No. 08-1130

In the Supreme Court of the United States

TRUTH, *et al.*,

Petitioners,

v.

KENT SCHOOL DISTRICT, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Equal Access Act, 20 U.S.C. § 4071 *et seq*., which provides that a public secondary school maintaining a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against" a proposed student group meeting "on the basis of the * * * content of the speech" at the proposed meeting, precludes a school from applying its non-discrimination policy to withhold official recognition from a student group that excludes students from non-voting membership on the basis of a religious test.

2. Whether a viewpoint-neutral restriction on granting official recognition to a student group in the high school setting must in all cases be reviewed under a strict scrutiny standard.

RULE 29.6 STATEMENT

The Kent School District is a government entity with neither a parent company nor any non-wholly-owned subsidiaries. The other respondents are natural persons.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 524 F.3d 957. The court of appeals' order denying petitioners' petition for rehearing en banc (Pet. App. 148a-164a) is reported at 551 F.3d 850. The district court's opinion and order granting summary judgment for respondents (Pet. App. 111a-147a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008, and a petition for rehearing was denied on November 17, 2008. On February 4, 2009, Justice Kennedy issued an order extending the time for filing a certiorari petition to and including March 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, appears at Pet. App. 165a-170a.

STATEMENT

A. Background

1. Two types of non-curriculum student groups are permitted at schools within the Kent School District, which is located in Washington State. Groups chartered by a school's Associated Student Body Council ("ASB")—a group of students designated to act as representatives of the student body—are entitled to receive school funds, may use the school district finance department for purchases, receive a faculty advisor who must be present at meetings and

assist in the club's activities, meet during non-instructional time, and may be recognized in the yearbook and announce activities over the school public address system. Pet. App. 9a-10a, 112a.

Groups not chartered by the ASB may be recognized by the school principal. They are permitted to meet on school property before or after instructional hours, but they do not receive all of the privileges accorded to ASB-recognized clubs. Pet. App. 9a.

The School District has a policy requiring "equal educational opportunity and treatment for all students in all aspects of the academic and activities program," which specifies that "[e]qual opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status" and other characteristics. Pet. App. 9a. It is undisputed that "inclusion of 'creed' indicates that discrimination based on religion is prohibited." *Ibid.*[1]

2. The individual petitioners, who at the time were students at Kentridge High School, applied for an ASB charter for a club named "Truth." Pet. App. 113a. The revised charter application submitted in April 2003—which all parties agree is the relevant application for purposes of this litigation (*id.* at 13a)—states that the club's purpose is "[t]o study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship." *Id.* at 174a.

The charter application "divides the membership into three categories: voting members, non-voting members, and attendees." Pet. App. 7a. Although

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[1] The State of Washington also has adopted a statute prohibiting discrimination on the basis of religion. See Washington Revised Code § 49.60.215 (West 2006); Pet. App. 10a-11a.

"[m]eetings are open to everyone" (*ibid.*), 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." *Ibid.* The proposed membership criteria include "a true desire to * * * grow in a relationship with Jesus Christ." *Id.* at 174a.

To qualify as a voting member, a student in addition would be required to sign a "statement of faith" requiring the student to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," that he or she believed that "salvation is an underserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Pet. App. 7a-8a.[2]

The ASB Council denied the application for a charter by a unanimous vote, with one member abstaining. Pet. App. 8a. The district court explained that, among other things, "[t]he ASB members were opposed to the club's faith-based membership requirement and the oath requirement for voting member status." *Id.* at 117a.[3]

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[2] The proposed charter also specified that officers were obligated to sign the Statement of Faith and to "believe in and be committed to biblical principles." Pet. App. 178a.

[3] The record indicates that there are two religious clubs in the Kent School District that are ASB approved. Pet. App. 29a n.2. A "Bible Club" at a junior high school has been in existence for ten years, and a "Truth Seekers" Bible club at a high school has been in existence for three years. Pet. App. 124a. Membership is open to all students in both clubs. *Ibid.*

B. Proceedings Below

Petitioners filed a complaint in the United States District Court for the Western District of Washington, alleging that the District had violated the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, which prohibits a public secondary school that "has a limited open forum" from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious * * * content of the speech at such meetings." The complaint also alleged violations of their First Amendment rights of free speech and expressive association; the Free Exercise Clause; the Establishment Clause; and the Equal Protection Clause.[4]

1. *The District Court's Decision*. The district court granted summary judgment in favor of respondents. Pet. App. 111a-147a.

The court based its decision exclusively on the proposed requirements for non-voting membership. Pet. App. 132a & n.10. It expressly did not address whether the School District could deny the application based solely on the restrictions on voting membership or officer status.

With respect to the statutory claim, the court concluded that the proposed membership policy was not "protected speech under the EAA"; accordingly,

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In addition, Kentridge High School has two non-ASB chartered clubs with a religious focus: the "Young Life" club (a Christian group), and the "Prayer Around the Flagpole" group. Pet. App. 6a.

[4] Petitioners instituted this action before the denial of the application for a charter, but subsequently sought relief from that decision. Pet. App. 116a-118a.

"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. As such, the School has not violated the EAA." *Id.* at 132a.

