APPEAL NO. 04-35876

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRUTH, AN UNINCORPORATED ASSOCIATION, *et al.*,
Appellants-Plaintiffs,

v.

KENT SCHOOL DISTRICT, *et al.*,
Appellees-Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
CIVIL CASE NO. C-03-785
(HONORABLE MARSHA J. PECHMAN)

APPELLANTS OPENING BRIEF

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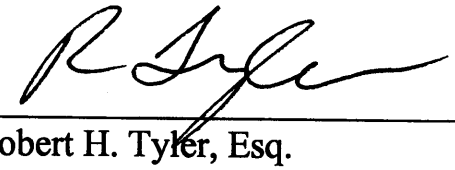
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs state they have no parent corporation, nor does any Plaintiff issue any stock.

Dated: February 17, 2005

ALLIANCE DEFENSE FUND

By: 

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I

INTRODUCTION

Over a two and one-half year period, Sarice Undis and Julianne Stewart submitted three Charter Applications to Kentridge High School in a fruitless effort to obtain official recognition for the Truth Bible club. Defendants claim to have an interest in preventing "religious discrimination" that trumps Truth's right to implement membership criteria preserving the club's religious expression. But to do so would infringe upon the Bible club's Christian nature, the ability of the club to express a distinctly Christian message, and the freedom of students to associate with like-minded individuals. Defendants' intolerance ultimately leaves a Bible club that cannot insist on having members that actually adhere to Biblically-based conduct.

II

STATEMENT OF JURISDICTION

The district court's jurisdiction arose by operation of 28 U.S.C. §§ 1331 and 1343. Plaintiffs advanced claims under the United States Constitution, particularly the First and Fourteenth Amendments, pursuant to 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983, 1988. Plaintiffs have also asserted claims under the Equal Access Act codified at 20 U.S.C. § 4071 *et seq.* This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292 as the district court granted Defendants'

motion for summary judgment and denied Plaintiffs' motion for summary judgment on September 23, 2004. (*See* Excerpts of Record ("ER") 16 and 17.) Plaintiffs filed a timely Notice of Appeal on September 29, 2004 pursuant to Federal Rules of Appellate Procedure Rule 4(a)(1) and 26(a). (ER 18.)

III

STANDARD OF REVIEW

An order granting or denying summary judgment is generally reviewed *de novo*. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). In reviewing rulings on cross-motions for summary judgment, the appellate court evaluates each motion separately, giving the non-moving party in each instance the benefit of all reasonable inferences. *American Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). In conducting a *de novo* review, the Ninth Circuit does not defer to the lower court's ruling but independently considers the matter anew, as if no decision had been rendered on the matter below. *Voigt v. Savell*, 70 F.3d 1552, 1564 (9th Cir. 1995).

The reviewing court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). In considering the facts, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). At the summary judgment stage, the non-movant's version of any disputed issue of fact is presumed correct. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992); *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-631 (9th Cir. 1987).

Here, there are no material facts in dispute. Rather, the district court should have denied Defendants' motion for summary judgment and granted Plaintiffs' cross-motion for summary judgment.

IV

STATEMENT OF THE ISSUES

1. Whether the district court erred when it ruled that Plaintiffs' have no right to receive official ASB recognition of their Bible club on the basis that Defendants' interest in preventing "religious discrimination" trumps Plaintiffs' rights under the First Amendment, the Equal Protection Clause, and the Equal Access Act.

2. Whether School District Policy 2153 violates the Equal Access Act, on its face and as applied, because of the separate and unequal status it gives to noncurriculum religious clubs in comparison to other noncurriculum clubs.

3. Whether the district court erred when it entered judgment in favor of Defendants by applying *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) and ruling Defendants were exempt from liability.

V

STATEMENT OF THE CASE

Plaintiffs filed their complaint on April 3, 2003. Plaintiffs alleged a deprivation of civil rights and seek injunctive, declaratory, and compensatory relief. Defendants filed their first Motion for Summary Judgment on July 17, 2003. Plaintiffs filed a Motion for Preliminary Injunction on September 15, 2003. On September 16, 2003, the district court entered an order denying Defendants' Motion for Summary Judgment. Oral argument on Plaintiffs' Motion for Preliminary Injunction took place on December 19, 2003. An order denying said motion was entered on December 31, 2003. Plaintiffs' Motion for Reconsideration was also denied on February 4, 2004. On June 30, 2004, the parties filed cross-Motions for Summary Judgment. Oral arguments on both motions were heard on September 10, 2004. On September 22, 2004, the district court entered an order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. Plaintiffs filed a notice of appeal from this order on September 29, 2004.

VI

STATEMENT OF FACTS

A. PLAINTIFFS AND THEIR PROPOSED BIBLE CLUB

Plaintiffs Sarice Undis and Julianne Stewart were Christian students at Kentridge High School ("Kentridge"). (ER 4, ¶ 3; ER 5, ¶ 3.) Beginning in the fall of 2001, these Plaintiffs and other Christian students attempted to form a noncurriculum-related Bible club. (ER 4, ¶ 4; ER 5, ¶ 4.) The club – named "Truth" – will celebrate the Gospel of Jesus Christ and share the Bible's religious message with any students desiring to "grow in their relationship with Jesus Christ, study the Bible, associate in fellowship with other Christians and express the love of Christ and his soul-saving grace through character, speech, conduct and behavior." (ER 4, ¶ 3, ER 5, ¶ 3.) Truth will promote the infallibility of the Bible and authentic Christianity, and will be voluntary and student initiated. (*Id.*) Truth is an unincorporated association of students from Kentridge that was named as a party to this action pursuant to Rule 17(b) of the Federal Rules of Civil Procedure. (ER 1, ¶ 3.10.) Although Ms. Undis and Ms. Stewart have both graduated, it was agreed that Lindsay Thomas, a present student, will take the leadership role of the club if it is officially approved. (ER 12, ¶ 3; ER 16, p. 2 n.2.)

B. DEFENDANTS' TWO-TIERED SCHEME FOR NONCURRICULUM-RELATED GROUPS

Kentridge is a secondary educational facility that receives federal funding. (ER 16, p. 15, lines 8-13.) It regulates access for noncurriculum-related student groups in at least two ways – the group is either recognized as an official student club via the Associated Student Body ("ASB")[1] charter process, or the group may informally meet on campus as a Policy 2153 group. (*See generally*, ER 4, p. 46 (Kentridge ASB Constitution ("ASB Const.")); ER 10, p. 145 (Policy 2153).)

Both ASB clubs and Policy 2153 groups may meet during noninstructional time on campus, contingent upon the principal's approval. (ER 1, ¶ 5.7; *accord* ER 2, ¶ 5.7; ER 10, p. 145.) ASB clubs may also advertise their activities, be recognized in the school yearbook, and announce club activities over the public address system. (ER 4, ¶ 2; ER 5, ¶ 2.) It is not clear from the present record whether Policy 2153 groups have advertising and yearbook rights. However, it is certain that ASB clubs do receive benefits that non-ASB student groups do not receive. First, simply existing as a club requires an ASB authorized charter: "Unchartered clubs are not permitted to exist at Kentridge High School."

[1]The ASB is a nonprofit student organization that acts as a student government and supports student participation in "optional, non-credit school district extracurricular events of a cultural, social, recreational, or athletic nature." (ER 4, p. 37 (Kentridge ASB Constitution Charter Preamble.) It is subject to the authority of the principal or his designee, who is responsible for ensuring the ASB follows all "Kent School District policies and rules . . . ." *Id.* (ASB Const., art. I, § 4; ER 10, p. 145 (Policy 2153).)

(ER 4, p. 46 (ASB Const., art. VIII, §§ 2.A, B); ER 1, ¶ 5.20; *accord* ER 2, ¶ 5.20.) ASB clubs also have the unique right to raise funds (ER 4, p. 57 (Kentridge Charter Application preamble)), to receive ASB funds[2] (ER 4, p. 46 (ASB Const., art. VIII, § 3.A.1)), and to be protected from the risk of financial improprieties by having supervised accounting procedures. (ER 4, p. 46 (ASB Const., art. VIII, § 3.B).) Kentridge currently officially recognizes numerous noncurriculum-related ASB clubs including VICA, National Honor Society, Girl's Honor, Men's Honor, Gay-Straight Alliance, Earth Corps (YMCA), Key Club, and the MultiCultural Student Union. (ER 4, ¶ 2 and p. 35 (listing ASB clubs); *see also* ER 11, p. 269, lines 10-24; ER 1, ¶ 5.10; *accord* ER 2, ¶ 5.10.)

