outset, the panel dismissed the District's arguments on standing and ripeness, characterizing ASB's rejection of Truth's charter as a concrete injury-in-fact. App. 86a-91a. The panel elaborated that the injury is directly traceable to the District's nondiscrimination policy because the District had repeatedly rejected Truth's charter under its policy. App. 90a-91a. The panel also reversed the district court's *Monell* ruling, citing its previous decisions holding *Monell* inapplicable to claims for prospective relief. App. 91a-92a.

As for the merits, the panel first contemplated Truth's claim under the Equal Access Act. The panel noted the State's right to enact legislation prohibiting invidious discrimination. App. 92a-93a. And, for the balance of its analysis, the court focused on the phrase "content of the speech" found in the

Act. Construing this phrase to only prohibit restrictions that are facially content-based – and not indirect burdens on group speech – the panel upheld the District's nondiscrimination requirement as an appropriate "content-neutral" measure. App. 93a-100a. The Ninth Circuit did not recognize expressive association as a right protected by the Act or explain why Congress would enact a protection that is so easily evaded. In so holding, the Ninth Circuit conceded that it was "in some tension" with the Second Circuit's holding in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). App. 98a-99a.

The panel then affirmed the district court's ruling on Truth's expressive association argument, finding no burden on a "First Amendment interest." App. 100a-107a. The panel cited this Court's forced-inclusion cases and pegged strict scrutiny as the appropriate standard to apply, but upheld the restriction on Truth in the absence of a "First Amendment interest." App. 103a-106a. The Ninth Circuit panel also distinguished an analogous case decided in the Seventh Circuit after the appeal was filed, *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), on this same basis that it could find no "cognizable First Amendment interest." App. 107a.

3. First Petition for Rehearing and Rehearing En Banc and Ninth Circuit's Substituted Opinion

Truth timely filed a petition for rehearing and rehearing en banc. Challenging the ruling on the

Equal Access Act, Truth stressed the need for en banc consideration in light of the admitted "tension" between the panel decision and the Second Circuit in *Hsu*. Concerning the expressive association aspect of the decision, Truth cited pertinent decisions of this Court, including *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Healy v. James*, 408 U.S. 169 (1972), and pointed out the error in not finding a First Amendment interest at stake with intrusion on a group's membership. Truth also drew attention to the conflict with the Seventh Circuit's decision in *Walker*. Lastly, Truth demonstrated the panel's error in ignoring undisputed evidence about other groups obtaining exemptions from the nondiscrimination policy.

The Ninth Circuit panel then withdrew its initial opinion, issued a substituted opinion, and denied Truth's petition as moot. App. 39a-40a. The panel's analysis on the Equal Access Act remained virtually the same. App. 58a-67a. But, in the substituted opinion, the panel surmised that their holding regarding the Act "is [actually] not inconsistent" with *Hsu* after all. App. 65a. Regarding the expressive association claim, the Ninth Circuit altered its analysis dramatically. The panel jettisoned this Court's expressive association jurisprudence and the strict scrutiny standard attached to it. Instead, the court applied public forum analysis. Relying almost exclusively on *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and its free speech analysis, the Ninth Circuit characterized the school as a limited public forum and upheld the District's

nondiscrimination policy as a reasonable and viewpoint-neutral restriction. App. 67a-71a.

The panel further deduced that Truth raised a triable issue of fact about whether the District violated Truth's rights in granting certain clubs exemptions to the nondiscrimination policy, while refusing to do the same for Truth. It remanded the case for further proceedings on this limited factual issue. App 67a, 71a.[4]

4. Second Petition for Rehearing En Banc and Ninth Circuit Panel's Amended Opinion

Truth filed a second petition for rehearing en banc. In this second petition, Truth reiterated the conflict between the Ninth Circuit and the *Hsu* Court on the scope of the Equal Access Act, and emphasized the inappropriateness of using forum analysis for judging the expressive association claim.

