No. 08-1130

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

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GREG LUKIANOFF
WILLIAM CREELEY
AZHAR MAJEED
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
601 Walnut Street, Suite 510
Philadelphia, PA 19106
(215) 717-3473

HARVEY A. SILVERGLATE
Counsel of Record
ZALKIND, RODRIGUEZ, LUNT & DUNCAN, LLP
607 Franklin Street
Cambridge, MA 02139
(617) 661-9156

Counsel for Amicus Curiae

April 29, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 08-1130

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

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Foundation for Individual Rights in Education ("FIRE") submits this brief as *amicus curiae*[1] in support of Petitioners.

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than *Amicus*, made a

FIRE is a secular, nonpartisan civil liberties organization working to defend and sustain individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

During its decade-long existence, FIRE has advocated for the fundamental religious liberties of campus religious organizations in multiple states and on multiple campuses. Because the Ninth Circuit's decision has already been cited as controlling precedent by both the Ninth Circuit (in a separate case) and a California district court in rulings denying associational rights to collegiate religious student groups, FIRE has a strong interest in securing a resolution of the present case that is consistent with this Court's jurisprudence and the nation's traditions regarding the fundamental importance of expressive association.

SUMMARY OF ARGUMENT

The fundamental question in this case is simple but profoundly important: Can religious student organizations participate in the life of public schools without being forced to give up their distinctive religious character? This Court has answered an emphatic "yes." In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court held that religious groups were entitled to equal access to high school facilities. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court held that religious organizations were entitled to viewpoint-neutral access to university facilities. In both public high

---

monetary contribution to the preparation or submission of this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk.

schools and colleges, religious groups are constitutionally entitled to equal access to academic facilities.

In recent years, however, public high schools, colleges and universities have created a new barrier to equal access: expansive nondiscrimination policies. In the instant case, Kentridge High School has conditioned access to its facilities on compliance with a nondiscrimination policy that prevents a religious student organization from functioning in a manner consistent with its principles. The school has taken the position that a religious student organization is not permitted to discriminate on the basis of *religion*. The organization cannot utilize the very principles that are *the reason for its existence* when making decisions on leadership, voting membership, and (because a group's statements come from its leaders and members) its message. This policy is akin to prohibiting an environmental group from asking whether prospective members or leaders actually have an interest in the environment or prohibiting the College Democrats from ensuring that its voting members are not Republicans. Kentridge's enforcement of its nondiscrimination policy ignores the critical difference between status and belief. Expressive organizations must be permitted to make *belief-based choices* when choosing their leaders and voting members. There is a difference between making a determination on the basis of an immutable characteristic and making a choice on the basis of changeable personal beliefs and rules of conduct.

Depriving religious student organizations of equal rights of speech and association simply because those organizations choose to govern themselves according to faith-based principles is fundamentally incompatible with this Court's precedents and unconstitution-

ally relegates religious students to second-class status. FIRE seeks to restore legal equality for students of all faiths or no faith at all.

REASONS FOR GRANTING THE WRIT

I. THE *TRUTH* DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT, DISREGARDS THE CORE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSIVE ASSOCIATION, AND CREATES A SPLIT IN THE CIRCUITS.

A. Freedom of Association Allows Groups to Choose Members and Leaders on the Basis of Belief.

Freedom of association is secured by the First Amendment.[2] It is a natural complement to freedom of expression because, as this Court has observed, "the right to speak is often exercised most effectively by combining one's voice with the voices of others." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 68 (2006). This Court has recognized that choosing the terms of one's associations free from undue government interference is a "crucial" component of freedom of association because it protects against state coercion of "groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000). Correspondingly, "freedom of association plainly presupposes a freedom not to associate." *Roberts,* 468 U.S. at 623. Freedom of association

[2] *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984) (holding that "a corresponding right to associate with others in pursuit of a wide variety of…ends" is "implicit" in the First Amendment).

therefore grants an organization the right to make belief-based membership choices, including the choice to exclude from the organization people who do not share its core beliefs. Put another way, freedom of association at its core grants a right to "discriminate" on the basis of belief.[3]

B. The Ninth Circuit's Analysis Contradicts Supreme Court Precedent and Eviscerates Students' Right to Expressive Association.