C. TRUTH'S FIRST CHARTER APPLICATION AND MONTHS OF INDIFFERENCE

In September 2001, Ms. Undis submitted a Club Charter Application ("Charter") (ER 10, pp. 154-55) to the ASB as directed by Assistant Principal Eric Anderson and as required by Article VIII § 2(A) of the ASB Constitution. (ER 5, ¶ 4.) The Charter is a formal application pre-designed by Kent School District (hereinafter the "School District") and Kentridge High School ("Kentridge") that must be submitted in order to receive official ASB status. (ER 5, ¶ 4.) At the ASB

[2]ASB funds are derived from student fundraising, event fees and ASB membership dues. (ER 4, p. 37 (ASB Const., art. I, § 7 (fundraising) and p. 38 (art. II, § 5 (membership fees)); *see also Prince v. Jacoby*, 303 F.3d at 1085 (9th Cir. 2002) (no school district funds allocated to ASB).

meeting in September or October 2001, numerous students objected to the formation of Truth. (ER 5, ¶ 5.) Rather than vote on Truth's proposed Charter, the ASB decided to discuss it with Mr. Anderson, who was not present at that meeting. (*Id.*) Shortly thereafter, Mr. Anderson spoke with Michael Albrecht, Kentridge's Principal, and Michael Harrington, the School District's in-house legal counsel, regarding the legality of allowing this religious club. (*Id.*; ER 13, p. 385; ER 9, ¶ 2.) From approximately October 2001 through June 2002, Ms. Undis requested of Mr. Anderson that Defendants make a decision on the proposed Charter on at least 10 occasions. (ER 5, ¶ 5.) Each time, Mr. Anderson represented the District had not yet made a decision on the proposed Charter. (*Id.*)

In the spring of 2002, Mr. Anderson ordered all existing student clubs to submit new Charters because of the proposed Bible club. (ER 3, ¶ 4.) Mr. Anderson stated the Charters of the existing student clubs were going to be "reworded" by the District's attorney in order to make them appear more like "curriculum" or "academic" related clubs. (*Id.*) During September through December 2002, Ms. Undis repeatedly asked Mr. Anderson to make a decision regarding the club. (*Id.*)

D. STUDENTS SEEK LEGAL ASSISTANCE AFTER SIXTEEN MONTHS OF OBSTRUCTION

On January 7, 2003, Plaintiffs' attorney sent a comprehensive four-page letter to Principal Albrecht explaining the factual circumstances surrounding Plaintiffs' attempt to have their Bible club approved. (ER 6, ¶ 3 and pp. 80-85.) The letter also explained the applicability of the Federal Equal Access Act and the First Amendment, and demanded that District officials immediately approve the club. (*Id.*)

1. The Second Charter and Constitution

Soon thereafter, Ms. Stewart questioned Mr. Anderson as to the status of the Truth's proposed Charter. (ER 4, ¶ 6.) He responded by demanding that a new Charter be submitted for approval. (*Id.*) However, Mr. Anderson delayed in providing a Charter application to Ms. Stewart and said the application was not received until after Plaintiffs' counsel sent a second demand letter to Mr. Harrington on January 30, 2003. (ER 6, ¶ 4 and pp. 87-88.) Ms. Stewart then submitted the second Charter and Constitution to Defendants in February 2003. (ER 4, ¶ 6 and pp. 50-55.)

On February 25, 2003, after numerous unreturned phone calls to Mr. Harrington, Plaintiffs' counsel faxed a third letter to Mr. Harrington demanding the District take action to approve the club. (ER 6, ¶ 5 and pp. 91-93.) That letter specifically argued that Truth's approval should not be contingent upon

approval of the ASB as Plaintiffs have a federal statutory right to approval. (*Id.*) With no return phone call from District officials, Plaintiffs began preparing a complaint. (ER 6, ¶ 9.)

2. Rejection of Truth's Second Charter and Constitution

However, prior to filing the Complaint, Mr. Anderson contacted Ms. Stewart and subsequently held an ASB meeting on March 28, 2003 wherein the ASB was to vote on whether to approve or deny official recognition of Truth. (ER 4, ¶ 8.) Ms. Stewart was asked various questions pertaining to the religious purpose and nature of the club. (*Id.*) No vote was taken at that meeting but, instead, the ASB scheduled another meeting to reconvene on April 1, 2003. (*Id.*)

On April 1, 2003, the ASB again met to discuss the Bible club. (ER 4, ¶ 9.) In that meeting, Mr. Anderson stated that even if the ASB approved Truth, it was the school administration that would ultimately determine whether Truth could legally exist on campus. (*Id.*; ER 11, p. 259; ER 10, p. 211.) On the other hand, if denied by the ASB, Truth would have no right to exist on campus. (*Id.*) Mr. Anderson also stated that it was illegal for Truth to limit voting members to those professing a belief in the Bible and in Jesus Christ. (ER 4, ¶ 9.) Mr. Anderson asserted there were problems with the name "Truth" because it would make others question if they were "believing a lie." (*Id.*) Mr. Anderson stated that Truth may not create a positive atmosphere for the rest of the school

because they may feel condemned. (*Id.*) Mr. Anderson further stated the ASB could not legally allocate funds to the Bible club. (*Id.*) Following Mr. Anderson's comments, the ASB rejected the second Charter and Truth's request to exist, meet and be recognized as an official noncurriculum club. (*Id.*) With no other apparent recourse available, Plaintiffs filed their Complaint in order to protect their rights under the Federal Equal Access Act (hereinafter "EAA") and the United States Constitution. (ER 1.)

3. The Third Charter and Constitution

On approximately April 8, 2003, Mr. Anderson delivered a letter to Ms. Stewart stating she may amend the latest Charter and Constitution in a further attempt to obtain ASB club status. (ER 10, p. 213; ER 4, ¶ 10.) He stated the amended documents would need to be submitted to the ASB for its meeting on April 25, 2003. (*Id.*) Ms. Stewart made certain amendments and resubmitted the third Charter and amended Constitution. (ER 4, ¶ 10 and pp. 57-62.)

Since the submission of the second charter, there have been three categories of Kentridge students who may choose to participate in Truth: attendees, general members and voting members. (ER 12, ¶¶ 4-7.)

The first category is "attendee." From the beginning, Truth meetings have been open to all students. (ER 10, p. 154-55 (first Charter); ER 4, ¶¶ 3, 7; ER 5, ¶ 3.) As the club meetings are open to members and non-members alike, any

student may attend a meeting and participate in club activities, regardless of his or her religious beliefs. (ER 12, ¶¶ 5-6.)

The second category is "general member." (*Id.*, ¶ 6.) General members must adhere to a code of conduct, that is, comply "in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." (ER 12, ¶ 6; ER 10, pp. 162-164.) The club's code of conduct refers to the Bible as the source for that standard of behavior. (*Id.*) A student need not hold a particular religious belief to comply with the code of conduct. (ER 12, ¶ 6.)

The third membership category is "voting member." (ER 12, ¶ 7.) These students elect the officers of the club, vote on club issues, and ensure the club adheres to its stated purpose and goals. (*Id.*) The third Charter and its accompanying Constitution limit voting membership to those students who were willing to sign a statement of faith. (*Id.*) The statement of faith requires the signor to state he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," and that "salvation is an undeserved gift from God." (*Id.*)

In a meeting on April 25, 2003, the ASB again denied the April 2003 Charter. (*Id.*) The ASB denial of the Charter prevented Truth from becoming an ASB-approved club. (ER 11, p. 259, lines 8-10 (Anderson deposition - "Q. And

did you advise the Associated Student Body that if they voted no, it would end it? A. Yes.").) According to the School District's ASB Policy Manual, Messrs. Albrecht and Anderson have been delegated the duty to ensure the ASB complies with the law. (ER 11, p. 340.)

E. THE SCHOOL DISTRICT HAS ADOPTED, AND HAS ALLOWED STUDENT CLUBS TO ADOPT, MEMBERSHIP QUALIFICAIONS BASED ON CODES OF CONDUCT AND GROUP IDEOLOGY

Defendants recognize other ASB clubs that mandate a code of conduct for membership or require that its members concur with the ideological perspective of the club. For example, VICA requires its members to "believe in high moral and spiritual standards" and requires members to "set an example for others by living a wholesome life and by fulfilling [their] responsibilities as a citizen of [their] community." (ER 11, p. 301.) The National Honor Society allows membership requirements to be based on "character" (*Id.*, p. 305) and sets forth a code of conduct wherein "all members will behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves, their school, or upon the National Honor Society organization." (*Id.*, p. 312.) ASB members must "follow the sports code" (*Id.* at p. 318), which is discussed below. Men's Honor members must be "upright and virtuous." (*Id.*, p. 322.) Gay-Straight Alliance members "must be willing to work towards the goals of the Club" (*Id.*, p. 325), which include "working to decrease homophobia" and fighting

"heterosexism." (*Id.*, p. 326.) Earth Club members must have an "interest and dedication toward environmental issues." (*Id.*, p. 332.) Objectives of Key Club members include giving "primacy to the human and spiritual rather than to the material values of life" and living by the Golden Rule. (*Id.*, p. 334.) Students Against Drunk Driving can expect members not to drink and expect members to encourage others not to drink and drive. (*Id.*, p. 244, lines 18-21.)

Additionally, the School District allows other groups to impose gender-based discriminatory membership policies in direct contravention of its nondiscrimination policy. For example, the Girl's Honor club requires members to be female. (ER 11, p. 314-15).

