No. 04-35876

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Truth, an unincorporated association, et. al.,
Appellants,

v.

Kent School District, et al.,
Appellees

On Appeal from the United States District Court
for the Western District of Washington
The Honorable Marsha J. Pechman, Presiding
District Court No. C-03-783

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the American Civil Liberties Union of Washington certifies that it is a Washington non-profit corporation. It has no parent corporations, and no publicly held company owns 10 percent or more of its stock.

CONSENT TO FILE

The parties have consented to the filing of this amicus brief.

IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is the state affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to preserving our nation's founding principles of liberty as embodied in the constitution. The ACLU has frequently appeared as counsel or amicus in cases involving student expression and religion in public schools. Along with organizations such as the Christian Legal Society and American Jewish Congress, it helped draft a set of interpretive guidelines to the Equal Access Act that were read into the Congressional Record by the Act's sponsors shortly after its enactment. *See*, 130 Cong. Rec. 32066-069, 32315-318 (statements of Sen. Hatfield, Rep. Bonker, and Rep. Goodling) (October 11, 1984).

This case requires the Court to consider many constitutional rights cherished by the ACLU: freedom from governmental discrimination, from governmental establishment of religion, and from governmental restrictions on expressive

association or exercise of religion. The ACLU carefully balanced these interests to reach our position here, concluding that in the current factual setting these sometimes-conflicting interests will best be served by affirming the district court.

STATEMENT OF THE CASE

A high school student religious club called Truth has sued the Kent School District, claiming it has a constitutional and statutory right to be affiliated with the Kentridge High School Associated Student Body (ASB), an affiliation which would connote official school sponsorship and entitle the club to public funds. The facts most important to this amicus brief may be grouped into four propositions.

First, under Washington law, affiliation with a school's ASB results in school sponsorship and control of the affiliated club, as well as club access to school funds. *See generally*, Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 Seattle U. L. Rev. 273, 311-13 (2003) ("Caplan"). By state statute, the ASB is the "formal organization of the students of a school formed with the approval of and regulation by" the school board. RCW 28A.325.020. All of the ASB's programs are "conducted with the approval, and at the direction or under the supervision, of the school district." WAC 392-138-010(2)(b). The district retains all power of "regulation of actions and activities of the associated student bodies." WAC 392-138-013(1)(a). This includes final control of each

school's ASB constitutions and bylaws and the policies that determine which activities and clubs will be within the ASB program, WAC 392-138-013(1)(b)(i), and final approval over the ASB's budget, RCW 28A.325.030(b), WAC 392-183-110. State law has long considered the ASB "an arm and agency of the school district." 1974 Washington Attorney General Opinion No. 21 at 3 (citations omitted). ASB funds are derived from student activity fees, admission fees, and the school's general operating funds. RCW 28A.325.010. These funds are considered public, not private, monies; they are managed by the county treasurer on behalf of the school district and are subject to various laws that apply to public records. Kent School District, *ASB Manual*, ER 588-609.

Second, the school's policy is that discriminatory groups may not receive official recognition and support. Policy 3210 provides:

> The district will provide equal education 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 [or] sex.

The district court characterized this policy as an "affirmative obligation to provide access to all of the school's activities for all students regardless of their religion." Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment ("SJ Order") at 21; ER 452; *see also*

Washington Law Against Discrimination, RCW 49.60 (forbidding discrimination on basis of creed).

Third, Truth maintains a discriminatory membership policy. (a) Voting members must a Statement of Faith professing that "the Bible [is] the inspired, the only infallible, authoritative Word of God" and that "[o]nly by my acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." ER 64. These affirmations function as religious tests that could never be required by a governmental entity. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (state may not require a declaration of belief in God). (b) General members must subscribe to a "Christian Code of Conduct." ER 61. Although Truth claimed that the Code does not limit general membership on the basis of religion, the district court properly found that a requirement to behave as a Christian (as defined by voting members who have all signed the Statement of Faith) is tantamount to a requirement to be a Christian. SJ Order at 21-22, ER 452-53. (c) Although not described in any of the club's various constitutions, Truth claims that it allows non-members (of any faith or none) to attend its meetings and participate in its activities. Truth Brief at 11-12. Allowing non-members to attend meetings and activities does not change the fact of a discriminatory membership policy. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481

U.S. 537, 541 (1987) (club violated state anti-discrimination law when it allowed women to attend meetings but not to be members).

