No. 08-1268

IN THE
SUPREME COURT OF THE UNITED STATES

KENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

TRUTH, an unincorporated association, et al.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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

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

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

REPLY BRIEF FOR THE PETITIONERS

This petition concerns the fundamental right of a religious student group to maintain its religious identity through its membership. The District nondiscrimination policy forces Truth to accept anyone as a member, even those whose views or conduct are inimical to the club's core ideology, while allowing secular clubs unquestioned freedom to form membership according to group values. The Ninth Circuit found no fault with this policy. And, if allowed to stand, this decision will deprive Truth – and countless other religious student groups – of fundamental associational freedoms crafted in the Equal Access Act and birthed in the First Amendment.

I. THE ISSUES BEFORE THIS COURT ARE FULLY DEVELOPED AND WILL NOT BE AFFECTED BY THE NARROW, UNRELATED ISSUE ON REMAND.

The District asks this Court to decline review on the important statutory and constitutional issues raised in Truth's petition, loosely claiming that such would give this Court "the benefit of the additional factual development on remand." Resp., 16. In reality, the issues raised in the petition are fully developed and the remand pertains to a narrow, unrelated question. The Ninth Circuit aptly describes this as a "limited" question that is "different in kind" than the issues before this Court. App. 28a. It is focused entirely on how the District applied its policy to a couple of other clubs in respect

to sex – a discrete factual matter – and the present issues deal with the impact of the policy on Truth.

The district court and Ninth Circuit will not reconsider any of the issues presented in this petition, and thus, the proper time for this Court to review is now.

II. THE NINTH CIRCUIT'S EQUAL ACCESS ACT ANALYSIS WARRANTS THIS COURT'S REVIEW.

One of the most remarkable aspects of the Ninth Circuit's decision is its refusal to interpret the Equal Access Act to protect students' expressive associations. This effectively puts nondiscrimination policies – and their adverse impact on associational rights – beyond the reach of the Act, and in direct conflict with the Second Circuit's holding in *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996).

Like the Ninth Circuit, the District tries to marginalize Truth's membership requirements as mere "acts." Resp., 18-19. But the labeling cannot negate the expressive aspect of membership. Invariably, membership is expression because "personnel *is* policy." App. 153a (Bea, J. dissenting) (citation omitted). This certainly holds true for Truth. Truth specifically observes in its charter that "[t]he character, behavior, speech and conduct of every person participating in the club reflects upon the religious expression and association of the club." App. 178a. For this precise reason, Truth requires every member to "comply[] in good faith and

Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." App. 7a, 178a. The qualification for membership is tied directly to the expression the group wants to share both internally and externally.

The District – echoing the Ninth Circuit – claims that *Hsu* is distinguishable because the club in that case sought to impose a religious test for its leadership positions, while Truth imposes such a test for all its members. Resp., 9-10; App. 27a-28a (distinguishing *Hsu* solely on this basis). But the District, like the Ninth Circuit, places major emphasis on a minor difference. The leadership criteria upheld in *Hsu* would necessarily be struck down under the legal analysis set out in *Truth*. By viewing nondiscrimination policies as merely regulating conduct, the Ninth Circuit does not believe that the Act's protections contemplate such policies at all, irrespective of their effect on expressive associations. App. 21a-28a.

Contrast that with the Second Circuit, which saw in the Act's plain language and legislative history "an implicit right of expressive association." *Hsu*, 85 F.3d at 859. As a result, the court grounded its analysis of the school district's nondiscrimination policy in the nexus between the group's purpose for existence and its exclusionary practice, leaning heavily on this Court's expressive association jurisprudence. *Id.* at 858-59. With the right nexus, the court explained, an exclusionary practice may foster a group's shared interest in communicating a particular viewpoint. *Id.* at 859. Such was the case

with the Christian club before the Second Circuit. The group's purpose was religious, and its religious test for certain officers was deemed "essential to the expressive content of the meetings and to the group's preservation of its purpose and identity, and [thus] protected by the Equal Access Act." *Id.* at 848.

Against this backdrop, the District carelessly proclaims that "the Second Circuit would reach the same conclusion with respect to the issue presented here." Resp., 9. As *Hsu* indicates, the Second Circuit would examine the group's religious purpose and basis for exclusion prior to reaching any conclusion about the matter. The Ninth Circuit, on the other hand, does not bother with consideration of any nexus between Truth's purpose and its exclusionary practice. Upon finding the District's nondiscrimination policies to be in existence, the court went no further. App. 64a.