The School District itself imposes codes of conduct and ethical guidelines to regulate behavior in the school environment. All students participating in athletics or as ASB officers must sign the student handbook setting forth the athletic code of conduct. (ER 12, ¶ 6; ER 11, pp. 291-99.) The athletic code of conduct establishes "rules and standards for athletics that reflect the behavior standards approved by the community." (ER 11, p. 293.) "[T]eam members [must] conduct themselves in a manner that will inspire pride and approval." (*Id.*, p. 294.) And athletes may not engage in "immoral conduct." (*Id.*, p. 295.) When asked for the meaning of "immoral conduct," the School District Superintendent remarked the Golden Rule, the Ten Commandments, the Torah, and the Bible would all provide meaning to

this phrase. (*Id.*, p. 288, lines 2-20.)

VII

SUMMARY OF ARGUMENT

Truth has a First Amendment right to expressive association and free speech. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000). This includes the right to choose its members based upon their religious beliefs. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). Truth also has the right under the Free Exercise Clause to govern its own internal religious affairs, free from governmental intrusion. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Defendants may justify their infringement on these rights only by showing their action is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Defendants' interest in preventing religious discrimination in school programs is not a compelling reason to regulate the internal workings of a private Bible club. Truth also has a right under the Equal Access Act to be granted official recognition as an ASB club and to be treated equally to other noncurriculum clubs. 42 U.S.C. ¶ 4071(a); *see also*, *Prince*, 303 F.3d 1074.

Additionally, the district court relied on *Monell* to dismiss all of Plaintiffs' claims under 42 U.S.C. § 1983. However, *Monell* does not apply to Plaintiffs' claims for prospective relief. *Chaloux v. Killeen*, 886 F.2d 247, 249-51 (9th Cir.

1989). And further, *Monell's* effect of prohibiting compensatory damages in some instances does not apply in this case for three reasons. First, Plaintiffs' injuries flow from official policies and customs implemented by Defendants. *Monell*, 436 U.S. at 690. Second, Defendants were "deliberately indifferent" to the violation of Plaintiffs' constitutional rights. *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 411 (1997). Third, the School District egregiously attempted to insulate itself, and its officials, from liability for their unconstitutional actions and policies. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126-27 (1988).

For these reasons, Plaintiffs respectfully request that this court reverse the district court's judgment in favor of Defendants and instruct the court to enter judgment in favor of Plaintiffs.

VIII

ARGUMENT

The lower court's entire decision rests upon its belief the School District's interest in preventing discrimination justifies the infringement upon Plaintiffs' First Amendment rights.[3] The lower court errantly stated that "the School's compelling

[3]The School District's Nondiscrimination Policy 3210 states: 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, national origin, sex, marital status,

interest in preventing discrimination based on religion justifies intruding upon Plaintiffs' right to expressive association." (ER 16, p. 453, lines 14-15.) Analyzing the Equal Access Act ("EAA"), 42 U.S.C. ¶ 4071(a), the court relied upon the same mistaken analysis and stated that "denying the Club ASB status because of its exclusionary general membership policy does not constitute a denial of equal access or discrimination based on the content of the Club's speech." (ER 16, p. 446, lines 18-20.) While curbing invidious discrimination is often a worthy cause, it is not invidious discrimination when a religious association requires members to adhere to a code of conduct, or even when it selects members based upon religious beliefs. Moreover, the School District's interest to ensure access to school activities – even assuming that a private Bible club is a school activity – is satisfied by the fact that all students are entitled to attend all of Truth's activities.

A. THE FREEDOM OF EXPRESSIVE ASSOCIATION PROTECTS THE RIGHT OF TRUTH TO ESTABLISH QUALIFICATIONS FOR ITS MEMBERSHIP

The Supreme Court has long recognized the First Amendment embodies a right to freedom of association for expressive activity in student groups. *See Widmar*, 454 U.S. at 268-269 (discussing both speech and association rights); *Healy v. James*, 408 U.S. 169 (1972) (same). In *Healy*, the Supreme Court noted

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previous arrest unless a clear and present danger exists, incarceration, or physical, sensory or mental disabilities. (ER 10, p. 153.)

the constitutional right of association is inherent in a student club.

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.

408 U.S. at 181 (emphasis added). The Constitution protects the right of individuals to join together to advocate their collective viewpoint. "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." *Dale*, 530 U.S. at 647, quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Therefore, an expressive religious association has the right to discriminate through its membership policies. *New York State Club Ass'n*, 487 U.S. 1 (1988) (affirmed that religious groups may use religious or ideological criteria for membership). As explained by the Second Circuit prior to *Boy Scouts*, absent a showing of invidious discrimination or material disruption, "if a sectarian club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so." *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872-73 (2nd Cir. 1996). Here, the district court did not address whether invidious discrimination or material disruption exist. (ER 16, p. 456.) And the record below does not support such a finding.

1. Truth Will Engage in Both Public and Private Religious Expression

A group is protected by the constitutional right to association when it demonstrates that it "engage[s] in some form of expression, whether it be public or private." *Boy Scouts*, 530 U.S. at 648. Unquestionably, Truth's charters show the club intended to engage in protected expression:

> 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.
>
> (ER 4, p. 57 (third charter).)
>
> FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: . . .3) Associate in fellowship with other Christians and 4) Express the love of Christ and His soul-saving grace through character, speech, conduct, and behavior.
>
> (*Id.* p. 58.)
>
> FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: Providing a biblically-based club for those students wanting to [ ] grow in their relationship with Jesus Christ.
>
> (*Id.*)
>
> PURPOSE: To have a Bible study to encourage and help [students] become better people with good morals.
>
> (ER 10, p. 154 (first charter).)

Likewise, Truth's constitutions articulated the expressive purposes of the club. Article I of the third charter provided the basis for the name "Truth" while

also reflecting on the expressive nature of the club:

> John 8:32 Speaking to the believing Jews, he says that if they hold to His teachings, they're really his disciples. He says "Then you will know the truth, and the truth will set you free . . . . Psalm 26:3 "for your love is ever before me, and I walk continually in your truth." In this Bible club, we'll strive to learn how to walk in the plan God has set out for us, and learn how to follow Him, and "walk in His truth". [sic]
>
> (ER 4, p. 60 (amended Constitution).)

While the club is open to all students, as attendees, who have a true desire to study the Bible "regardless of their particular beliefs" (ER 10, p. 55 (first Charter); ER 12, ¶ 5), a general member must behave in accord with the code of conduct:

> The Amended Constitution stated that 'the privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible.' The student who chooses to participate at this level need only abide by the Club's 'code of conduct.' The Club's code of conduct provides a reference to the Bible as the source for that standard of behavior so as to provide guidance to both members and leaders. A student need not hold a particular religious belief to be in compliance with the code of conduct. For example, a Muslim, Hindu or person of other faith, is welcome to be a member so long as they abide by the code of conduct. A general member does not need to affirm the Christian faith. The Club's code of conduct is simply intended to require, for example, that members attempt in 'good faith' to refrain from vulgar language, lewd conduct, drunkenness, and other inappropriate behaviors. This code of conduct is very similar to the code of conduct established by Kentridge High School in its Student Athletic Handbook. I was required to abide by the code of conduct as a student athlete. Student athletes are required to sign the Student Handbook in acceptance of its terms.

(ER 12, ¶ 6; ER 4, p. 60-61.)

And lastly, in order to be a voting member, the member must sign a statement of faith:

> These students elect the officers of the Club, vote on Club issues, and help make sure the Club adheres to its stated purpose and goals. The Third Application and Amended Constitution limited voting membership to those general members who were willing to sign a statement of faith. The statement of faith requires the signor to state that he or she believes 'the Bible to be the inspired, the only infallible, authoritative Word of God,' and that 'salvation is an undeserved gift from God.'
>
> (ER 12, ¶ 7; ER 4, pp. 60 to 62 (amended constitution) and p. 64 (Statement of Faith).)

Truth's governing documents clearly show that its members plan to engage in both public and private expressive activity. That expression will be "to those in the club as well as those outside of the club." (ER 4, p. 57.) Therefore, Truth clearly satisfies this first prong of *Boy Scouts*.

2. The Forced Inclusion of Non-Complying Students Will Significantly Affect the Expressive Purposes of the Club

The next inquiry under *Boy Scouts* is "whether forced inclusion" of persons who do not support Truth's expression will "significantly affect" the organization's ability "to advocate public or private viewpoints." 530 U.S. at 650. The district court erred in finding that it will not. (ER 16, p. 23.)

Like most religious associations, Truth welcomes the opportunity to share its religious message to interested students, regardless of religious belief. (ER 10, p. 154-55; ER 12, ¶ 5.) Therefore, all students have access to Truth's events.

However, Truth intentionally structured itself to protect its expressive message through the conduct of its members. Thus, to participate as a general member, a student must abide by Truth's code of conduct. The code of conduct was included "in order to lessen the possibility that members would detract from the reputation and expressive purposes of the club." (ER 12, ¶ 4.) Forcing Truth to accept members who disagree with the club would significantly hinder, if not destroy, the effectiveness of the organization to "[e]xpress the love of Christ as his soul-saving grace through character, speech, conduct, and behavior." (ER 12 ¶ 4; ER 4, p. 58.)

3. Although Truth has the Right Choose Members Based on Religious Beliefs, Truth Gives Everyone Access to its General Membership

The district court erroneously concluded that Truth's code of conduct prevented a student with different religious beliefs from joining as a "general member." (ER 16, pp. 21-22.) Even if this were true, an expressive religious association has the right to require its members to adhere to its Christian principles. *New York State Club Ass'n*, 487 U.S. 1 (1988) (affirmed that religious groups may use religious or ideological criteria for membership).