Fourth, notwithstanding its discriminatory membership provisions, Truth is allowed to operate on campus. Under the District's Policy 2153, ER 145-46, whose language closely tracks the Equal Access Act, 20 U.S.C. § 4071, Truth may meet at the school as a non-ASB affiliated group during non-instructional time and may otherwise function in the school environment. The record shows that other religiously-oriented groups have taken part in campus life, both at Kentridge High School and at other schools in the District. ER 205-206, 222-223. Truth's repeated assertion that it needs ASB affiliation in order to exist (*e.g.*, Truth Brief at 6, 10, 11) contradicts the undisputed record facts. The District allows non-ASB clubs on campus. ER 537.

SUMMARY OF ARGUMENT

This case asks whether a student club that restricts its membership on the basis of religion may force the school to offer it ASB affiliation, despite the fact that the school forbids ASB-affiliated clubs from discriminating. While Truth claims it seeks only to be treated equally with other clubs, in fact it seeks special treatment; namely, full ASB status but with an exemption from the District's anti-discrimination policy.

The District's position is based on its overriding interest in assuring that all students are treated equally in every aspect of their education, whether in the classroom or while participating in school-sponsored club activities. The lower court was correct in finding that the school district has a compelling interest in distancing itself from religiously discriminatory behavior. The policy is narrowly tailored to the District's compelling interests, and thus does not abridge Truth's constitutional rights to freedom of expressive association and freedom of religion. Truth remains free to conform to its own membership rules, and even remains free to meet on school grounds while doing so. When the club seeks the governmental benefits of ASB affiliation, however, its rights are not violated when the District requires it to adhere to the rules governing that affiliation.

Nor did the school district violate the Equal Access Act. Truth is entitled under the Act and District policy to meet and to operate on campus the same as any other non-ASB group. That is all the Act requires, for affiliation with the ASB is not an element of equal access to a statutory limited open forum. To the extent any prior cases suggest otherwise, they are distinguishable or incorrect. The proper balance of interests is the one struck by the district court in granting summary judgment in favor of the school district.

ARGUMENT

A. Denial of ASB Affiliation Does Not Abridge Truth's Constitutional Rights.

1. The School District Has Compelling Interests In Avoiding Any Support for Religious Discrimination

The school district's antidiscrimination policy is grounded it its overriding interest in maintaining a school environment free from bias, including discrimination on the basis of religion. "A public school must not only prevent such discrimination, but has an affirmative obligation to provide access to all of the school's activities for all students regardless of their religion." SJ Order at 20-21; ER 451-52. Truth is dismissive of this interest, but never advances any reason why it is not compelling. In fact, the government's interest in maintaining an educational environment free from discrimination can hardly be overstated. The United States Supreme Court has acknowledged the importance of equality in public education, most famously in *Brown v. Board of Education*, 347 U.S. 483 (1954). Indeed, the obligation to maintain a public school system free from discrimination is "fundamental and pervasive." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). In Washington, this duty is reflected in the state's 1889 constitution, which declares that providing education for all children "without distinction or preference" is a "paramount duty of the state." Washington Const. art. IX, § 1.

In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Supreme Court considered and rejected a central argument advanced by Truth: that a private group engaging in constitutionally protected activities has the right to public support notwithstanding its discriminatory behavior. *Norwood* was a challenge to a state program that loaned textbooks to private schools, including schools that practiced race discrimination. The parents of private school pupils argued that their constitutionally protected right to send their children to those schools would be undermined if the state, which provided textbooks to non-discriminatory private schools, did not also provide textbooks for private, discriminatory, schools. Firmly rejecting that argument, the Court held that a state is forbidden from granting aid even in the form of textbook loans "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466. The right of discriminatory institutions to exist under other constitutional protections does not carry with it the right to a claim on the "state largesse, on an equal basis or otherwise." *Id.* at 462.