Reacting to this petition, the panel amended its opinion -- adding a concurring opinion from Judges Fisher and Wardlaw. App. 35a-38a. The two-judge concurrence, which amounted to a majority opinion, attempted to "amplify" and defend the panel's abandonment of its initial expressive association analysis and delayed adoption of public forum analysis. App. 35a-36a. The majority concurrence stated that "[e]xpressive association is

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[4] In conjunction with the remand, the Ninth Circuit gratuitously offered its doubts about the continued viability of this claim. App. 67a.

simply another way of speaking," and when the state 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." App. 37a. While recognizing governmental intrusion on membership as infringing on expressive association, the majority concurrence carved out a special exception for violations in a limited public forum. App. 36a-37a. The majority concurrence further tried to distinguish *Walker*, saying: "Although the Seventh Circuit applied strict scrutiny in addressing [the 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." App. 38a.

5. Ninth Circuit Denial of Rehearing En Banc with Dissenting and Concurring Opinions

With Judges Bea and O'Scannlain dissenting, the Ninth Circuit denied en banc review. App. 148a-164a. Writing for the dissent, Judge Bea explained that the "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)." App. 152a. He and Judge O'Scannlain observed that the panel's holding "flies directly in the face of Supreme Court precedent" by "telling [Truth] how its expression must be determined." App. 153a.

Elaborating on the prospect of an inter-circuit conflict, Judges Bea and O'Scannlain called attention to this Court's "clear mandate" to apply strict scrutiny to state intrusion on expressive association and the Seventh Circuit's adherence to this principle in *Walker*. App. 158a-162a. They also portrayed the panel's treatment of *Walker* as a "flat-out misrepresentation" because mention of forum in the *Walker* case referred to the free speech claim alone, not to the separate expressive association claim. App. 162a. Because *Walker* is "on all fours with our case," the dissent understood that the panel decision "clearly establishes a circuit conflict." App. 162a.

In a concurring opinion to the denial of rehearing en banc, Judges Fisher and Wardlaw reiterated their denial of a circuit split with *Walker*. App. 163a-164a.[5]

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for two distinct reasons.

First, this case presents an opportunity to resolve a critical issue that has divided the circuits about the scope and purposes of the Equal Access Act, specifically, whether the Act protects religious student groups' freedom to associate for expressive

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[5] Because the heart of the case – the Equal Access Act and expressive association claim – is subject to this Petition, the district court is staying the matter pending final decision of this Court.

reasons to the same degree as other non-curricular groups. The Act is intended to ensure that students engaging in religious expression have the same rights as other students to associate together and to speak. *Hsu*, 85 F.3d at 859. In refusing to recognize expression association as a freedom protected under the Act, the Ninth Circuit deviated from decisions of this Court and fundamentally undermined the basic purpose of the Act. If schools are free to discriminate against student religious groups because of their membership criteria, then the Act's protection against discrimination based on the religious nature of the speech would be a hollow guarantee. As a result, the decision clashes with the *Hsu* decision in the Second Circuit, and clarity is needed.

Second, this Court can resolve the conflict among the circuits on how to judge the propriety of infringement on a student religious group's expressive association. The Ninth Circuit's decision departs from the previously well-established principle of applying strict scrutiny to government regulations that coerce groups to accept members who would substantially alter their desired identity and message. *Dale*, 530 U.S. at 659; *Healy*, 408 U.S. at 181. The Ninth Circuit abandoned this Court's expressive association jurisprudence, and applied public forum doctrine instead, betraying the traditional meaning of associational freedom. The expressive association right is supposed to be "an indispensable means" of preserving many constitutional liberties, including the freedoms of speech, assembly, and petition. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). But, the Ninth Circuit's decision relegates the fundamental

guarantee to a superfluous notion that carries no independent significance, conflicting with decisions from the Seventh and Eighth Circuits.

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE PURPOSES OF THE EQUAL ACCESS ACT IN CONFLICT WITH DECISIONS OF THIS COURT AND THE SECOND CIRCUIT.

