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

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April 29, 2009

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

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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.

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[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

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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

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]

[2] Roberts v. U.S. Jaycees,

therefore grants an organization the right to make belief-based membership choices, including the choice to exclude from the organization people who do not t

First, the Ninth Circuit erroneously applied a rea -

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]

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[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

As the Ninth Circuit's opinion explicitly acknowledged, student groups may limit their membership to

which a variety of subjects may be discussed and con - sidered" and thus is a viewpoint). The Ninth Circuit is thus incorrect in cla iming that the school's exclu - sion 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

on groups that would rather express other, perhaps

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 EX -

In spite of the obvious differences between the high school and college settings, federal circuit courts have occasionally conflated the standards governing regu - lation of student speech in each arena. As a result of this confusion, decisions restricting speech and asso - ciation at the high school level threaten those rights

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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 —

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.

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

[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,

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