Even a claim of free exercise is insufficient to outweigh the government's compelling interest in distancing itself from discriminatory educational practices. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), private religious schools that maintained racially-exclusive admissions policies challenged an IRS

ruling denying them tax exempt status because of their discriminatory practices. Although the schools' discriminatory policies were grounded in religion, the Court held that denial of tax exempt status would not violate their free exercise rights. It reviewed a line of decisions holding that "certain governmental interests [are] so compelling as to allow even regulations prohibiting religiously based conduct." *Id.* at 603 (citing *United States v. Lee*, 455 U.S. 252 (1982) (requiring payment of taxes); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (preventing child labor); *Reynolds v. United States*, 98 U.S. 145 (1878) (banning polygamy)). While the Court acknowledged that denying tax exempt status would have a "substantial impact" on the private schools, it also noted that denial of that benefit would not prevent the schools from observing their religious tenets. The interest in nondiscrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604.

The Kent School District's commitment to diversity and non-discrimination is not simply as a matter of political preference or of following governing law, but is also firmly grounded in its own factual experience. The District recognizes it as a necessary educational imperative to serve its rapidly changing population. As recently as the early 1970's, Kent was rural, 95% white, and overwhelmingly Christian. As the Seattle metropolitan area has expanded, Kent has tripled in size

and become far more ethnically diverse. Marcia Slater, *History of the Kent School District* (1998) at http://www.kent.k12.wa.us/community/history. Statistics compiled by the Office of the Superintendent of Public Instruction for the 2003-04 school year (at http://reportcard.ospi.k12.wa.us) reveal that the Kent School District is now only 65% white, with the remainder of the student body identifying as Asian/Pacific Islander (15%), African-American (10%), Latino (8%), or Native American (1%). Almost 13% of students in the District are in transitional bilingual education programs, and nearly a third qualify for free or reduced-price school lunches. World Relief, the state's largest refugee resettlement agency, has an active office in Kent. Tan Vinh, *Refugee numbers on the rise*, Seattle Times, January 27, 2005. The South King County Asian/Pacific Islander community is particularly diverse in its religion, including Muslims, Buddhists, Hindus, and Sikhs. Kathleen Lynch, Harvard Pluralism Project, *Mapping Religious Diversity in Washington State* (2005) at http://www.pluralism.org/affiliates/student/lynch/index.php.

Since 1990, the Kent School District has convened two separate diversity task forces to deal with these enormous demographic changes, spurred in part by complaints from some minority families that they felt excluded from the District's programs. These task forces have now been institutionalized as the permanent

Alliance for Diversity & Equity. *See* http://www.kent.k12.wa.us/webnav/directory.aspx?LinkId=528 (2005). The Alliance's work has included express consideration of the District's large and growing population of non-Christian students. Diversity Task Force II, Meeting Minutes (February 24, 2004), at http://www.kent.k12.wa.us/committee-data/dtf/highlights/2004-2-24.pdf. Simply put, this school district has not been free of ethnic tension, and it reasonably believes that eliminating discrimination is crucial to its educational success.

Norwood and *Bob Jones* cannot be distinguished by arguing that they involved discrimination based on race rather than on religion. While race discrimination has been this nation's most prominent form of institutionalized bias, one need only read any newspaper's international coverage to understand that religious conflicts are routinely the basis for social conflict, harmful discrimination, and even violence. Barring a student from the full advantage of all public school-related activities because of her faith is every bit as odious as barring her because of her race. Here, the District has an affirmative obligation to distance itself from discriminatory conduct, and has worked to advance that obligation by withholding its financial and symbolic support, in the form of ASB status, from groups that practice discrimination. A governmental interest of this constitutional

magnitude is sufficient to override Truth's interests in expressive association and free exercise of religion in this setting.

2. Truth's Right of Expressive Association Does Not Entitle It To ASB Affiliation.

Amicus does not doubt that Truth intends to engage in expressive association, and that expressive association enjoys some measure of constitutional protection. But this is insufficient to justify a broad exemption from anti-discrimination laws for religious groups. The association cases Truth cites do not support its conclusion.