This Court, in *Widmar v. Vincent*, struck down a state university regulation that prohibited a student group from using school facilities for "religious worship or religious teaching." 454 U.S. 263, 265 (1981). After this decision, in 1984, Congress passed the Equal Access Act for the express purpose of providing the same protection to religious student groups in public secondary schools. *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239 (1990). The Act 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).[6]

The Ninth Circuit found no violation of the Equal Access Act on the theory that discrimination

[6] The District falls under the constraints of the Act because it is a public secondary school, receives federal funding, and creates a limited open forum for non-curricular clubs. App. 26a.

against a religious club - because of the religious nature of the club's membership criteria - did not run afoul of the Act. In ruling against Truth on this issue, the Ninth Circuit does not appreciate expressive association as a component of the freedom protected by the Act. Nor does the court recognize membership criteria as being integrally related to content of speech, even though membership facilitates and furthers speech during group meetings. Rather, the Ninth Circuit construed the Act to proscribe only regulations that facially restrict content of speech.[7] This interpretation circumvents the basic protections of the Equal Access Act and allows state nondiscrimination policies to effectively preempt the Act.[8]

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[7] Finding expressive association uncovered by the Act, the Ninth Circuit marginalizes the import of it. Because thought precedes speech, government restrictions on what members of an association may or may not believe not only curtails the content in a given meeting, but also on a group's identity.

[8] The Ninth Circuit defends the existence of nondiscrimination policies on the footing that "States have the constitutional authority to enact legislation prohibiting invidious discrimination." App. 21a. But while this much is correct, nondiscrimination policies cannot be used in a way that frustrates the objective of the Equal Access Act. *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993). Moreover, there is nothing "invidious" about a religious group defining itself through shared beliefs because "religious discrimination by a religious group is 'vital' to the group's religious mission ...." *Hsu*, 85 F.3d at 869. The Constitution protects the rights of religious groups to select members who agree with their beliefs. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-40 (1987) (upholding exemption for religious organizations from Title VII ban on religious discrimination). For this reason, virtually all nondiscrimination laws, including Title VII (42 U.S.C. § 2000e-1(a)) and Washington's

The Ninth Circuit presents a remarkably narrow reading of the Act. *See* Jonathan Duncan, *The Equal Access Act: From Clear to Complicated in One Case*, 231 ED. LAW REP. 7, 11 (2008) ("The decision in *Truth* was surprising because it interpreted the Act's protections more narrowly than previous decisions by federal courts."). Dating back to its inspiration in *Widmar*, the Equal Access Act has always contemplated expressive association as an integral part of the assurances afforded. In *Widmar*, this Court expressly held that the challenged university policy infringed on the group's right to associate, as well as right to speech. 454 U.S. at 268-69.

Indeed, the whole focus of the Act is to protect a religious group's right to associate free from discrimination, as reflected in the text itself. The Act guarantees "equal access" of student groups, their freedom from "discrimination," as well as "a fair opportunity" to meet on the same basis as other groups. App. 165a. To be sure, the Act speaks to the "content of the speech at ... meetings," but that phrase cannot be read in isolation to deny any effective protection to religious groups who wish to control the content of speech at meetings by adopting certain membership criteria.

"[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a

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employment non-discrimination law (Wash. Rev. Code § 49.60.040(3)), allow religious organizations to discriminate on the basis of religion.

sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (citation omitted). This axiom is particularly pertinent to the Equal Access Act, which is intended to be interpreted "broadly" to protect the rights of student religious groups. *Mergens*, 496 U.S. at 239. In lieu of interpreting the Act broadly, the Ninth Circuit exalted a restrictive reading of the phrase "content of the speech" over everything else in and about the Act.[9]

Legislative history confirms that the Act protects expressive association. The Senate Report declares up front that the Act's purpose is to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students." S. Rep. No. 98-357, at 3 (1984). The Act's "Legal Authority" section denotes that "the right of individuals to associate to further their personal beliefs" is among students' First Amendment rights, and that the "primary impediment to free association" is the "denial of use of campus facilities for meetings and other appropriate purposes." *Id.* at 23-24.

Dispensing with the aim of the Equal Access Act, the Ninth Circuit diverges from the Second

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[9] The Ninth Circuit strained to parcel out expressive association from the term "speech." Ironically, in conflating free speech and expressive association on the First Amendment issue, the majority concurrence even acknowledged: "Expressive association is simply another way of speaking...." App. 37a.