In upholding Kentridge High's denial of official recognition to Truth, the Ninth Circuit construed the public high school's extracurricular program offering funding, access to facilities, and other benefits to a wide variety of student groups as a limited public forum. *Truth v. Kent School District*, 542 F.3d 634, 640 (9th Cir. 2008). It further held that the school's exclusion of a student group from that forum for refusing to abide by the school's nondiscrimination policy was permissible because such an exclusion need only be reasonable and viewpoint neutral. *Id*. at 649–50; *Truth v. Kent School District*, 551 F.3d 850, 850–51 (9th Cir. 2008) (concurring in denial of *en banc*). The Ninth Circuit's faulty analysis directly contradicts this Court's precedents and eviscerates students' right to expressive association.

---

[3] Distinguishing "discrimination" on the basis of *belief* from invidious discrimination based on *status* is critical. Excluding individuals because of animus based on immutable characteristics like race does not follow from the right to form expressive organizations, because one's skin color does not define one's beliefs. However, the right to exclude people who do not share a common belief central to the group's purpose *is* fundamental to the right to expressive association.

First, the Ninth Circuit erroneously applied a reasonableness standard in evaluating Truth's denial of recognition. Concurring, two judges explained:

> [T]his case is not about the school's recognition of Truth as a school group, but the school creating Truth 'as a school-sponsored group.'… [T]he government is not required to subsidize expression, including expression through expressive association, within limited forums of its own creation as long as it restricts access to the forum according to reasonable, viewpoint-neutral rules.

Truth, 551 F.3d at 850–51 (internal citation omitted) (Fisher, J. and Wardlaw, J., concurring). Kentridge High's extracurricular program, which included 30 student groups in 2003, created a "forum for student and faculty expression." *Truth*, 542 F.3d at 640, 649 (quoting the program's constitution). Approved student groups adopted a wide variety of ideological perspectives, determined by the students outside of the classroom and during non-instructional time. *Id*. at 640–41. It is therefore not tenable to conclude, as the Ninth Circuit did, that the student groups' speech was partially the speech of the school.[4] The speech at issue here is readily distinguishable from the school-

[4] The Ninth Circuit claimed its opinion was consistent with the Second Circuit's ruling in *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996), that student groups could restrict their group leadership to those endorsing the group's religious beliefs. *Truth*, 542 F.3d at 647. But the Second Circuit's holding in *Hsu* explicitly recognizes that the speech of student groups is the speech of the students, not the government, and as such does not violate the Establishment Clause. *Hsu*, 85 F.3d at 865–67 ("In short, the Establishment Clause does not bar the School from recognizing the Walking on Water Club and its leadership provision.").

sponsored speech in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, the speech in question—a student newspaper—was edited by the school and "disseminated under its auspices" as part of a faculty-run program "designed to teach" lessons in journalism. *Id*. at 272. As a result, this Court found that the newspaper in *Hazelwood* was speech that "members of the public might reasonably perceive to bear the imprimatur of the school." *Id*. at 271–72. In contrast, the public could not reasonably perceive the 30 different student groups funded by this program, expressing a wide variety of ideological views, as all "bear[ing] the imprimatur of the school."

Indeed, the Court has repeatedly held that a public school providing funds and other resources, such as empty classrooms, to a variety of student groups is not sufficient to transform student speech into school-sponsored speech. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) (student groups in a similarly structured program did not speak for the government); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995) (with regard to a similarly structured program, the school is funding students' private speech); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (a similarly structured program "does not confer any imprimatur of state approval" on the messages expressed by student groups).

Because the speech at issue in *Truth* is private, the Ninth Circuit should have applied the strict scrutiny standard of review that governs school regulations on private speech. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969) (schools may regulate students' on-campus speech

only when it causes "disruption of or material interference with school activities"). Instead, the Ninth Circuit held that the school's exclusion policy was justified because it would "instill[] the value of nondiscrimination" in students. *Truth*, 542 F.3d at 649. Properly analyzed under strict scrutiny, however, this justification is clearly insufficient.[5] The school could not have prevented the *Tinker* students, for example, from wearing their anti-Vietnam armbands on school property in order to instill the value of patriotism. *Tinker*, 393 U.S. at 512–14.