In several places, Truth claims that *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), stands for the proposition that religious groups may lawfully use religious or ideological criteria for membership. Truth Brief at 15, 18, 22-23. Truth substantially overreads that case, whose only holding regarding religion was that a New York anti-discrimination law that exempted religious organizations did not on its face violate the equal protection rights of secular organizations. *Id.* at 14-18. The Court did not say that such an exemption was constitutionally required by the free exercise clause. And it most assuredly did not hold that a private club that chooses to discriminate on the basis of religion has an entitlement to official government endorsement and public funding.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 US 557 (1995), on which Truth also relies, involved a parade in a traditional public forum. Of course, all persons and organizations have access to traditional public forums: white supremacists may hold parades on city streets, *Forsyth County v. Nationalist Movement,* 505 U.S. 123 (1992), and a church may hold services in a city park, *Niemotko v. Maryland,* 340 U.S. 268 (1951). The Kent School District is not barring Truth from a traditional public forum. Nor is it barring Truth from the statutorily-created "limited open forum" under the Equal Access Act, since the group is free to hold its meetings on the premises under Policy 2153. If the District were barring Truth from a forum to which it had a lawful claim of access, amicus would support its petition. But the facts do not reveal this type of infringement.

The anti-discrimination law challenged in Truth's primary authority, *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), purported to control the membership and leadership decisions of the Boy Scouts regardless of the forum where they operated. The law would apply even to activities held on private property owned by the Boy Scouts. The Kent School District is not attempting any similar level of control. Truth is free to establish its own membership criteria for its private activities. It is even allowed to meet on school property. The only restriction—if it can be called that—is denial of the school's endorsement and

public funds should the club establish criteria that are inconsistent with such endorsement. "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 470. Like the parents in *Norwood* who had no claim to public resources to advance values rejected by government, Truth has valid no claim to the sponsorship and funding inherent in ASB status.

The Court in *Dale* was careful to state that the right to expressive association is not absolute. Indeed, it may be overridden by a rule serving "compelling state interests, unrelated to the suppression of ideas, that could not be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). Here, the District's antidiscrimination policy serves a compelling interest: to create and maintain a public school system free from discrimination. The rule is narrow: it bars discriminatory groups only from ASB affiliation, in order to distance the District from financial, symbolic and other support of groups that discriminate. It is also no more restrictive of clubs' First Amendment rights than necessary, for pursuant to Policy 2153, clubs may practice discrimination and still meet on campus during non-instructional time and otherwise reach out to willing students,

but without the official support of the ASB. Thus, their right to function is assured, yet the District's interest in distancing itself from discrimination is accommodated.

The District did not infringe Truth's expressive association rights by refusing ASB status. Nothing in the district court's ruling "in any way undermines or denigrates the importance of any associational interests at stake." *New York State Club Ass'n*, 487 U.S. at 18 (O'Connor, J., concurring). To the contrary, it was a necessary recognition that the right to expressive association varies with the nature of the organization and the type of state action to which it was subjected.

3. The District Did Not Prohibit Truth's Free Exercise of Religion.

Free exercise claimants must demonstrate that state law prohibits them from exercising their religion. *Lyng v. v. Northwest Indian Cemetery Protective Ass'n,*, 485 U.S. 439, 451 (1988). "The crucial word in the constitutional text is 'prohibit'." *Id.* A neutral government rule that does not "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" will not violate the Free Exercise clause. *Id.* at 449; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *KDM v. Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999). It is incumbent on any free exercise claimant to prove — not simply to assert — that the regulation

at issue abridges a core aspect of religious pursuit. *See Lyng*, 485 U.S. at 447. Truth never claims — nor could it — that being affiliated with the ASB is a central tenet of its faith. Moreover, Truth is welcome to engage in activities traditionally viewed as being at the core of religious freedom — the ability to gather, to worship, and to proselytize — free of interference by the District.