However, Truth's code of conduct does not apply to beliefs – just to outward conduct. (ER 12, ¶ 6.) The distinction is an important one: A student of any faith may be a member of Truth as long as he follows the code of conduct. (*Id.*) For example, the "Golden Rule" falls squarely within Christian conduct. The Golden

Rule is not a unique Christian principle – it transcends all religions. Thus, a Christian, a Muslim and an atheist may all be general members of Truth if they agree to follow this principle. In contrast, a "Christian" student whose conduct does not reflect the Golden Rule may be rejected as a member, regardless of beliefs. This is true of many concepts embodied in conduct codes. In fact, Superintendent Grohe readily acknowledges that she relies on the Golden Rule, the Ten Commandments, the Torah, and even the Bible in understanding what constitutes immoral conduct – the code of conduct required in the Kent School District athletic handbook. (ER 11, pp. 288, 295.)

Like most religious associations, it is self-evident that Truth welcomes the opportunity to "express the love of Christ and His soul-saving grace" not only to Christians, but to people of other faiths as well.[4] (*See, e.g.,* ER 10, pp. 154-55, 156-157, 161-62 (third Charter); ER 4, ¶ 3.) Truth merely seeks to protect the reputation and expressive purposes of the club. Therefore, Truth's code of conduct does not deny students the opportunity to participate in the Club based on their religion.

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[4]The court below accused Plaintiffs of contradicting themselves by contending that they have a right to choose general members based on religious beliefs while Truth's general membership policy excludes solely on conduct. (ER 16, p. 455, n.11.) This is not a contradiction. Plaintiffs are afforded the right to exclude members based on their religious beliefs. *See New York State Club Ass'n*, 487 U.S. 1 (1988). However, Truth has chosen to forego this option and open its doors to everyone, so long as their conduct does not undermine the message Truth seeks to communicate.

4. Truth is entitled to be free from government-compelled expression

The First Amendment prevents the state from forcing citizens to adopt unwanted messages. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (*citing Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634 (1942) (Murphy, J., concurring)); *see also*, *Riley v. National Federation of the Blind*, 487 U.S. 781, 797 (1988) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573 (1995). Similarly, individuals, as well as groups, have a constitutional right "to decline to foster" ideological concepts, particularly those "they find morally objectionable." *Wooley*, 430 U.S. at 715.

Here, the students' qualification for membership is based upon the "message" the group is intending to convey both internally and externally. A group cannot convey its message if the government requires membership for persons who are unwilling to agree with the group's central message and who may even contradict that message. In this case, the School District is attempting to force a Christian Bible club to adopt an ecumenical message inclusive of all faiths, and those of no faith, by requiring that every student be eligible to be a member. The School District clearly disapproves of the Bible club's religiously exclusive message that it intends to convey. However, "disapproval of a private speaker's statement does not legitimize use of . . . [the School District's] power to compel the speaker to alter the message by including one more acceptable to others."

Hurley, 515 U.S. at 581.

B. THE FREE EXERCISE CLAUSE PROTECTS THE RIGHT OF TRUTH TO DETERMINE QUALIFICATIONS FOR ITS VOTING MEMBERSHIP

The right of a religious group to define itself is at the heart of the Free Exercise Clause. The freedom of association and the free exercise of religion reinforce one another in the context of religious groups' rights. *Employment Division v. Smith*, 494 U.S. 872, 882 (1990), *citing Roberts*, 468 U.S. at 622. And the combination of a free exercise right, together with another fundamental right, triggers strict scrutiny. *Id.*

In *Smith*, the Court recognized a long line of cases protecting the autonomy of religious groups in matters of religious doctrine, discipline, and self-governance, including standards of conduct required of leaders in a religious group. *Id.* at 877 (*citing Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976)). In *Kedroff*, the Supreme Court stated that religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Similarly, in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Supreme Court upheld the constitutionality of Congress' exemption of religious organizations from federal anti-discrimination laws prohibiting religious discrimination in employment. In a concurring opinion, Justice Brennan observed:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause.

Id. at 341 (quotation and citation omitted). *See also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (religious organizations' constitutional right to be free from state interference in administration and governance to overcome claim of gender discrimination in dispute between clergy and religious organization); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (same).

The right of the Bible club to determine the qualifications for its members and leaders, and the right to official recognition under 20 U.S.C. § 4071(a) of the EAA is violated by the insistence of School District the Bible club forfeit the ability "to define and carry out [its] religious missions." *See Amos*, 483 U.S. at 339. Just as the government cannot invade the religious realm under the guise of anti-discrimination laws, so too, the School District cannot invade the right of the Bible club to establish qualifications for its members and leaders.

C. THE SCHOOL DISTRICT LACKS A COMPELLING INTEREST TO JUSTIFY ITS BURDEN ON PLAINTIFFS' RIGHT TO EXPRESSIVE ASSOCIATION AND FREE EXERCISE

Defendants may justify their discrimination only by showing their action is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest." *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 128 (1981) (compelling state interest test applicable where freedom of association is burdened); *see also Smith*, 494 U.S. at 881-882 (compelling state interest test applies to free exercise claim where law is not neutral and generally applicable or where raised in conjunction with any other fundamental right); *Prince*, 303 F.3d at 1091 (where student clubs are granted access, the school "cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling state interest that is narrowly tailored to achieve that end"). This strict scrutiny test "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

1. The School District's Interest in Nondiscrimination is not Sufficiently Compelling to Overcome Plaintiffs' Right to Freedom of Association

The district court ruled the School District has a compelling state interest in eliminating discrimination. (ER 16, p. 453, lines 11-15.) But in every case in which the Supreme Court has confronted this question, it has rejected the state interest of eliminating discrimination as "compelling" when the State uses it to

suppress expression protected by the First Amendment. In *Boy Scouts of America*, the Supreme Court ruled that New Jersey could not apply its antidiscrimination law against the Boy Scouts' standards for selecting scoutmasters that excluded homosexuals because New Jersey's law in this instance would "materially interfere with the ideas that the organization sought to express." 530 U.S. at 657.

Also, in *Hurley*, the Supreme Court rejected application of Massachusetts antidiscrimination law to private parade organizers who excluded a homosexual group because of the pro-homosexual message it wished to communicate in the parade. *Hurley*, 515 U.S. 557. The Supreme Court rejected the goal of eliminating discrimination as a "compelling state interest" sufficient to overcome the parade organizers' First Amendment right to expression:

> Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.

Id. at 579.

Even in cases in which the Supreme Court has ruled that a private association must obey a local antidiscrimination law, the Supreme Court stated the result would be different if that law infringed on the group's First Amendment right of association to advocate its viewpoints collectively. In *Roberts*, the Supreme Court ruled the Jaycees must obey a state antidiscrimination law and

admit women as members. But the Court added that "[i]ndeed, the Jaycees has failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association." 468 U.S. at 626.

In *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Supreme Court ruled the Rotary Club must admit women as members, but the New Jersey antidiscrimination law did not infringe on the Rotary Club's First Amendment rights to assert its viewpoints in the marketplace of ideas:

> [I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.

Duarte, 481 U.S. at 626 (internal quotation marks and citations omitted).

The Supreme Court reaffirmed the view that religious and political groups may use religious or ideological criteria for membership in *New York State Club Ass'n*:

> If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. . . [A]n association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.

487 U.S. at 13.

The Supreme Court reiterated this view in *Wisconsin*, stating:

> [T]he freedom to associate for the common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

405 U.S. at 122 (quotation marks, citations, and footnote omitted).

The district court erred when it found that School District Policy 3210, prohibiting discrimination, trumped Plaintiffs' First Amendment right to expressive association. (ER 16, p. 453, lines 14-15.) The Supreme Court has clearly stated the government violates an organization's right to expressive association by "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623. This is exactly how the School District applied its nondiscrimination policy in this case. The price of official recognition for Truth was forced acceptance of persons whose religious beliefs and lifestyles may conflict with those of the organization.

Notwithstanding its nondiscrimination policy, the school district allows other campus organizations to require their members to abide by certain codes of conduct, agree with the group's ideologies, and advocate the goals of the club. (*See generally*, Section VI (E) *supra.*) For example, National Honor Society maintains a code of conduct (ER 11, p. 312), Key Club members must meet

"character requirements" and live the Golden Rule (*Id.*, p. 334), VICA requires its members to "believe in high moral and spiritual standards" (*Id.*, p. 301), and Gay-Straight Alliance members "must be willing to work towards the goals of the Club" (*Id.*, p. 325), which include "working to decrease homophobia" and fighting "heterosexism." (*Id.* p. 326.) Kentridge itself has adopted a code of conduct for its athletes, which requires the athletes to maintain a moral lifestyle - a condition that is exclusively defined by school officials. *See generally*, Section VI (E) *supra*.)

Even more significantly, the School District allows other groups to impose discriminatory membership policies in direct contravention of its non-discrimination policy. For example, the Girls Honor club requires members to be female. (ER 11, p. 314-15.) A Men's Honor club was formed directly in response to the Girls Honor club's exclusive policies. (*Id.* p. 322.) This freedom for students to form new groups in response to those with which they disagree further undermines the School District's interest. Students who are unable or unwilling to abide by Truth's membership policies are not precluded from enjoying the same benefits or communicating their own message. They simply can start their own club.