Circuit's interpretation of the legislation. The Second Circuit, in *Hsu*, concludes in contrast that the Act offers protection for free association. 85 F.3d at 859. The *Hsu* Court reasoned: "The Act's authors made it clear that the language of [the Equal Access Act] was intended to protect both free speech and free association rights of certain student clubs." *Id.* (citation of legislative history omitted).

In the face of this contrary analysis, the Ninth Circuit proclaimed that its decision "is not inconsistent" with *Hsu* because the Second Circuit "focused on the term 'speech' in the Act rather than the content-neutrality (or lack thereof) of school policies." App. 27a. But, this is to explain the conflict, not to erase it.[10] While the Second Circuit looked at the term "speech" in the Act and read it to include freedom of association, the Ninth Circuit interpreted the term only to concern verbal expression. *See* Charles Morris, *Association Speaks*

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[10] Also, the Ninth Circuit tried in vain to distinguish *Hsu* on the basis that the Second Circuit dealt with leaders, not general membership. App. 27a-28a. This factual difference is meaningless because the nondiscrimination policy in *Hsu*, and its application to leaders, survives under the rationale of the Ninth Circuit. Not only does the Ninth Circuit fail to include expressive association in its understanding of "speech," it does not even think that the Act can apply to nondiscrimination policies. *See* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 906-07 (2009) (In commenting on the conflict between *Hsu* and *Truth*, Dean Howarth points out that "the Second Circuit in *Hsu* was divided in how far to extend the exclusionary rights of the Christian student club Walking on Water, but the Ninth Circuit panel rejected any basis for the Christian student club Truth to exclude non-Christians.")

Louder Than Words: Reaffirming Students' Right to Expressive Association, 19 GEO. MASON U. CIV. RTS. L.J. 193, 212 (2008) ("...the Ninth Circuit reasoned that the Equal Access Act protected only the content of verbal speech in school meetings. By so holding, the court deliberately eviscerated Truth's associational rights.")[11]

If the authors of the Act intended to do anything at all, they "sought to end discrimination against religious extracurricular groups in public schools by mandating a policy of neutrality." *Hsu*, 85 F.3d at 854. Truth is deprived of this key freedom because it is not permitted to limit its membership to those who subscribe to the group's principles. No other group in the District is inhibited in this manner. Earth Corps, for example, can associate according to ideology, restricting membership only to those students who adhere to the group's viewpoints about the environment. App. 11a, 181a-183a. Gay-Straight Alliance likewise can and does limit membership to students who share in the group's beliefs about and commitment to homosexual issues. App. 11a-12a, 184-191a. Truth is not treated the same as these and other groups simply because Truth's organizing principles are religious in nature. App. 173a-180a.

The Ninth Circuit recognized that other clubs in the District premise their membership on ideology, but reasoned that "nothing in the District's

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[11] The Ninth Circuit was more candid about the conflict with *Hsu* in its initial opinion: "Our reasoning is in some tension with that of the Second Circuit ...." App. 98a-99a.

non-discrimination policy prohibits discrimination on the basis of *political* belief." App. 66a. (emphasis added). This merely restates the existence of discrimination. In other words, non-religious groups are free to limit membership to adherents in ways that further the mission and resulting speech of the group, while religious groups are denied this right. But even if the policy was uniform in application, "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" *Hsu*, 85 F.3d at 860. *See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 57 (2006) (explaining that the Solomon Amendment "looks to the *result* achieved" by a school's recruiting policy; applying the policy uniformly is "insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military.").

The disparate treatment from which Truth suffers is precisely what the Act is intended to alleviate: "To the Act's authors, 'equal access' meant that 'secondary school students engaging in religious speech have *the same rights* to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy.'" *Hsu*, 85 F.3d 854 (citation omitted).

In sum, the Ninth Circuit's holding betrays Equal Access Act's explicit purpose of ensuring "equal access" for religious groups. Reading the Act narrowly, so as to strip it of protection for students' free association, the Ninth Circuit has disregarded

the legislative purpose and the text of the Act, as well as this Court's guidance on the Act, and has effectively created a "[c]onflict between federal appellate courts [that] presents an opportunity for Supreme Court intervention." Duncan, *supra*, at 11.