Truth's reliance on Title VII employment cases like *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Truth Brief at 25-26, 32-33) is similarly misplaced. The issue in *Amos* was whether a statute exempting religious institutions from requirements of nondiscrimination in employment practices violated the Establishment Clause. As in *New York State Club Ass'n*, there is no suggestion in *Amos* that such an exemption was mandated by the Free Exercise Clause. *Amos*, 483 U.S. at 334. Here, Truth enjoys religious autonomy of the sort recognized in Title VII's ministerial exception. It maintains its ability to organize, meet, and advocate its positions both within the school and outside it. Other student religious student groups freely operate at District schools. Indeed, the District has explicit policies in place to insure religious freedom of all students. *E.g.*, Policy 2340 (role of religion in curriculum), ER 512; Policy 2340P (guidelines for maintaining religious neutrality), ER 515. Denial of ASB

affiliation is no more of a prohibition on Truth's free exercise than denial of a tax exemption was a prohibition of Bob Jones University's free exercise.

The recent decision in *Locke v. Davey*, 540 U.S. 712 (2004), confirms that putting Truth to the choice of opening up membership to any interested student or forgoing ASB affiliation does not abridge its free exercise rights. In *Locke*, a student argued that Washington State's prohibition on using certain state scholarship funds to pursue a theology degree violated his free exercise rights. The Court found no constitutional violation in a state law that required the student to choose between pursuing a secular degree with state money or pursuing a theology degree without it. The prohibition against funding theology degrees had none of the indicia of true hostility to religion. For example, the State imposed no sanction on any type of religious service or rite, did not deny ministers the right to participate in the political affairs of the community, and did not require students to choose between their beliefs and receiving the scholarship. *Id.* at 720 (comparing the *Locke* facts against *Lukumi Babalu Aye*, where true hostility to religion shown by enactment of criminal laws barring core religious ritual).[1] Significantly, the rule

[1] Plaintiffs argue that hostility is illustrated by the District's failure to act promptly on the club's application and the District's objection to the group's name. Truth Brief at 40. This does not approach the showing necessary to support a Free Exercise violation grounded in religious hostility, as *Lukumi Babalu Aye*, 508 U.S. at 534, makes clear. Amicus agrees that the club's

upheld in *Locke* singled out religious education for differential treatment, in contrast to the District's policies here which are neutral as to religion: they withhold sponsorship and funding from all discriminatory student groups, not simply religiously-oriented ones." Like the unsuccessful plaintiff in *Locke,* Truth has the right to exercise its religion, but does not have the right to public sponsorship and funds to do so.

B. The District Complied with the Equal Access Act.

Truth's equal access claims fail because Truth is not seeking equal access. The group already has equal access to the school grounds pursuant to Policy 2153. It claims a right to affiliate with the ASB, but not on the same terms as every other student group. It asks this Court to grant it a superior right to ASB affiliation on its own terms, with the ability to pick and choose which ASB rules it will honor and which it will reject. The cases Truth relies upon — *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), and *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2nd Cir. 1996) — do not support the club's position.

1. The Club Enjoys Equal Access to the Premises Under Policy 2153.

The Equal Access Act provides that it is "unlawful for any public secondary school…which has a limited open forum to deny equal access or a fair opportunity

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application should have been handled more carefully, but that would not change the outcome of

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). Defendants' Policy 2153 was expressly formulated to meet the requirements of the Act. Titled "Noncurriculum-Related Student Groups," it provides that "[p]ursuant to the Equal Access Act, the board authorizes noncurriculum-related, non ASB student groups to meet before or after school, subject to the approval of the principal." ER 145. Approval is required so long as particular conditions are met, including that the meeting be voluntary and initiated by students, not sponsored by the school or staff, and directed and conducted by students. These provisions mirror the language of the Act and its interpretation by the Supreme Court in *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). Truth cannot show that the type of access provided in Kent's Policy 2153 violates the Act, because that policy incorporates all of the Act's requirements.

2. *Prince* and *Hsu* Are Distinguishable.

This Court's decision in *Prince* involved a Bible Club and a Washington school's ASB, but the similarity ends there. The single issue in this case is whether a school must allow a religiously discriminatory club to affiliate with its ASB

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this case.

notwithstanding a generally applicable nondiscrimination rule that governs every other ASB-affiliated club. That issue never arose and was never discussed in *Prince*. The opinion does not disclose anything about that club's membership policies. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)

The issue in *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2nd Cir. 1996), was not ASB affiliation or anything like it. *Hsu* was a true access case that involved the "right to meet in school classrooms." *Id.* at 847. The student club would not be allowed to meet on campus unless it obtained the District's approval, which was withheld because the club wanted to impose a religious test on its officers. Because of this crucial difference, anything *Hsu* has to say about expressive association rights will apply to this case only by analogy.