The school's underlying desire to implement its nondiscrimination policy is really an attempt to create an ecumenical environment. However, that interest does not truly prepare children for a pluralistic society. As this Court has explained,

> [I]t is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the schools can teach anything at all.

Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (internal quotation marks and citation omitted). Thus, the School District cannot claim a compelling state interest to prevent Truth's exclusionary membership provisions when it allows other clubs, and Kentridge itself, to discriminate in a substantially similar manner.

2. The School District's Nondiscrimination Policy is not Sufficiently Compelling to Overcome Plaintiffs' Rights to the Free Exercise of Religion

The Supreme Court's Free Exercise Clause decisions suggest that a religious organization's leadership selection is at the core of the right to religious free exercise. *See, e.g.*, *Serbian Eastern*, 426 U.S. at 713-714. Congress has exempted churches from Title VII's prohibition of religious discrimination with respect to all of a church's employment decisions and the Supreme Court has upheld this exemption. *Amos*, 483 U.S. at 339.

Federal courts of appeals have specifically ruled that antidiscrimination laws do not apply to a religious group's choice for its leadership. *See McClure*, 460 F.2d 553 (relying on the importance of religious organizations' constitutional

right to be free from state interference in administration and governance to deny claim of gender discrimination in dispute between clergy and religious organization); *Rayburn*, 772 F.2d 1164 (same), *EEOC v. Catholic Univ. of America*, 856 F.Supp 1 (D.C. Cir. 1994) (*aff'd* 83 F.3d 455 (D.C. Cir. 1996)) (Catholic university was exempted from Title VII regarding selection of members of faculty for tenure).

As explained in Section VIII(A)(3), religious associations have the right to be autonomous from governmental nondiscrimination laws. *Kedroff*, 344 U.S. at 116. This is especially true when the government asserts that it has a compelling state interest to prevent religious discrimination. The unconscionable result of allowing the government to dictate religious membership criteria would be the dilution of sectarian doctrines in favor of one state orthodoxy. As one court noted, the "government's interest in prohibiting religious discrimination by a sectarian organization which has a true religious purpose would indeed be minimal or nonexistent." *Welsh v. Boy Scouts of America*, 742 F.Supp. 1413, 1435 (N.D. Ill. 1990). Needless to say, the School District has no compelling state interest that would justify such outrageous interference with the internal structure of the Bible club.

D. THE COURT BELOW ERRED IN FINDING THE SCHOOL DISTRICT HAS NOT VIOLATED THE EQUAL ACCESS ACT

The School District refuses to recognize Truth as an ASB club, denying it the benefits afforded all other clubs. This position is squarely foreclosed under the Equal Access Act ("EAA") and *Prince*, 303 F.3d 1074. The EAA provides:

> It shall be 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). It is undisputed that, having opened a limited public forum and receiving federal funding, the School District is subject to the EAA. (ER 16, p. 446, lines 8-13.). This imposes at least two statutory obligations on the Defendants: (1) provide equal access to club benefits; and (2) avoid discriminating against a club based upon the content of its speech. *Prince*, 303 F.3d at 1080-81. The School District has failed both of these duties.

1. Truth did not receive "equal access" to club benefits

As stated by this Court, the term "equal access" means exactly "what the Supreme Court said in *Widmar*: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities, once the secondary school has established a limited open forum." *Id.* at 1081 (emphasis added) (citing *Widmar*, 454 U.S. at 267-71).

The "terms and conditions" for recognizing non-curriculum clubs at Kentridge are straightforward: Prospective clubs must submit an application and charter to the Kentridge ASB "when initially forming and seeking official recognition by the Kentridge High School." (ER 1, ¶ 5.20; *accord* ER 2, ¶ 5.20.) Once officially recognized, an ASB club receives benefits that a non-ASB club does not: permission to engage in fundraising (ER 4, p.57.); access to ASB funds (*Id.*, p. 46 (ASB Const. art. VIII § 3.A.1)); and access to an audited purchasing procedure that protects club members from financial misadventures. (*Id.*, p. 46 (ASB Const. art. VIII § 3.B).)

Truth submitted its charter and constitution (more than once) to the ASB. But the School District refuses to recognize it. Rather, it belatedly (post litigation) alleges that Truth is entitled to separate, but unequal, status under Policy 2153, which offers only the right to meet informally on campus – subject to the principal's approval. (See, Defs.' Reply in Support of Defs.' Mot. for S.J. at 7; ER 10, p. 145.)

This Court struck down a virtually identical two-tier scheme that relegates religious clubs to second-class status:

> [Plaintiff] challenges the school's refusal to allow her Bible [c]lub to meet as an Associated Student Body ("ASB") club, entitled to the same benefits as other student clubs. Instead, *Prince*'s club was recognized only as a "Policy 5525 club," which limited her club's access to benefits offered by the high school.

Prince, 303 F.3d at 1077. Comparing *Prince*'s Policy 5525 to the School District's Policy 2153 reveals how similar they are. Policy 5525 states:

> [T]he policy authorizes student sponsored and initiated student groups to meet at the school, subject to approval by the principal. The policy provides for approval, so long as the groups 1) remain voluntary and student initiated; 2) are not sponsored by the school and staff; 3) hold meetings that do not materially and substantially interfere with the orderly operation of the school; 4) require that students, rather than outsiders, are responsible for the direction, control, and conduct of the meetings; 5) do not require students to participate in any religious activity; 6) do not use school funds for other than incidental and/or monitoring costs; 7) do not compel any staff member to attend; and 8) respect the constitutional rights of all persons.

303 F.3d at 1077. Policy 2153 incorporates all but the fifth criterion, which is scarcely a material difference because compelled religious observance is already proscribed by the First Amendment. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The *Prince* defendants argued that religious clubs merited only a "fair opportunity" to meet under the EAA, rather than uniform access to ASB benefits. 303 F.3d at 1079. The Ninth Circuit squarely rejected that argument:

> [T]he purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and the other noncurriculum-related student groups on the other. The [*Mergens*] Court held that '[o]fficial recognition [by the school] allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.' Denying the Christian club those same benefits was a denial of 'equal access,' not just 'fair opportunity,' under the Act.

Prince, 303 F.3d 1082 (quoting *Mergens*, 496 U.S. 226 (1990)) (internal citations and quotations omitted). The Defendants' reliance on their two-tiered scheme is unconstitutional under *Widmar* and its progeny, and surely violates the EAA both facially and as applied.

2. The Defendants discriminated against the content of Truth's speech

To evade both *Prince* and the EAA, Defendants argued that it does not discriminate against Truth's speech, but rather its exclusionary membership policy. This argument was flatly rejected in *Hsu*, a case relied upon by the district court. *Hsu* – noting the Supreme Court's command to construe EAA broadly – construed "speech" to include policies "reasonably designed to assure that a certain type of religious speech will take place at the Club's meetings." *Id.* at 856. "The message a group imparts sometimes depends upon its ability to exclude certain people, and that this exclusion may be protected by the First Amendment." *Id.* (citing *Hurley*, 515 U.S. 557).

Defendants are discriminating on the basis of Truth's speech – speech designed to protect the message and nature of the club itself – in direct contravention of the EAA.

3. The court below improperly concluded that Truth's policies are not protected speech

Truth implemented its code of conduct to protect the group's integrity and assure that those formally associated with the group do not detract from its expressive nature, both in meetings and within the entire school community. (*Id.*, p. 61). Thus, under *Hsu*, Truth's code of conduct is protected speech under the EAA. *Hsu*, 85 F.3d at 856.

The district court disagreed, finding the code of conduct to be a "type of religious test" not protected by the EAA. (ER 16, p. 448, line 24.) The court reasoned as follows: Truth's code of conduct is distinctively Christian, as defined by Truth's leaders. What is "Christian" conduct varies widely from sect to sect and even from individual to individual. Therefore, those who hold different beliefs about what constitutes "Christian" conduct will be excluded because of those beliefs, in violation of the School District's non-discrimination policy. (*see generally*, ER 16, pp. 452-53.)

This argument is faulty. It concludes that because a student subjectively defines a code of conduct differently based on her religious beliefs, denying her membership is based on her religion. That is wrong. A code of conduct is based on exactly that – conduct. The conduct – not the belief – is what determines membership. The student may engage in conduct that is consistent with what Truth considers "Christian" conduct without adopting Truth's "Christian" beliefs.

Conduct does not compel conviction.

In effect, the district court has distorted the EAA – a statute specifically designed to protect religious clubs[5] – by concluding that the club's distinctively religious nature prevents it from receiving the very protection the EAA is meant to provide.[6] The court came to this conclusion even though Truth is open for all students to participate. This is an absurd result.