II. THE NINTH CIRCUIT'S DECISION RUNS AFOUL OF THIS COURT'S EXPRESSIVE ASSOCIATION CASES AND CREATES A CONFLICT AMONG THE CIRCUITS.

In the initial paragraph of the decision below, the Ninth Circuit observed that Truth's legal claims include, among other things, "violations of ... the First Amendment rights of free speech and expressive association." App. 3a. Despite the recognition of two distinct claims, the Ninth Circuit went on to mix up the two in its analysis, using forum analysis to judge the entirety of the matter.[12] This approach is deeply flawed. The holding runs counter to this Court's precedent and the Seventh and Eighth Circuits' interpretation of the precedent.

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[12] The panel's analysis is puzzling, particularly, in light of its prior decision, *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007) (withdrawn). At that juncture, the panel recognized Truth's right to expressive association as a distinct First Amendment claim and analyzed the claim under this Court's expressive association cases. App. 100a-107a. The panel made various and critical mistakes in that portion of the opinion, and Truth enumerated these errors in the first petition for rehearing en banc. But instead of correcting the errors, the Panel abandoned the expressive association analysis altogether. *Cf.* App. 30a-38a.

A. The Ninth Circuit Wrongly Applied Forum Analysis to Truth's Expressive Association Claim.

The freedom to associate – and the corresponding right *not* to associate – is implicit in the First Amendment freedoms of speech, assembly, and petition. *Roberts*, 468 U.S. at 622. "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." *Id.* And, importantly, the associational right encompasses the autonomy to define and control group membership. *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981).

This Court, in *Dale*, confirmed the proper analysis for evaluating governmental intrusion on a group's membership. The right of expressive association is implicated if a group "engage[s] in some form of expression, whether it be public or private," and the forced inclusion "would significantly affect the [group's] ability to advocate public or private viewpoints." 530 U.S. at 648, 650. Such intrusions are only permissible if the government can prove they are "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

This Court noted that the Boy Scouts' mission is to instill values in young people, both expressly and by example. *Id.* at 649-50. Two principle values were living "morally straight" and "clean," and the Scouts viewed homosexual behavior to be inconsistent with those values. *Id.* at 650. Emphasizing that "deference [must be given] to an association's view of what would impair its expression," this Court held that Dale's forced presence in the Scouts would require it "to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. And, because the state was unable to muster a compelling reason for interference with the Scouts' expressive association, the restriction was struck down as unconstitutional. *Id.* at 659.

The same concerns are present here. Truth's general membership criteria are intimately tied to the fundamental purpose of the organization and its expression. Allowing those who lack desire to have a relationship with Jesus Christ, or who openly flaunt their disdain for the Bible's instruction on conduct, to become and hold out themselves as members, would significantly undercut the core message Truth is seeking to convey inside and outside of its group.

Thus, "*Dale* is not only illuminating, it is determinative of this case." App. 153a (Bea, J., dissenting). Strict scrutiny – the test used in *Dale* – should apply to the restriction on Truth. *Dale* is just the latest in a long line of this Court's opinions holding that regulations affecting a group's ability to associate or disassociate must survive strict

scrutiny. *See, e.g., Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (inquiring whether the State has a compelling interest that would justify its intrusion on a Rotary Club's membership criteria); *Roberts*, 468 U.S. at 623 (explaining that infringements on the right to expressive association must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Democratic Party*, 450 U.S. at 124-25 (holding that the state did not provide a compelling interest to justify intruding on the Democratic Party's right to expressive association).

Instead of following (or even citing) *Dale*, the Ninth Circuit upheld the nondiscrimination policy as "viewpoint neutral and reasonable in light of the purposes of the forum." App. 31a. So holding, the Ninth Circuit placed much emphasis on the fact that the District does not keep Truth from existing as a Policy 2153 group before or after school.[13] But the nature of the burden does not alter the analysis for expressive association. In addition to precluding direct interference with a group's membership, the guarantee also serves to keep the government from penalizing or burdening the right to expressive association. *Healy,* 408 U.S. at 183.