Aside from hypothetical outcomes of particular cases, the District glosses over the larger and more significant point: the Second Circuit and Ninth Circuit differ deeply on whether the Equal Access Act covers expressive association freedoms. While different circumstances can dictate different results, the District cannot possibly harmonize *Hsu* with *Truth* with *Hsu* being more faithful to the meaning of the Act.[1] And this great divide between

---

[1] As described in the Petition, the intention to protect expressive associations is undergirded by the legislative history of the Act. Pet., 18-19. The District denigrates Truth's recitation of legislative history as a "fragment," but tellingly, fails to supplement with any legislative backing of its own. Resp., 18.

Second and Ninth Circuits – regarding suitable interpretation and application of the Equal Access Act – requires this Court's immediate attention.

III. THE NINTH CIRCUIT'S EXPRESSIVE ASSOCIATION ANALYSIS WARRANTS THIS COURT'S REVIEW.

This Court's ruling in *Boy Scouts of America v. Dale* requires strict scrutiny of any state action that intrudes on a group's membership. 530 U.S. 640, 648 (2000). The Ninth Circuit eschewed this standard for Truth's expressive association claim, in favor of forum analysis. App. 68a.

In defending the nonconforming shift in legal analysis, the District theorizes that *Dale* and the balance of this Court's expressive association jurisprudence can be jettisoned on the grounds that this Court has yet to entertain expressive association in the context of a government forum, that is, after the advent of forum analysis. Resp., 21-23.[2] Since this Court has never mentioned venue as a factor in assessing expressive association claims, the departure from traditional doctrine is suspect. Even so, the fact that the Ninth Circuit has taken a divergent view on *Dale* – and employed a radically different approach for evaluating expressive association claims – only underscores the necessity for this Court's intervention.

---

[2] The District also tries to distinguish *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. U. S. Jaycees*, 468 U.S. 609 (1984), and *Healy v. James*, 408 U.S. 169 (1972) on this same basis.

The District also urges that the instruction of *Dale* be shunned - and forum analysis be embraced - because the restriction on Truth is not direct, but rather an indirect impact via access. Resp., 24-25. But this rationale is not supported by any precedent. Indeed, this Court has repeatedly affirmed that inappropriate interference with expressive association "may take many forms." *Dale*, 530 U.S. at 658; *Roberts*, 468 U.S. at 622. The right to expressive association is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).[3]

The Ninth Circuit diverges from this Court's holdings chiefly on the stubborn insistence that expressive association is nothing more than speech

---

[3] The District further protests in vain that applying strict scrutiny to an expressive association claim in a limited public forum "would undo decades of law establishing that strict scrutiny does not apply whenever government subsidizes some speech, but not all speech." Resp., 27-28 (quotation marks and citations omitted). The instant case is no more a subsidy case than *Healy*. But even if equal access could be depicted as a "subsidy," this Court has explained that its "unconstitutional conditions" doctrine prohibits the government from "plac[ing] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original). This condition is precisely what the District is imposing on Truth, as Truth is required to abandon its membership criteria and core identity beyond the realm of the forum itself.

and should be regulated as speech. App. 37a; Resp., 25. This view overlooks that the right of expressive association is linked to multiple constitutional protections besides the freedom of speech, in particular, the freedoms of assembly, petition, and religious exercise. *Roberts*, 468 U.S. at 622. Thus, it is not fitting to treat an intrusion on a group's expressive association the same as an intrusion on pure speech. These rights, while interrelated, are not coextensive. And the conflating of the two - as the Ninth Circuit has done - unduly weakens this fundamental liberty.

Healy recognized the critical importance of protecting associational rights, and did so in a government-controlled forum. There, similarly to here, a state university denied official recognition to a student club because it disagreed with the philosophy of the group. *Healy*, 408 U.S. at 175. And this Court found that the university could not satisfy its "heavy burden" to justify this intrusion into the club's associational rights. *Id.* at 184.

In an attempt to circumvent *Healy,* the Ninth Circuit implicitly, and the District explicitly, portray *Healy* as an obsolete precedent that has effectively been overshadowed by this Court's subsequent public forum cases. Resp., 23. Had *Healy* come later, the District asserts, this Court would have applied forum analysis instead.[4] This is wild speculation (at

[4] The District claims that *Widmar v. Vincent*, 454 U.S. 263 (1981) "establishes" that *Healy* has been overruled, and forum analysis is proper for expressive association claims arising in government-controlled forums. Resp., 23. But *Widmar* never makes such a claim. Contrary to the District's contention, this

best) and cannot possibly validate the decision below. The Ninth Circuit was obliged to follow *Healy* up and until this Court expressly overrules it. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[5]