E. DEFENDANTS HAVE VIOLATED THE ESTABLISHMENT CLAUSE

The Establishment Clause forbids hostility toward religion. "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *accord Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (The Court has "consistently described the Establishment Clause as forbidding not only state action motivated by the desire to *advance* religion, but also that intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion") (citation omitted); *McDaniel v. Paty*, 435 U.S. 618, 641 (1982) ("The Establishment Clause, properly understood, is a shield against any attempt by the

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[5]The EAA 'was intended to address perceived widespread discrimination against religious speech in public schools." *Prince*, 303 F.3d at 1083 (quoting H.R. Rep. No. 98-710, at 4 (1984), S.Rep. No. 98-357, at 10-11 (1984)).

[6]This conclusion represents a fundamental flaw in the district court's decision. The Defendants have opened a forum which admits religious speech, but because Truth's religious speech is built on a distinctively Christian perspective, it is essentially "too religious" and can be excluded. This is clear and blatant viewpoint discrimination.

government to inhibit religion") (Brennan, J., concurring).

The Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religious, and forbids hostility toward any." *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984) (emphasis added) (citations omitted). Despite this mandate, Defendants treated Truth as a second-class group because of its religious convictions, denying it the rights, privileges, and autonomy that all other student groups enjoy.

Mr. Anderson's blatant rejection of Truth's name is overtly hostile (ER 4, p. 32), and Defendants failure to act on Truth's Charter for nearly two years reveals latent hostility. Such an excessive "delay is tantamount to an effective denial of First Amendment rights." *Clark v. City of Lakewood*, 259 F.3d 996, 1009 (9th Cir. 2001). In their pursuit of pluralism and tolerance, Defendants have denied students their religious liberties and recognized only those groups which are sufficiently innocuous in the government's eyes. This message of disapproval and hostility cannot survive; the Establishment Clause requires Truth to be treated equally.

F. DEFENDANTS HAVE VIOLATED THE EQUAL PROTECTION CLAUSE

"[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more

controversial views." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). At "a minimum," government classifications "must be rationally related to a legitimate governmental purpose . . ." while "classifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). A restriction on religious speech represents a classification affecting fundamental rights, as the rights of free speech and free exercise of religion are clearly implicated. As under the First Amendment analysis, *see* Section VIII(C), *supra*, the Defendants' discrimination against religion must also fail under Fourteenth Amendment strict scrutiny.

G. THE DISTRICT COURT ERRED IN APPLYING *MONELL* TO THIS CASE

The court below relied on *Monell* to grant Defendants' Motion for Summary Judgment on all of Plaintiffs' claims brought under 42 U.S.C. § 1983. (ER 16, p. 445, 457.) *Monell* alleviates the imposition of financial liability on local governments based solely on a *respondeat superior* theory. *Monell*, 436 U.S. at 691. This is not a *respondeat superior* case. Rather, this case involves the implementation of an official policy that deprived Plaintiffs of their constitutional rights. This is the "touchstone" of a § 1983 claim, and does not trigger liability under the theory of *respondeat superior*. *Id.* at 690.

Here, the School District has an official policy of distinguishing student groups – and the privileges they are afforded – based on whether they are approved by the ASB. (*See* Section VI(B), *supra.*) The official approval process provides no time constraints or objective criteria to the ASB or school administrators in responding to a Charter application. (ER 10, p. 145.) This process allows the Defendants to indefinitely delay approving Truth's application – at the expense of Plaintiffs' constitutional rights. Absent such a policy, Truth would not have been denied ASB recognition. Therefore, the district court erred by applying *Monell* to Plaintiffs' § 1983 claims.

H. EVEN UNDER *MONELL,* DISMISSING PLAINTIFFS' § 1983 CLAIMS WAS ERRONEOUS BECAUSE *MONELL* DOES NOT APPLY TO CLAIMS FOR PROSPECTIVE RELIEF

Under *Monell,* municipal liability for damages arises when an "official policy or custom" inflicted the harm. 436 U.S. at 694. The court below relied on *Monell* to grant Defendants' Motion for Summary Judgment on all of Plaintiffs' claims brought under 42 U.S.C. § 1983. (ER 16, p. 445, 457.) That reliance was misplaced. As this Court has held, *Monell* does not apply to claims for prospective relief.[7] *Chaloux*, 886 F.2d 247, at 249-51.

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[7]"Prospective relief" is defined broadly. Congress defines it as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). Similarly, this Court drew a distinction between the phrase "prospective or ancillary relief, which refers to relief given in the future pursuant to an injunction, and retroactive relief, which refers to the payment of damages to compensate for past injuries." *Native*

Consistent with this limitation, the Supreme Court in post-*Monell* decisions has considered the "official policy or custom" requirement only when a municipality faced monetary damages. *Id.* (citing multiple Supreme Court cases). In contrast, municipalities "can be subject to prospective injunctive relief even if the constitutional violation was not the result of an 'official custom or policy.'" *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993) (citing *Chaloux*, 886 F.2d at 251); *accord Reynolds v. Giuliani*, 118 F.Supp.2d 352, 363 (S.D.N.Y. 2000) (finding "no persuasive reasons" to apply *Monell* to claim for injunctive relief), *Nobby Lobby v. City of Dallas*, 767 F.Supp. 801 (N.D. Tex. 1991) (*Monell* only "established an 'official policy or custom' requirement to limit *damage* awards in Section 1983 lawsuits) (emphasis in original).

Here, Plaintiffs seek prospective relief declaring the Defendants violated the United States Constitution and the Equal Access Act, and enjoining them from denying Truth access to the same benefits as other noncurriculum-related groups. (ER 1, pp. 16-18.) The court below erred by imposing *Monell*'s "official policy or custom" requirement to these claims.

Village of Noatak v. Blatchford, 38 F.3d 1505, 1511-12 (9th Cir. 1994).

I. DEFENDANTS ARE LIABLE BECAUSE PLAINTIFFS' INJURIES FLOW FROM THE SCHOOL DISTRICT'S OFFICIAL POLICIES AND DEFENDANTS' DELIBERATE INDIFFERENCE AND EGREGIOUS ATTEMPTS TO AVOID LIABILITY

A local government entity is liable for damages under § 1983 in any of three situations. First, the action inflicting injury flows from an official policy or custom. *Monell*, 436 U.S. at 691. Second, a policymaker's conduct reflects "deliberate indifference" to the risk that a violation of a constitutional right will follow. *Brown*, 520 U.S. 397 at 411. Third, the entity egregiously attempts to insulate itself from liability for its unconstitutional actions. *City of St. Louis v. Praprotnik*, 485 U.S. 112 at 126-27. All three are implicated in this case.[8]

1. The School District's "Separate but Unequal" Policy is Patently Unconstitutional Under *Prince*

The School District has enacted a "separate but unequal" policy that is virtually identical to the policy stricken in *Prince*. Defendants are charged with the "knowledge of constitutional developments at the time of the alleged constitutional violation, including all available case law." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989). This includes *Prince*, which the School District's counsel had discussed with school administrators as early as 2001. (ER 13, pp. 352-56.)

Policy 2153 allows student groups to meet informally on campus, but offers

[8]Plaintiffs only seek nominal damages for the violation of their constitutional rights. "[N]ominal damages must be awarded if a plaintiff proves a violation of his constitutional rights." *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) (citations omitted).

none of the other privileges afforded to ASB clubs. (*See* Section VI(B), *supra.*) Specifically, the second-class access offered to Truth under Policy 2153 is substantially identical to that offer by the *Prince* defendants' Policy 5525. (*Compare Prince*, 303 F.3d at 1077 *with* Policy 2153 (ER 10, p. 4).) School District counsel, Mr. Harrington, forthrightly described *Prince's* 5525 policy as "remarkably similar to ours," referring to Policy 2153. (ER 13, p. 354, lines 1-4.) This denial of equal treatment is precisely what was struck down in *Prince.*

The court below rejected this point, offering a single justification: "The Club in this case is different from those clubs [referring to religious clubs at other schools in the District] and the club at issue in *Prince* because none of those clubs had the exclusive membership policies that are present in this case. *Prince*'s holding did not address the legal issues presented by these membership policies." (ER 16, p. 441, lines 10-11.)

This is not a meaningful distinction. Nothing in *Prince* suggests an exclusive membership policy would absolve the Defendants from their obligations to provide equal access. *Prince* never mentions the club's membership policies in its rationale. In fact, it appears to be irrelevant. The only example given of when a school may deny a group equal access is when the group would "substantially interfere with the orderly conduct of educational activities within the school." *Id.* at 1082 (citing *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 509

(1969). Additionally, the court explained that once a school creates a limited open forum, "it cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling government interest that is narrowly drawn to achieve that end." *Id.* at 1091. It is unquestionable the First Amendment freedom of association includes the right to define and control the terms of membership in a private group. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000) (See Section VIII(A), *supra.*) And, as explained in Section VIII(C), *supra*, the Defendants do not have a compelling government interest that warrants stifling Plaintiffs' First Amendment liberties.

Prince is one of many federal cases that rejected school officials' attempts to evade the Equal Access Act's affirmative mandate of equal treatment. *See, e.g., Mergens*, 496 U.S. 226 (attempting to define "curriculum-related" so broadly as to virtually eliminate limited open *fora*); *Ceniceros v. Bd. of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (claiming lunch hour as "instructional time" to prevent non-curriculum clubs from meeting); *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993) (refusing to recognize religious club based on state constitutional Establishment Clause); *Donovan v. Punxsutawny Area Sch. Bd.*, 336 F.3d 211 (3rd Cir. 2003) (defining school activity period as "instructional time" to prevent non-curriculum clubs from meeting); *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244 (3rd Cir. 1993) (requiring all

student activities be school-sponsored rather than student-initiated, thus exempting them from the Act). In the same way, this Court should reject the Defendants' efforts to evade equal access based upon erroneous Establishment Clause analysis and an "anti-discrimination" interest that undermines the First Amendment.