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[13] In blocking ASB status, the District denies Truth the opportunity to meet during school. The District further denies Truth funding, chance to advertise, recognition in yearbook, and access to public address system.

In *Healy*, a state university provided official recognition to student groups, which allowed them to meet on campus and make announcements through university channels like newspapers and bulletin boards. 408 U.S. at 176. The university refused to officially recognize a chapter of the Students for a Democratic Society, citing a conflict between the group's philosophy and university policy. *Id.* at 174-76.

This Court upheld the students' expressive association challenge, underscoring the protection afforded against even "indirect" interference with fundamental rights. *Id.* at 183. "There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right," regardless of the group's ability to exist outside of the campus community. *Id.* at 181. As a "form of prior restraint," the university bore a "heavy burden" to justify the appropriateness of its restriction—a burden it failed to meet. *Id.* at 184.[14]

Healy is controlling here. Both schools opened forums providing official recognition for student clubs and granting access to facilities, channels of communications on campus, and funding. Truth is excluded from the forum, like the club in *Healy*,

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[14] This Court empathized with the school's need to impose reasonable regulations for maintaining order and preventing material disruptions in the educational environment, but noted a difference between advocacy, which is fully protected, and action, which is not. *Id.* at 192. Here, the District has not even suggested that Truth could disrupt the educational environment.

because its association is contrary to school policy. Truth, too, could use alternate locations and modes for communication, but this does not "ameliorate significantly the disabilities imposed" by the school's action. *Id.* at 183.

As with *Dale*, the Ninth Circuit missed the instruction of *Healy*. The Ninth Circuit dismissed this Court's holding as irrelevant because, in its view, the District has only opened a limited public forum.[15] The Ninth Circuit mistakenly relied on forum analysis for assessing Truth's expressive association claim.

The Ninth Circuit's novel analysis robs expressive association of its independent force and any true meaning. This Court has consistently recognized that the freedom to associate is not only an important component of speech, but is the linchpin in preserving other cherished liberties as

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[15] In the two-judge majority concurrence of the amended opinion, Judges Fisher and Wardlaw wrote separately to "amplify" their thinking on this particular issue. They cited *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995) for the right to expressive association in a traditional public forum and cited *Healy* for the same right in what they depicted as a "general public forum." App. 35a-38a. The court drew the line there, though, requiring different treatment for expressive association in a limited public forum. This differentiation finds no support in this Court's jurisprudence. While *Hurley* did concern a parade on a public street, this Court's ruling did not turn on forum status. *Hurley*, 515 U.S. at 573-81. And this Court made no mention of "general public forum" or even forum analysis in *Healy*. Regardless, from a pure factual standpoint, the forum in *Healy* is no more "general" than the forum in this case, as both involve denial of access via school policy.

well. The right has firm constitutional roots in multiple clauses, including the freedoms of assembly and petition, in addition to speech. *Healy*, 408 U.S. at 181. And, it is "an indispensable means" of preserving each of these liberties. *Roberts*, 468 U.S. at 618. The freedom of association serves a distinct, elemental constitutional purpose and must be evaluated under its own constitutional standards.

Forum analysis is often appropriate for free speech claims, though sometimes difficult to apply, but there is no justification for transplanting the doctrine to expressive association rights. With expressive association, forum is not even a relevant consideration. An imposition on a group's expressive association goes beyond any particular venue and attacks its identity.[16] The District's nondiscrimination requirement does not merely affect Truth's speech within the confines of the school; it follows Truth wherever it goes. Truth is thus forced into an untenable dilemma: either abandon its religious identity to be a full participant of campus life or accept second-class status at the price of religious identity. In either instance, Truth cannot function as the group it is designed to be.[17]

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[16] It would make no sense to exclude organized churches from limited public forums because their membership criteria discriminate on the basis of religion, and yet, this is the impact of the Ninth Circuit's decision.

[17] Dean Howarth, in her thorough treatment on the issue, speaks to the irony of nondiscrimination policies in this context.

> Equality and nondiscrimination are too precious to be reduced to the silly formalities of insisting that faith-based organizations cannot discriminate on the basis of faith. We

B. The Ninth Circuit conflicts with Seventh Circuit and Eighth Circuit on the Proper Framework for Analyzing Expressive Association Claims.