In violation of this Court's precedent, the Ninth Circuit's holding in *Truth* means that schools may violate students' fundamental associational rights in order to teach "correct" values. This Court has repeatedly held that the state cannot interfere with expressive organizations' ability to form and to express their messages "for no better reason than promoting an approved message." *Dale*, 530 U.S. at 661 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)). The school here seeks to force Christian groups to accept avowed atheists, Muslim groups to accept Christians, and so forth, thus teaching students that religious student groups—unlike all other ideological student groups—do not enjoy the same right to expressive association as other groups dedicated to particular viewpoints.[6]

---

[5] The *Tinker* Court stated that seeking to confine students "to the expression of those sentiments that are officially approved" is not a "constitutionally valid reason[] to regulate their speech." *Tinker*, 393 U.S. at 511.

[6] Indeed, the Ninth Circuit analogized banning Christian groups who only accept Christians to banning "a Student Pro-

This Court has made clear that the state's interest in preventing what public officials deem "discrimination" does not outweigh an organization's right to reject members who do not support its message. *See Dale*, 530 U.S. at 656–59. The school has chosen to fund a wide variety of private student speech. Having done so, it is precluded from requiring students to forego their right of expressive association as a condition of accessing those funds. Laws that "[make] group membership less attractive" by "withhold[ing] benefits… [raise] the same First Amendment concerns about affecting the group's ability to express its message" as the state engaging in direct regulation of group membership. *Rumsfeld*, 547 U.S. at 69.

Addressing a similar program to the one at issue here, this Court held in *Healy v. James*, 408 U.S. 169 (1971) that a public university cannot require a student group to forego its expressive association rights in order to receive school recognition. The Court stated in *Healy* that the fact that a student group maintains a "possible ability to exist outside the campus community" nevertheless "does not ameliorate" the unconstitutional burden placed on the student group by a denial of recognition. *Id*. at 183.

Further, even under the Ninth Circuit's misapplied reasonableness standard, the school's exclusion policy is unconstitutional because it is viewpoint discriminatory. The school has not claimed that all student groups must be open to all students. Instead, it has prohibited student groups from restricting group membership by the endorsement of only one particular belief system: religion. *Truth*, 542 F.3d at 639–40.

Drug Club that refused to obey the school's anti-drug policy." *Truth*, 542 F.3d at 650.

As the Ninth Circuit's opinion explicitly acknowledged, student groups may limit their membership to those who endorse the beliefs of feminists, patriarchs, liberals, conservatives, Thomas Hobbes, or the Sierra Club, but not to those who endorse a religion. *Id*. at 640–41. The fact that this unequal outcome comports with the school district's nondiscrimination policy speaks to the infirmity of that policy, not—as the Ninth Circuit held—to the legitimacy of the school's decision.

The forced inclusion of members who do not endorse the fundamental beliefs of a group severely interferes with a group's ability to form, develop and express its message. *Dale*, 530 U.S. at 654 (holding that requiring the Boy Scouts to accept a gay rights activist as an assistant scoutmaster would "surely interfere with the Boy Scout[s'] choice not to propound a point of view contrary to its beliefs.") With the benefits the school provides recognized student groups, students are able to develop and express any ideological viewpoint except a religious viewpoint. Liberal student groups can prevent conservative students from joining their group in order to develop and clearly express their liberal message. Conservatives may similarly reject liberals. Christian students, by contrast, must allow their message to be represented by those hostile to the basic beliefs around which the group was formed.

A policy allowing student groups to limit their membership to those with any ideological viewpoint except a religious one uniquely interferes with the development and expression of a religious viewpoint. Court precedent leaves no doubt that religion qualifies as a viewpoint. *Rosenberger*, 515 U.S. at 831 (stating that religion provides "a standpoint from

which a variety of subjects may be discussed and considered" and thus is a viewpoint). The Ninth Circuit is thus incorrect in claiming that the school's exclusion policy is viewpoint neutral.

C. The Ninth Circuit's Decision Creates a Split With the Seventh Circuit Over the Appropriate Standard of Analysis for Freedom of Expressive Association Claims in Student Group Cases.

This Court provided specific guidance in *Dale* for evaluating claims of undue government interference with expressive association: The government must prove its regulation furthers "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). By ignoring *Dale*'s clear analytical framework and failing to subject the District's restriction to strict scrutiny, the Ninth Circuit is flatly at odds with a parallel case in the Seventh Circuit.