Despite the Defendants' knowledge of controlling case law, it failed to correct Policy 2153, leaving Truth as a second-class group. The School District is therefore liable for its unconstitutional act of perpetuating a "separate and unequal" status for a student club. (ER 13, pp. 355-356.) (The School District's counsel admits there had been no change in District policy since the *Prince* decision and they have no intention of making any change.)

The district court's narrow reading of *Prince* is unjustifiable. Defendants had a duty to ensure that Truth was given the same access as other clubs. They failed to discharge that duty and must be held accountable for that failure.

2. Defendants' Conduct Constitutes Deliberate Indifference of the Violation of Plaintiffs' Protected Rights

Municipal authorities are liable under § 1983 if their conduct "reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Brown*, 520 U.S. at 411. Deliberate indifference requires (1) knowledge that a harm to a protected right is substantially likely, and (2) a failure to act upon that likelihood. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) (citing *City of Canton v. Harris*, 489 U.S. 378,

389 (1989)).

The district court found there was insufficient evidence to support this theory of liability. (ER 16, p. 442.) This conclusion is flawed for two reasons: (1) the court failed to consider whether Principal Albrecht acted with deliberate indifference as required by *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); and (2) the court ignored evidence the Board was deliberately indifferent.

a. The court below misapplied *Gebser*

The court below cited *Gebser* for the proposition that to prove deliberate indifference, "a plaintiff has to show that an official with policymaking authority had actual knowledge of the alleged constitutional violations." (ER 16, p. 441, lines 18-25.) The court determined the Board was the only official policymaker. (*Id.*) As a result, its analysis only considered whether the Board – and not the principal – acted with deliberate indifference.

Gebser does not stand for this proposition. Rather, *Gebser* explains that

> in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie . . . unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

524 U.S. at 290 (emphasis added). Thus, it is unnecessary for the official acting with deliberate indifference to have final policymaking authority. Rather, all the official needs is actual knowledge of the violation with the authority to institute

corrective measures. Principal Albrecht easily meets this standard. As explained below, not only did Principal Albrecht have actual knowledge of the violations, he had the authority to institute corrective measures.

b. Principal Albrecht has authority to institute corrective measures

District Policy 2340P expressly provides the principal with authority to institute corrective measures regarding all "religious related activities or practices" on campus, including the denial of a religious club on campus. The policy states: "Students, parents and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal." (emphasis added.) (ER 10, p. 152.) Additionally, the ASB Manual provides the principal with "[g]eneral responsibility for defining, controlling and accounting for ASB activities" including "assignment of advisors, fiscal supervision and coordination of activities." (ER 11, p. 340.)

Plaintiffs approached Mr. Anderson on no less than ten occasions requesting a decision regarding their Charter. (ER 5, ¶ 5). He consistently said he was conferring with Principal Albrecht and in-house counsel Harrington about the club. (*Id.*) Similarly, his May 12, 2004 letter states Plaintiffs could appeal the ASB decision either to the principal, superintendent, or district ombudservices' office. (ER 10, p. 214.) The letter also identified the Kentridge administration as the final oversight in decisions about ASB clubs. (*Id.*) Therefore, the court below should

have considered whether Principal Albrecht – having the authority to institute corrective measures – was deliberately indifferent to violating Plaintiffs' rights.

c. Principal Albrecht had actual knowledge that harm was substantially likely

Principal Albrecht was fully aware of the constitutional and statutory rights guaranteed to students to form non-curriculum groups to engage in religious, political, or philosophical discourse. Mr. Anderson first conferred with Principal Albrecht and Mr. Harrington, the school's counsel, about Truth's Charter in 2001. (ER 13, p. 385; ER 5, ¶ 5, ER 9, p. 132) Mr. Harrington expressed concerns about Truth in light of *Prince*. (ER 13, p. 352-56.) In light of such a clear threat of discrimination, school administrators have a duty to act. *See, e.g., Montiero v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (administrators' failure to respond to parent complaint of a school's racially hostile environment "could only have been the result of deliberate indifference" because of "obvious" risk of discrimination). Thus, the first element of deliberate indifference – knowledge that a harm to a protected right is substantially likely – is satisfied.

d. Principal Albrecht failed to act upon the substantial likelihood of harm

Despite their counsel's warnings and numerous pleas from the Plaintiffs, the Defendants waited *nearly two years* before taking any action on Truth's Charter. And those actions did not take place until after three letters from counsel in 2003.

Plaintiffs submitted their Charter to the ASB in September 2001. (ER 5, ¶ 4). After the ASB spoke to Mr. Anderson about the Charter, he spoke with Principal Albrecht and Mr. Harrington regarding the club. (ER 5, ¶ 5). For fifteenth months, Plaintiffs repeatedly requested a decision, but none was given. (ER 5, ¶¶ 5, 7). Plaintiffs' counsel then sent a comprehensive demand letter to Principal Albrecht and three other letters to the school's counsel demanding the Charter be approved. (ER 6, ¶¶ 3-6). He also placed numerous phone calls to Mr. Harrington between January and March 2003. (ER 6, ¶ 9). Those calls were not returned. (*Id.*)

Despite these efforts, it took three additional months – until April 1, 2003 – for the school administration to call ASB to vote on Truth's Charter. (ER 5, ¶ 10). Prior to the vote, Mr. Anderson commented that he believed it was illegal for the Bible club to receive funds from the school and to limit voting members, and that he had a problem with the name "Truth" because it would make others question if they were "believing a lie." (ER 4, ¶ 9; ER 10, p. 211 (ASB minutes reflecting discussion).) He also explained that if ASB approved Truth, the group would be

subject to review by the school's administration to determine whether it could legally exist on campus. (*Id.*) If ASB rejected the group, that "would end it." (*Id.*) Unsurprisingly, the ASB rejected the Charter. (*Id.*)

Over two months later, well after this lawsuit was filed, Mr. Anderson drafted a letter stating, for the first time, that Plaintiffs had the option of discussing the ASB decision with Principal Albrecht or the district ombudservices office.[9] (ER 10, p. 214.) Thus, given the lengthy inaction, the second element of deliberate indifference is satisfied.

e. The court below erred in finding the Board was not deliberately indifferent

The Board is likewise culpable. The Board was aware of Truth's Charter, and its Equal Access implications, before suit was filed. (ER 13, p. 371 (deposition p. 14, lines 18-21).) Mr. Jensen explained the Board was informed "of the possibility that a lawsuit may be filed as a result of this proposed Bible club." (*Id.*) Yet the court below failed to acknowledge this fact in its decision.

Despite this knowledge, the Board did not even bother to review Truth's Charters. (ER 13, p. 366 (depo p. 13, line 25 to p. 14, line 6); Mr. Floyd never saw the Charter in writing nor spoke with school officials regarding Truth); (*Id.*, p. 371 (deposition p. 14, line 22 to p. 15, line 3); Mr. Jensen neither reviewed any ASB

[9]The letter is dated May 12, 2003. However, Plaintiffs did not receive the letter until June 17, 2003 when the school district's attorney faxed it to Plaintiffs' counsel. (ER 10, p. 215-16.)

charters in nine years nor spoke with school officials regarding Truth); (*Id.*, p. 376 (deposition p. 24, line 24 to p. 55, line 6); Mr. Boyce did not review Truth Charter or Constitution); *Id.*, p. 380 (deposition p. 15 line 21 to p. 16, line 5); Ms. Petersen never reviewed Truth Charter or Constitution). Clearly, the Board was utterly indifferent to Truth's plight. In fact, even after the lawsuit was filed in April, the Board did not discuss Truth again until December. (ER 13, p. 366 (deposition p. 14, line 25 to p. 15, line 16).) Section 1983 does not tolerate state actors who willfully turn a blind eye to constitutional injury – nor should this Court.

3. The Defendants Egregiously Attempted to Insulate Themselves from Liability

Section 1983 is also triggered when government officials egregiously attempt to insulate themselves from liability for unconstitutional policies or practices. *Praprotnik*, 485 U.S. at 127. The Defendants attempted to evade liability in this case by refusing to make any decisions and ultimately channeling the decision to grant Truth ASB status to the ASB Council. And they did so even though they knew that this decision had constitutional implications and the Council was not prepared to properly address such issues.

There is substantial evidence to support this conclusion. First, as described in detail above, the administrators delayed for almost two years making a decision despite Plaintiffs' repeated requests. The only action they ever took was to refer the matter to the ASB for a vote. And when the vote finally took place,

Mr. Anderson advised the ASB the Bible club would be illegal, and that if they rejected the club, "it would end it." (ER 4, ¶ 9; ER 11, p. 25, lines 1-10; ER 10, p. 211.) It was not until months after the lawsuit was filed that they revealed there was an administrative review process available. (ER 10, p. 214.) All this took place despite Plaintiffs' counsel's letter to the School District explaining that it would be unlawful to require approval from the ASB. (ER 6, p. 91.)