The Ninth Circuit's decision also "clearly establishes a circuit conflict." App. 162a (Bea J., dissenting).

First, the Seventh Circuit's decision in *Christian Legal Society v. Walker* is "on all fours with our case." App. 162a (Bea J., dissenting). *Walker* involved a public law school that offered official recognition to student groups. As here, recognition provided groups access to various channels of communication on campus, the ability to reserve meeting space, and funding from the school. *Walker*, 453 F.3d at 857. The school revoked the official status of the Christian Legal Society (CLS), however, because it required members to subscribe to a statement of faith – a violation of the school's nondiscrimination requirement for student clubs. *Id.* at 858. CLS could still meet on campus, but it did not have access to any of the other benefits afforded officially recognized groups. *Id.*

> do not really expect student organizations to ignore their defining purposes in selecting members and officers, and the pretense that we do is causing an unnecessary and harmful battle that pits equality for LGBT people against First Amendment rights of students.

Howarth, *supra*, at 923-24.

CLS challenged the revocation as violating its rights of expressive association and free speech. The Seventh Circuit analyzed these two claims separately. Relying on *Dale* and *Healy*, it applied strict scrutiny to the expressive association claim. *Id.* at 861-64. It then applied forum analysis to the free speech claim. *Id.* at 865-67.

The Seventh Circuit concluded that CLS engages in expressive activity, highlighting that CLS, much like Truth, is a "group of people bound together by their shared Christian faith and a commitment to showing the love of Christ to the campus community and the community at large by proclaiming the gospel in word and deed." *Id.* at 862 (quotation marks omitted). The court then asked whether forced inclusion of those who did not share its beliefs would affect CLS's message. "To ask this question is very nearly to answer it," it concluded. *Id.* Using as an example CLS's belief that sexual conduct outside of a traditional marriage is immoral, the Seventh Circuit found that it 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.

The university in *Walker* argued that the *Dale* standard was inapplicable because it was merely excluding CLS from a forum, not imposing a prohibition on CLS's membership criteria. But the Seventh Circuit disagreed, finding that this Court in *Healy* had already rejected the argument, and confirmed that the university "may not do indirectly

what it is constitutionally prohibited from doing directly." *Id.* at 864. (citing *Healy*, 408 U.S. at 183).

Although the Ninth Circuit here acknowledged that the *Walker* court applied strict scrutiny to an expressive association claim, it deemed *Walker* distinguishable because "[*Walker*] 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." App. 38a. But the Ninth Circuit misreads (and, as a result, misrepresents) *Walker*. The Seventh Circuit invoked forum analysis for evaluating CLS's free speech claim after it already had concluded that CLS was likely to succeed on its expressive association claim. Walker, 453 F.3d at 865. The mention of a forum in a separate section of the opinion does not erase the conflict with *Walker*.[18]

The logic of the Ninth Circuit is also at odds with the Eighth Circuit's decision in *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). There, the Eighth Circuit declined to apply forum analysis to an expressive association claim, even though the issue concerned access to a limited public forum. In *Cuffley*, a state refused to allow the Ku Klux Klan to participate in its Adopt-A-Highway program because the Klan's membership criteria discriminate on the basis of race, religion, color, and national origin. *Id.* at 705. The Eighth Circuit saw "little question that

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[18] As described by Judges Bea and O'Scannlain, this attempt to distinguish *Walker* "is not only a *non sequitur* because the two claims [free speech and expressive association] are distinct; it is a flat-out misrepresentation." App. 161a-162a.

requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message," citing several of this Court's expressive association cases. *Id.* at 708. The court held that the state "cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." *Id.* at 709. The Eighth Circuit thus applied expressive association standards, not forum analysis, contrary to the Ninth Circuit's decision here.

This conflict among the circuits warrants resolution by this Court. There exists a disparity in the basic legal framework used to decide the fundamental constitutional freedom of expressive association.

CONCLUSION

For the foregoing reasons, this Court should grant Truth's petition for writ of certiorari.

Respectfully Submitted,

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