Despite Truth's expressive association claim, the Ninth Circuit's decision failed to impose *Dale*'s strict scrutiny requirement. Instead, as the dissent notes, the Ninth Circuit mistakenly applied "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)." *Truth*, 551 F.3d at 853 (Bea, J., dissenting). *Dale* indeed is controlling and compels a different result. As in *Dale*, the government action at issue here forces Truth to fundamentally alter its expressive message and allows the District to "impos[e] its views

on groups that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647–48. As in *Dale*, the government action here would "force the organization to send a message"—namely, that behaviors or beliefs patently inconsistent with Truth's mission are nevertheless unobjectionable. *Id*. at 653. This Court has held that a government actor cannot compel indirectly a result that it is constitutionally prohibited from achieving directly. *Healy*, 408 U.S. at 183. By permitting the District to require Truth to change its organizational message in order to gain official recognition and the attendant benefits, the Ninth Circuit has allowed precisely such unconstitutional government compulsion.

Instead of following *Dale*, the majority largely ignored the student group's core expressive association claim, deciding that the District's nondiscrimination policy is an acceptable instance of a "viewpoint neutral" and "reasonable" forum requirement. *Truth*, 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring). In the majority opinion, *Rosenberger*'s forum analysis test—which looks only to the "reasonableness" of the restriction on speech—is allowed to subsume the First Amendment's distinct protection of expressive association, swallowing Truth's expressive association claim whole. As a result, the state is able to infringe upon freedom of association without being required to withstand strict judicial scrutiny. By trivializing Truth's expressive association claim, the Ninth Circuit's opinion renders freedom of association an empty right.

The Ninth Circuit's treatment of a student group's expressive association claim is at odds with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). The facts in

Walker are analogous to those in *Truth*.[7] In *Walker*, Southern Illinois University School of Law, a public law school, cited a violation of school nondiscrimination policy to deny recognition to a Christian student group because the group's membership requirements excluded individuals who engaged in homosexual conduct.[8]

Unlike the Ninth Circuit in *Truth*, however, the Seventh Circuit recognized the facts in *Walker* as presenting a "'forced inclusion' case," as in *Dale* and *Hurley*.[9] Accordingly, the Seventh Circuit applied the *Dale* standard, holding that "[i]nfringements on expressive association are subject to strict scrutiny." *Walker*, 453 F.3d at 861. Finding that "CLS's beliefs about sexual morality are among its defining values," the Seventh Circuit concluded 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*. Compelled by this Court's holdings in *Dale*, *Healy*, and *Hurley*, the Seventh Circuit issued a preliminary in-

---

[7] In dissenting from the Ninth Circuit's denial of rehearing *en banc*, Judge Bea classified *Walker* as being "on all fours with our case" and characterized the majority concurrence as "clearly establish[ing] a circuit conflict." 551 F.3d at 857.

[8] While expecting members to refrain from engaging in homosexual conduct, the Christian Legal Society accepted officers and members who had engaged in homosexual conduct in the past or who had homosexual inclinations but did not engage in or affirm homosexual conduct. *Walker*, 453 F.3d at 858. CLS's disapproval of homosexual conduct is one of several moral strictures promulgated by the group, which also prohibits fornication and adultery.

[9] *Walker*, 453 F.3d at 864. Furthermore, the Seventh Circuit characterized the question presented by *Walker* as "legally indistinguishable from *Healy*." *Id.*

junction against Southern Illinois University, prohibiting the school from denying recognition to CLS. Critically, the Seventh Circuit distinguished the student group's expressive association claim from a concordant free speech claim, addressing each in separate sections of the opinion. This approach allowed each distinct First Amendment claim to be considered discretely, with the proper scrutiny, and in the correct analytical framework.

In sharp contrast, rather than accord expressive association a distinct analysis befitting its importance (and demanded by precedent), the Ninth Circuit reduces expressive association to "simply another way of speaking," indistinct from other speech claims. *Truth*, 542 F.3d at 652 (Fisher, J. and Wardlaw, J., concurring). In doing so, it robs expressive association of its unique value as "a correlative freedom" to other First Amendment protections, "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622. The Ninth Circuit uses this reduction to justify "apply[ing] the lesser standard of scrutiny, even if the same burden on a group's rights outside a limited public forum would be subject to strict scrutiny." *Truth*, 542 F.3d at 652 (Fisher, J. and Wardlaw, J., concurring). But the concurrence ignores the fact that this Court applied a different and stricter analysis in *Healy*, despite the fact that *Healy*, like *Truth*, involved access to a "forum" created by a public school. Further, as Petitioners note, the Ninth Circuit's prior decision in *Truth*, later withdrawn, analyzed Truth's expressive association claims independently of forum analysis, relying on this Court's expressive association holdings. Pet'rs' Br. at 22 n.12, citing *Truth v.*

Kent School District, 499 F.3d 999 (9th Cir. 2007) (withdrawn).