In resolving the dispute in Roslyn, the Second Circuit began by deciding that the Equal Access Act protected not just speech at meetings but also expressive association at meetings. *Id*. at 859. This is one possible interpretation of the EAA, but not the only one, and this Court is not bound by it. As *Hsu* acknowledged, the text of the statute does not refer to association or club

membership, and "there is no discussion in the legislative history about whether 'equal access' allows an after-school religious club to limit its leaders to those of a particular religious faith." *Id*. at 855. The Act contains several clauses that expressly reserve a school's authority to enact regulations to ensure that student clubs do not cause material disruption of the educational process. 20 U.S.C. § 4071(c)(4), (f). These were included in the Act in large part because of Congress's concerns that the Act would guarantee a statutory right for racially discriminatory groups like the Ku Klux Klan or the American Nazi Party to meet at public schools. *Hsu,* 85 F.3d at 854-55 & n.10; Caplan at 286. As *Hsu* recognized, it is not without doubt whether the Act extends to expressive association.

This Court need not decide that issue, however, because even if the Act is interpreted to incorporate the First Amendment doctrine of expressive association, it would not incorporate more protection for expressive association than the First Amendment provides. As explained above, Kent's rule does not violate Truth's constitutional association rights, because the constitution gives the group no right to the District's support and funding in the form of ASB affiliation. The district court relied on different reasoning to reach the same result. Certain club officers in *Hsu* (but not all of them) were speaking agents of the club, like the scoutmasters in

Dale or the paraders in *Hurley*. Truth does not seek to limit its discriminatory rule to those who deliver the expressive message, but instead wishes to impose a religious test for all members, a result even *Hsu* considered "plainly unsupportable." SJ Order at 17, ER 448 (quoting *Hsu*, 85 F.3d at 858). While *Hsu* is indeed distinguishable on this basis, this method results in a case-by-case line-drawing approach where a school (or ultimately a court) must determine which positions within an organization are sufficiently expressive to warrant exemption. This will ultimately prove more difficult to manage than the straightforward reasoning offered above: namely, that there is no expressive association right to force a school to extend ASB affiliation to a student club that discriminates in its membership in violation of school district policies.

3. If *Prince* Is Not Distinguished, It Should Be Overruled.

Truth may argue that *Prince* cannot be distinguished as amicus suggests, because it held that ASB affiliation — including its connotation of sponsorship and its access to public funds — is in itself a limited open forum under the EAA or a limited public forum under the First Amendment. If *Prince* really means this, it should be overruled en banc.

Prince's errors flow from its misunderstanding of the ASB and of the Equal Access Act. Regarding the ASB, *Prince* assumed that affiliation with the ASB was

necessary for equal access to the school premises. This was the case with "official recognition" in *Mergens*, *see* Caplan at 305-06 & 330-31, but it is not the case at Kent, which offers access to the premises through Policy 2153 regardless of ASB affiliation. Rather than being a key to an empty classroom after hours, the ASB is an arm and agency of the school district: when the ASB offers a noncurriculum related student activity like Students Against Drunk Driving, the school is offering that activity, just as when the ASB commits a tort, the school is liable, *Carraba v. Anacortes School District*, 435 P.2d 936, 947 n.8 (Wash. 1968).

A school does not necessarily create a forum when it speaks; sometimes it is simply expressing its own message. *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013 (9th Cir. 2000). Given Washington's unique statutory framework, ASB-affiliated clubs are, like a school-sponsored student newspaper, "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

Prince wrongly held that the Equal Access Act required equal entitlement to a school's official sponsorship of clubs and financial support of the clubs it chooses to sponsor. In fact, the EAA requires only an equal opportunity "to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b); *see also* Caplan at

287-89. The Congressional debates were very specific on this point: the problem at which the Act was targeted was outright denial of access to empty classrooms after school for student groups who wished to meet for Bible study. *Id.* at 291-95. There is no statutory obligation to provide equal expenditures of "public funds beyond the incidental cost of providing the space for student-initiated meetings." 20 U.S.C. § 4071(d)(3). Moreover, there is an outright prohibition of school sponsorship of religious clubs. 20 U.S.C. § 4071(c)(2), (c)(3), (d)(2), (d)(4). Because ASB affiliation is a form of sponsorship and funding, *Prince* should not have equated it to a statutory limited open forum, which should consist of classroom space for meetings (and their appurtenances like announcements of meeting times). To extend the Act to sponsorship violates the Act itself.