In contrast to the Ninth Circuit, the Seventh Circuit dutifully applied *Dale* and *Healy* in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), a student-club case much like this one. The District strains to evade the obvious conflict and reconcile the two opinions, plodding through a series of insubstantial aspects of *Walker* while largely mischaracterizing the import of the decision, but to no avail. None of the District's arguments diminish

---

Court did not even employ forum analysis in the case. And even though the regulation in *Widmar* triggered both pure speech and associational concerns, the speech claim was emphasized because the restriction was limited to the forum. There, a public university made its facilities generally available to student clubs to use for meetings, but prohibited clubs from using the facilities "for purposes of religious worship or religious teaching." *Id.* at 265. Unlike the restrictions in this case, and in *Healy*, the *Widmar* restriction did not attach to clubs apart from the forum.

[5] The District also characterizes the facts in *Healy* as being "far more extreme" than this case. Resp., 24. But, in actuality, Truth is seeking the same access as the club in *Healy*.

the square contradiction on expressive association rights.[6]

The District's primary argument is that *Walker* can be distinguished because it involved CLS's criteria for voting members and officers. Resp., 11-12. This detail is more of a distraction than a meaningful distinction.

Contrary to the District's claim, the Seventh Circuit did not specify restriction on voting members or leaders as being relevant to the impairment on CLS in *Walker*. Instead, the appellate court placed significance on the "presence" of individual members holding views antithetical to the group's ideology. *Walker*, 453 F.3d at 861-62.[7] The *Walker* court explained that forcing CLS "to accept as *members* those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* at 863 (emphasis added). It was not the act of voting or leading that caused these unwelcome members to alter the group's expressive association, but - as the

---

[6] For example, the District's lead argument points to the Seventh Circuit finding it unlikely that the university policy applied to CLS, and says that the holding distinguishes *Walker* from the instant case (Resp., 11), but the presence of an additional ruling does not eradicate a conflict explicitly set out in the opinion.

[7] The Seventh Circuit was simply following the lead of this Court in *Dale*. *Walker*, 453 F.3d at 861-64. In this case concerning a non-voting member of the Boy Scouts, this Court stressed: "the presence of Dale as an assistant scoutmaster would ... surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Dale*, 530 U.S. at 640.

Seventh Circuit understood and articulated – it was their formal association with the club. This same concern applies to Truth and its intended message.

The District also claims that *Walker* is distinguishable from this case because it arose in the university setting. Resp., 13-14. This notion, though, was recently dispelled in *Christian Legal Society Chapter of the University of California v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) ("*Kane*"). *See* Supplemental Brief in Support of Petition (expounding on how *Kane* demonstrates the broad ramifications of *Truth*). There, in a case involving a law school club, the Ninth Circuit confirmed that its analysis applies with equal force in the university setting.

Additionally, the District claims that *Walker* and the decision below are not in conflict because the courts evaluated the clubs' free speech claims in the same way. Resp., 12-13. And, with this, the District is mistaken again. Unlike the Ninth Circuit, *Walker* rightly analyzed CLS's expressive association claim apart from its free speech claim. 453 F.3d at 861-865.[8]

---

[8] The District appears to suggest that the Seventh Circuit would have applied forum analysis to CLS's expressive association claim if not for its finding of viewpoint discrimination. Resp., 12. And yet, the Seventh Circuit did not mention the nature of the forum until it reached CLS's free speech claim – after it already concluded that the club was likely to succeed on its expressive association claim. *Walker*, 453 F.3d at 865.

The District further disputes any conflict between the decision below and *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). In *Cuffley*, the Eighth Circuit considered expressive association and free speech challenges from the Ku Klux Klan after it was excluded from a state Adopt-A-Highway program. Taking a more traditional route than the Ninth Circuit here, the *Cuffley* court did not apply forum analysis to the expressive association claim, even though the issue concerned access to a limited public forum. 208 F.3d at 708-09.

The District misses the point in contending that the Eighth Circuit "did not have to consider the nature of the forum because it found that the defendant had engaged in viewpoint discrimination." Resp., 14. The court's viewpoint discrimination analysis had nothing to do with its expressive association analysis. Citing this Court's line of expressive association cases, the Eighth Circuit found the nondiscrimination policy violative of the Klan's "freedom of political association." *Id.* at 708.

In short, *Walker* is "on all four with our case," and in sidestepping *Dale* and *Healy*, the Ninth Circuit "clearly establishes a circuit conflict." App. 162a. The same is true for *Cuffley*. This conflict among the circuits warrants review.

CONCLUSION

For the foregoing reasons, this Court should grant Truth's Petition for Writ of Certiorari.

Respectfully Submitted,

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