Because the proper framework for analyzing the right to expressive association is in doubt as a result of conflicting analyses employed by the circuits, this Court should grant Truth's petition.

II. IF ALLOWED TO STAND, *TRUTH* WILL ERODE THE FIRST AMENDMENT EXPRESSIVE ASSOCIATION RIGHTS OF STUDENTS AT PUBLIC COLLEGES ACROSS THE COUNTRY.

A. Decisions Restricting Freedom of Speech and Association at the High School Level Threaten Those Rights at the College Level.

Traditionally, this Court has afforded robust protection to the expressive rights of students at public colleges and universities and has, by contrast, given primary and secondary schools greater leeway to regulate student speech. In case law spanning decades, the Court has declared the public university campus to be "peculiarly the 'marketplace of ideas'"[10] and has written that the university carries a "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[11] The Court has recognized that "[u]niversity students are, of course, young adults. They are less impressionable than younger students … " *Widmar*, 454 U.S. at 274 n.14.

---

[10] *Healy*, 408 U.S. at 180 (quoting *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967)).

[11] *Rosenberger*, 515 U.S. at 835.

In spite of the obvious differences between the high school and college settings, federal circuit courts have occasionally conflated the standards governing regulation of student speech in each arena. As a result of this confusion, decisions restricting speech and association at the high school level threaten those rights at the university level as well.

The Tenth Circuit, facing an acting student's refusal to use certain expletives during an in-class acting exercise, held that this speech was "school-sponsored" and therefore was governed by *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004). *Hazelwood* stated that high school administrators may regulate the content of school-sponsored student publications "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 at 273. The Tenth Circuit similarly applied *Hazelwood*'s analysis to a university's decision to prevent a student group from showing a film deemed by administrators to be too controversial. After finding that the student group was an organ of the school, the Tenth Circuit held that *Hazelwood* governed the university's ability to regulate its speech. *Cummins v. Campbell*, 44 F.3d 847, 853 (10th Cir. 1994).

The Seventh Circuit applied the *Hazelwood* framework to university censorship of a student newspaper in *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (declaring "*Hazelwood* provides our starting point."). In response to plaintiffs' objection to applying *Hazelwood*'s high school standard to a college newspaper, the court wrote that "[T]here is no sharp difference between high school and college papers." *Id*. at 734–35.

The Eleventh Circuit even applied standards governing high school speech to university regulations restricting the time and place for distributing student government campaign literature and election-related debates. *Alabama Student Party v. Student Government Association of University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). Despite the fact that the regulations intruded upon the core political speech of university students, the Eleventh Circuit pronounced that because the University of Alabama "is a university, whose primary purpose is *education*…Constitutional protections must be analyzed with due regard to that educational purpose…" *Alabama Student Party*, 867 F.2d at 1346. The court added that, like the student newspaper in *Hazelwood*, student elections should be considered a "learning laboratory," subject to "reasonable restrictions." *Id.* at 1347.

Rulings concerning students' speech rights in the secondary school context have negatively impacted students' speech rights in higher education. Therefore, the Ninth Circuit's decision in *Truth* will inevitably deprive college and university students of First Amendment rights.

B. The Ninth Circuit and Lower Courts Have Already Relied on *Truth* to Deny Associational Rights to Religious College Student Groups.

The Ninth Circuit's holding in *Truth* has already negatively impacted expressive association on college campuses. Despite the fact that *Truth* arose in the high school context, the Ninth Circuit subsequently applied its decision and reasoning to the university setting. *See Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009).

In *Kane*, a religious student group at the University of California at Hastings Law School challenged the school's nondiscrimination policy, which required all student groups to "accept all comers as voting members even if those individuals disagree with the mission of the group." *Kane*, No. 06-15956. The student group was denied official recognition because it required all voting members and officers to agree to a Statement of Faith. In a one-paragraph opinion, the Ninth Circuit upheld the law school's nondiscrimination requirement as "viewpoint neutral and reasonable," citing *Truth* as controlling precedent. *Id*.