The court below rejected these arguments because the Plaintiffs (1) never pursued the administrative review process; and (2) continually changed the nature of the club they wanted approved, which warranted returning to the beginning of the process. (ER 16, p. 444, lines 10-25.) Both of these findings are erroneous.

a. Requiring Plaintiffs to seek a final administrative decision was erroneous, both legally and practically

Plaintiffs were not afforded administrative review, nor was it necessary. Thus, the court below erred in relying on this fact to find the Defendants cannot be liable under § 1983. Three points support this argument.

First, Plaintiffs were not informed of the administrative review process until well after this lawsuit was initiated – despite their repeated good faith efforts for resolution. As explained above, the first time the Defendants informed Plaintiffs of the administrative review process was almost two years after their Charter was first submitted, and over two months after they filed this lawsuit. (ER 10, p. 214.) Second, formally pursuing the administrative review process would have been

futile. Generally, a case is not considered ripe until all administrative remedies are exhausted. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453-54 (9th Cir. 1987). However, *Kinzli* recognizes a "futility exception" when pursuing administrative remedies would be an "idle and futile act." *Id.* at 1454.

In the present case, the Defendants' staunch support of the ASB decision throughout this litigation makes clear that any administrative review would have produced the same result. It was the administration that counseled the ASB to deny the application. Moreover, each official authorized by Policy 2340P to resolve this issue – the principal, superintendent, and district ombudservices office (ER 10, p. 152) – were already aware of the situation and refused to take any remedial action.

As discussed in Section VIII(H)(2), *supra*, Principal Albrecht was authorized to act, but refused. Similarly, the superintendent was authorized to act, knew about the issue, and refused act. (ER 13, p. 371 (depo p. 14, lines 18-21); ER 10, p. 144 (superintendent is executive officer of Board)). Finally, the district ombudsman service is headed by Mr. Harrington. As such, Mr. Harrington was authorized to act, knew about Truth, and refused to act. (ER 6, ¶ 9; ER 13, pp. 351-52, 361-62; p. 385 (depo p. 16, line 24 to p. 17, line 2).) Now these same officials audaciously contend that Plaintiffs made no effort to seek administrative remedies. Without question, such attempts would have been futile. It is entirely

disingenuous to suggest these students should be expected to continue seeking aid from the same officials that had disregarded their rights for almost two years.

Regardless, it is dispositive that a party subjected to unconstitutional discrimination exhaust every administrative remedy before seeking recourse under § 1983 in federal court. "When federal claims are premised on 42 U.S.C. § 1983 . . .we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).

4. Truth's Charter Applications did not Change the Nature of the Club

In submitting new Charters, Plaintiffs were merely responding to Defendants' demands to submit new Charters without compromising the integrity of the club's expression. (ER 4, ¶¶ 6, 10.) These Charters did not change the nature of the club, but refined the club to more clearly articulate the Plaintiffs' goals in the face of the Defendants' implacable resistance. Moreover, there was ample time between the Charters for the Defendants to act – which they failed to do.

The three Charters are very similar, and did not change the basic nature of the club. The most significant clarification was the distinction between voting and non-voting members. Voting members are required to sign a statement of faith and

follow a code of conduct, while non-voting members merely had to follow the code of conduct. (ER 12, ¶¶ 5-7.) But, as explained above, the Defendants may not reject Truth as an ASB club for instituting such a policy.

Additionally, the three Charters do not change the fact that Truth submitted their first Charter in September 2001 and the Defendants did nothing for over a year, despite repeated requests for an answer by Plaintiffs and two letters from Plaintiffs' counsel. (ER 3, ¶ 4; ER 5, ¶ 5; ER 6, ¶¶ 3-4 and pp. 80-89.) Defendants had ample notice of, and opportunity, to act on Truth's first Charter.

The second Charter did not short-circuit this opportunity. Rather, Mr. Anderson demanded a new Charter. (ER 4, ¶ 6.) Again, Defendants failed to timely respond. After numerous unreturned phone calls to Mr. Harrington, Plaintiffs' counsel faxed a third letter to Mr. Harrington demanding the Defendants take action to approve the club. (ER 6, ¶ 5 and p. 91.) In April, over two months after the second Charter was submitted – and nineteen months after the first – the ASB finally voted on, and rejected, Truth's Charter. (ER 4, ¶ 9.) Again, despite Plaintiffs' repeated efforts to get school officials involved, they refused to take any action.

Thus, school officials had sufficient notice their involvement was necessary. As a result, the court below erred in finding that Truth's Charters permitted school officials to stand idly by as Plaintiffs' constitutional and statutory rights were

violated.

IX

CONCLUSION

The district court erred in finding that Defendants have a compelling state interest to prevent a Bible club from discriminating based upon religion. Defendants' interest does not trump Plaintiffs' rights under the First Amendment. Further, Plaintiffs are entitled to equal access as is statutorily prescribed in the Equal Access Act. Lastly, *Monell* is not a bar to Plaintiffs' right to prospective relief and compensatory damages. For these reasons, Plaintiffs respectfully request that this court reverse the district court's judgment in favor of Defendants and instruct the court to enter judgment in favor of Plaintiffs.

X

ATTORNEYS FEES

Pursuant to FRCP § 54(d) and FRAP § 39, Truth will seek attorneys' fees and costs as the prevailing party.

XI

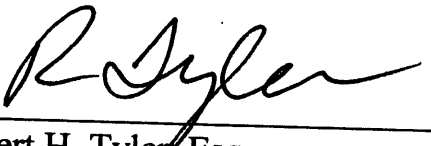
REQUEST FOR ORAL ARGUMENT

Courts regularly declare that students do not shed their constitutional rights at the schoolhouse gate. At the same time, public schools have authority to protect their educational environment. This intersection necessarily concerns fundamental

constitutional liberties in the public school – the quintessential marketplace of ideas. Oral argument will allow this Court the opportunity to further explore and provide clarity to these important issues. Additionally, Plaintiffs raise serious questions about losing their constitutional liberties, and oral argument will afford them the full opportunity for their case to be presented. Accordingly, pursuant to Rule 34(a)(1) of the Federal Rules of Appellate Procedure, Plaintiffs respectfully request that oral argument be permitted.

Dated: February 17, 2005

ALLIANCE DEFENSE FUND

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) and Circuit Rule 32-1, I certify the foregoing Appellants' Opening Brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,830 words, as calculated by Microsoft Word, exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Request for Oral Argument, Certificate of Compliance, and Statement of Related Cases.

Dated: February 17, 2005

Robert H. Tyler

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases.

Dated: February 17, 2005

Robert H. Tyler

CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. My business address is 38760 Sky Canyon Drive, Suite B, Murrieta, California 92563.

I served the document(s) described as:

APPELLANTS OPENING BRIEF

on the interested parties in this action:

Michael B. Tierney, Esq LAW OFFICES OF MICHAEL B. TIERNEY, P.C. 2955 80th Avenue S.E., Suite 205 Mercer Island, WA 98040 Telephone: (206) 232-3074 Facsimile: (206) 232-3076 Attorneys for Appellees-Defendants (2 copies)	Office of the Clerk Unites States Court of Appeals For the Ninth Circuit 95 Seventh Street San Francisco, CA 94103 (original and 15 copies)

☐ (BY ELECTRONIC TRANSMISSION) Pursuant to agreement and written confirmation of the parties to accept service by electronic transmission, I transmitted ☐ originals ☐ true copies of the above-referenced document(s) on the interested parties in this action by electronic transmission from snolen@telladf.org on _____ at _____a.m./p.m. Said electronic transmission was reported as complete and without error.

☐ (BY FACSIMILE TRANSMISSION) Pursuant to agreement and written confirmation of the parties to accept service by facsimile transmission, I transmitted ☐ originals ☐ true copies of the above-referenced document(s) on the interested parties in this action by facsimile transmission from (951) 461-7860 on _____ at _____a.m./p.m. A transmission report was properly issued by the transmitting facsimile machine and the transmission was reported as complete and without error. A copy of said transmission report is attached hereto.

☐ (BY UNITED STATES POSTAL SERVICE) I am readily familiar with the practice for collection and processing of correspondence for mailing and deposit on the same day in the ordinary course of business with the United States Postal Service. Pursuant to that practice, the above-referenced document(s) were sealed in an envelope, with postage paid, and deposited in

a post office, mail box, subpost office, substation, mail chute or other like facility regularly maintained by the United States Postal Service on _____ at Murrieta, California.

☒ (BY OVERNIGHT MAIL SERVICE) I deposited in a box or other facility regularly maintained by OverNite Express/Federal Express, an express service carrier, at 38760 Sky Canyon Drive, Murrieta, California, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, an envelope or package designated by the express service carrier with delivery fees paid or provided for, a copy of the above-referenced documents.

☐ (BY PERSONAL SERVICE) I caused to be delivered copies of the above-referenced documents to the addressee(s) noted above, on _____ at _____a.m./p.m.

I declare under penalty of perjury under the laws of the State of California and the United States of America the above is true and correct. Executed at Murrieta, California.

DATE: February 17, 2005

SYLVIA NOLEN