> In sum, *Prince* was wrongly decided because:
>
> the school was obligated to allow unsponsored student groups to meet on campus, but had no corresponding obligation to provide them the other attributes of school sponsorship. This is because student groups have the right to promote ideas or behavior that public schools may be legally prohibited from endorsing— as with clubs that advocate for religious beliefs or political candidates—or that schools prefer not to endorse—as with clubs that advocate racial superiority, legalization of recreational drugs, or other controversial ideologies. Schools need the ability to give meaningful support to the clubs they endorse, and to express in a meaningful way their lack of sponsorship of the clubs they do not endorse. By requiring schools to treat student groups identically with regard to all benefits, and not just building access, *Prince* reduces the ability of public schools to communicate their desired educational messages.

Caplan at 275-76. Here, Kent has proffered a compelling educational message of opposition to discrimination, one strongly rooted in its own real-world experience. The law should allow it to signal that opposition by declining to affiliate itself with a discriminatory private club.

Amicus believes that the school also has a compelling educational message to deliver regarding freedom of religion: namely, that it flourishes best in the absence of governmental endorsement. That message is fully consistent with the provisions of the EAA that expressly require a school to keep an appropriate boundary between its publicly funded activities and any student religious clubs that meet in empty classrooms. The Act specifies, among other things, that schools may not sponsor religious group meetings, that no student be required to participate, that no school employee be compelled to attend, and that the school may not influence the religious content of meetings. 20 U.S.C. §§ 4071(c)(1), (c)(3), (c)(5), (d)(1) - (d)(4). These clauses have been cited with approval in many court opinions as Congress's means to ensure that the Act did not violate the Establishment Clause. *E.g., Mergens*, 486 US at 236; *Garnett v. Renton School District*, 987 F.2d 641, 645 (9th Cir. 1993) (these provisions "explicitly exclude from the Act's protection the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active

involvement … in religious activity") (internal citations and punctuation omitted). Following the First Amendment itself, the Act may result in religious groups having less school support than secular school-sponsored clubs (although they would have equal access to the premises). *Id.* Thus, it is hardly either a constitutional violation, or a violation of the Act, to treat religious clubs in a manner that is not identical to school-sponsored secular student groups.

The district court was correct to uphold the school district's reasonable and well-tailored steps to maintain a meaningful boundary between the clubs that it sponsors and the clubs to which it merely provides equal access. If *Prince* requires otherwise, it should be overruled en banc.

CONCLUSION

For the foregoing reasons, amicus urges that this Court affirm the decision of the district court granting summary judgment to the defendants.

Respectfully submitted this 8th day of April, 2005.

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*Application for Ninth Circuit Admission Pending

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS

I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,815 words, as calculated by Microsoft Word (not counting the Table of Contents, Table of Authorities, Corporate Disclosure Statement, Certificate of Compliance with Length Limits, and Proof of Service, which are excluded under FRAP 32(a)(7)(B)(iii)).

DATED this 8th day of April, 2005.

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Jane M. Whicher

PROOF OF SERVICE

I hereby certify that on this date I filed with the Court the original and 15 copies of the following document via first class mail, postage pre-paid, on the date indicated below:

1. Amicus Curiae Brief of The American Civil Liberties Union of Washington

I further certify that on this date I served 2 copies of the above document to each of the following people, in the manner indicated below.

Robert H. Tyler Alliance Defense Fund 38760 Sky Canyon Drive, Suite B Murrieta, CA 92563 Via U.S. Mail	Michael B. Tierney 2955 80th Avenue SE, Suite 205 Mercer Island, WA 98040 Via U.S. Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of April, 2005.

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Kristina Armenakis