Anticipating *Kane*, a district court in the Ninth Circuit applied the *Truth* decision to other religious college student groups. *Every Nation Campus Ministries v. Achtenberg*, 2009 U.S. Dist. LEXIS 12251 (S.D. Cal. Feb. 6, 2009). Relying almost exclusively on *Truth*, the district court denied four religious groups at two California State University system schools the right to choose their members or leaders by reference to religious beliefs. *Id*. Repeating *Truth*'s mistaken application of forum analysis, the district court held that "CSU may restrict access to its recognized student organization forum so long as the restrictions are viewpoint-neutral and reasonable in light of the purposes served." *Id*. at *48–49. Having determined that CSU's regulations were viewpoint-neutral and reasonable, following *Truth*, the court concluded that "CSU's nondiscrimination policy burdens Plaintiffs' expressive activity, if at all, only incidentally." *Id*. at *55.

Truth's holding has already negatively affected student rights in the university setting. If allowed to stand, the *Truth* decision will deprive secondary school

and collegiate student groups of their associational rights.

C. Student Groups at Our Nation's Public Colleges Have a Fundamental Right to Specify Terms of Membership Based on Shared Beliefs.

The First Amendment's protections fully extend to the public university campus.[12] This extension encompasses freedom of association since "implicit in the right to engage in activities protected by the First Amendment" is a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622.

This Court has previously affirmed the importance of students' associational rights in the university setting. In *Healy v. James*, the Court invalidated a university's decision to deny official recognition to a student group because of concerns over potential disruption of campus activities. Stating that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right," the Court held that "a 'heavy burden' rests on the college to demonstrate the appropriateness" of its action. *Healy*, 408 U.S. at 181, 184. In *Widmar v. Vincent*, the Court held that by denying a religious student group the use of campus facilities for meetings, a university violated the group's right to free exercise of religion

[12] *See, e.g., Healy*, 408 U.S. at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

and freedom of speech and association. *Widmar*, 454 U.S. at 269. Because denying the group recognition impacted "forms of speech and association protected by the First Amendment," the university had to demonstrate that such a denial was "necessary to serve a compelling state interest and…narrowly drawn to achieve that end," and it was unable to do so. *Id*. at 270.

That student groups at public colleges and universities have the same right as other private expressive organizations to limit membership based on shared beliefs was recognized by the Seventh Circuit in *Christian Legal Society v. Walker*. There, the Seventh Circuit granted a student group's request for a preliminary injunction against a law school's revocation of the group's official status, which the school had justified on the basis that the group required voting members and officers to affirm a statement of faith denouncing homosexual conduct, in violation of the university's nondiscrimination policies. *Walker*, 453 F.3d at 858.

In granting the injunction, the Seventh Circuit held that forced inclusion would violate the group's expressive associational rights, for "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id*. at 863. Finding that the law school did not demonstrate a compelling state interest sufficient to justify its interference with the group's associational rights, the Seventh Circuit issued a preliminary injunction ordering the group's official status to be restored. *Id*. at 867. The Ninth Circuit's ruling in *Truth* contravenes the well-established Court jurisprudence that *Walker* upholds.

D. Religious Student Groups are Frequently Denied Official Recognition by Public Colleges and Universities in Violation of their First Amendment Right to Freedom of Association.

At public colleges and universities across the country, religious student groups are forced to choose between abandoning their core religious beliefs to gain official recognition and its attendant benefits,[13] or preserving their associational identity at the cost of being denied equal access to school resources enjoyed by similarly motivated—but secular—groups. Unsurprisingly, religious organizations recruit and choose leaders and voting members using faith-based criteria. Forcing religious student groups to choose leaders and members without reference to faith-based criteria thwarts the groups' central purpose—namely, to provide students the ability to associate with people of their faith.

Despite the understandable and constitutionally protected desire of religious students to join and maintain campus groups centered upon shared faith, *amicus* FIRE has seen a trend toward denial of recognition of religious college student groups in recent years.[14] In response, students have filed federal civil

---

[13] The benefits of official recognition are often vital to the very existence of an organization on campus. Frequently, "unrecognized" campus organizations are not allowed to meet anywhere on campus, may not be referenced by name in any printed materials on campus, and are subject to similar requirements that impact their ability to exist as organizations.

[14] *See, e.g.,* Andrea Billups, *Student Group Can Use 'God' in Creed*, The Washington Times, March 30, 2001; *Christian Student Group Sues Rutgers after University Revoked its Charter*, The Chronicle of Higher Education, Jan. 10, 2003; John Leo,

rights lawsuits against numerous public universities, including Southern Illinois University–Carbondale, the University of Minnesota, Rutgers University, The Ohio State University, Pennsylvania State University, the University of North Carolina at Chapel Hill, Arizona State University, Southwest Missouri State University, the University of Oklahoma, the University of Florida, and the aforementioned suit against the University of California at Hastings College of the Law. Several have resulted in out-of-court settlements and university policy changes—specifically, at the University of Minnesota, Rutgers, Ohio State, Penn State, Southwest Missouri State, Arizona State, and the University of Oklahoma. Others, at Southern Illinois University and the University of North Carolina, were resolved in favor of the religious student groups by court order or decision.[15] Finally, a decision from the United States Court of Appeals for the Eleventh Circuit is pending in *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), a case in which a Christian fraternity brought suit against the University of Florida after being denied recognition as a registered student organization because the fraternity requires its members to be Christian.

Not all disputes result in litigation, but the many incidents that FIRE has seen speak volumes about

---

Playing the Bias Card, U.S. News & World Report, Jan. 13, 2003; *UNC Affirms Christian Group; UNC-CH Says Christian Group Can Remain Official Organization*, The Associated Press State & Local Wire, Dec. 31, 2002.

[15] *See Walker*, 453 F.3d 853 (7th Cir. 2006); *Alpha Iota Omega Christian Fraternity v. Moeser*, Civ. No. 1:04CV00765 (M.D.N.C. May 4, 2006) (dismissing plaintiffs' complaint as moot after voluntary revision of university non-discrimination policy).

the size of this unconstitutional trend. At numerous other public colleges, Christian or Muslim student organizations have faced sanctions for refusing to comply with nondiscrimination policies or similar requirements. Without ending up in court, controversies have roiled public campuses, including California State University – San Bernardino, Louisiana State University, Purdue University, Castleton State College in Vermont, the University of Arizona, the University of Wisconsin at Madison, the University of Wisconsin at Eau Claire, and Wright State University.

E. If the Circuit Split Regarding the Analysis of Expressive Association Claims Is Not Resolved Properly, the Exclusion of Religious Student Groups From Our Nation's Public Colleges Will Grow Far Worse.

A split exists among the circuits over the analytical framework for evaluating government infringement of expressive association rights. Allowing this conflict to go unremedied will dramatically increase the burgeoning incidence of hostile exclusion experienced by religious student groups on public campuses.

In the few months since the Ninth Circuit's ruling in *Truth*, it has already been cited as justification for denying recognition to several religious student groups in California. As a result of *Truth*, all religious student groups wishing to limit their voting membership and leadership to those who share the group's tenets of faith are at risk of derecognition. FIRE's decade of experience has taught us that university administrators are keenly aware of discre-

pancies or unresolved questions in the law,[16] so we are sadly confident that if *Truth* and its progeny are allowed to stand, universities in all circuits will be emboldened to force student religious groups off campus and out of what this Court has deemed "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180 (internal citation omitted). Depriving religious organizations of an equal right to associate on public university campuses simply because those organizations choose to govern themselves according to faith-based principles is fundamentally incompatible with the marketplace of ideas and relegates religious students to an unconstitutional second-class status. The circuit split demands resolution to preserve doctrinal clarity regarding the fundamental right of student groups to determine their associative message. Simply put, this Court must act to preserve freedom of association on campus.

[16] For example, one week after the Seventh Circuit's decision in *Hosty v. Carter*, holding that public colleges can regulate the content in student newspapers in a manner akin to high schools, the general counsel for the California State University system penned a memorandum to CSU college presidents stating that the decision "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf.

CONCLUSION

For all of the reasons stated above, we ask that the Supreme Court grant the writ of certiorari.

Respectfully submitted,

GREG LUKIANOFF
WILLIAM CREELEY
AZHAR MAJEED
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
601 Walnut Street, Suite 510
Philadelphia, PA 19106
(215) 717-3473

HARVEY A. SILVERGLATE
Counsel of Record
ZALKIND, RODRIGUEZ, LUNT & DUNCAN, LLP
607 Franklin Street
Cambridge, MA 02139
(617) 661-9156

Counsel for Amicus Curiae

April 29, 2009