The district court also rejected Truth's First Amendment association claims, holding that the School District's nondiscrimination policy furthers its compelling interest in "provid[ing] equal opportunity and treatment to all students to participate in school activities programs without regard to religion, race, or sex (among other things)." Pet. App. 138a. It rejected petitioners' argument that inclusion of students of other faiths as non-voting members would interfere materially with the Club's expression of its ideas:

> The general members do not control the Club's Bible study and prayer functions. They do not lead the Club in its spiritual activities, nor do they dictate or control the other members' religious beliefs

Id. at 143a. Even if the Club included those of other faiths as non-voting members, "the Club could still expound upon its particular beliefs, including for example the idea that only certain beliefs, conduct, and speech are truly Christian." *Ibid.*

The district court did not rule on the remaining claims (based on the Equal Protection Clause, Establishment Clause, and Free Exercise Clause), finding them to be "subsumed within" the First Amendment argument. Pet. App. 147a.[5]

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[5] The district court also granted summary judgment for the School District on the ground that petitioners failed to establish

2. *The Court of Appeals' Decision*. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-38a. Like the district court, the court of appeals based its decision solely on the proposed charter's requirements for non-voting membership. *Id*. at 20a & 23a n.1.

The court held that a party asserting a claim under the EAA must demonstrate—in addition to the existence of a limited open forum—"1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the 'content of the speech' at its meetings." Pet. App. 22a. It pointed out that "content of the speech" has "a particular meaning in First Amendment jurisprudence" (*id*. at 23a), holding that the Act's prohibition is triggered "to the extent the limitation [on a club] is justified with reference to the expressive content of the regulated conduct." *Id*. at 24a.

Here, the court held, "[o]n their face, the District's non-discrimination policies do not preclude or discriminate against religious speech" (Pet. App. 26a) and the District did not "justif[y] its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content neutral." *Id.* at 27a. Accordingly, the District's policies "do not implicate any rights that Truth might enjoy under the Act." *Ibid*.

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a basis for liability under *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), and its progeny. Pet. App. 121a-130a. The court of appeals reversed that determination. Pet. App. 19a-20a. Respondents have filed a conditional cross-petition (No. 08-1268) with respect to that ruling.

The court observed, however, that petitioners also contended "that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy" but allegedly refused to grant such exemptions to religious groups. Pet. App. 28a. "If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups," the court stated, "this policy would of course violate the Act." *Ibid.* The court reversed and remanded "for further proceedings on this limited issue." *Id.* at 29a (footnote omitted).

The court reached a similar conclusion with respect to the First Amendment association claim. It observed at the outset that "the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group" with special rights to funds, school property, and facilities. "Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a 'limited public forum.'" Pet. App. 30a (citation omitted). The applicable standard, therefore, was "whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum." *Id.* at 31a.

Because "the purpose of the ASB program is to advance the school's basic pedagogical goals," and "instilling the value of non-discrimination" is a legitimate part of a school's mission, the District's decision to restrict ASB charters "based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum." Pet. App. 32a.

The court also determined that the policy is viewpoint neutral, because "the school is not denying

Truth [a charter] based solely on its religious viewpoint, but rather on its refusal to comply with the District's nondiscrimination policy." Pet. App. 33a. "[T]he District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with is non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti drug policy." *Ibid*.

As with the statutory claim, the court pointed out that "[t]here is evidence in the record that other groups * * * were granted ASB recognition despite violating the District's non-discrimination policy." Pet. App. 33a. It reversed and remanded with respect to petitioners' claim that they were "denied an *exemption* from the non-discrimination policy based on the content of [their] speech." *Ibid*. (emphasis in original). It also reversed and remanded with respect to petitioners' Free Exercise Clause, Establishment Clause, and Equal Protection Clause arguments resting on the same contention. *Id*. at 34a.

Judges Fisher and Wardlaw joined a concurring opinion, further explaining why any burden on petitioners' right of expressive association resulting from application of the non-discrimination policy was properly assessed under the standard governing access to a limited public forum. Pet. App. 35a-38a.

The Ninth Circuit denied rehearing en banc with two judges dissenting. Pet. App. 148a.[6]

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[6] The district court on remand denied the parties' joint motion to stay proceedings pending this Court's disposition of the cer-

REASONS FOR DENYING THE WRIT

The unanimous decision below is correct and does not conflict with any decision of another court of appeals or with a decision of this Court. Moreover, the decision is interlocutory: The court of appeals reversed and remanded parts of the district court's ruling on both the statutory and constitutional claims. Petitioners accordingly may receive full relief in the district court or on an appeal of the remanded issues. If they do not, this Court would have the opportunity to review the court of appeals' rulings here as well as its rulings with respect to the closely-related remanded issues. Review at this time plainly is not warranted.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS REGARDING THE QUESTIONS PRESENTED.

Petitioners' claims of conflicts among the courts of appeals are simply wrong. The decisions petitioners cite accord fully with the ruling in this case.

A. Equal Access Act

Petitioners assert (Pet. 11) that the statutory holding below conflicts with *Hsu* v. *Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996). As both courts below explained, however, the opinion in *Hsu* leaves no doubt that the Second Circuit would reach the same conclusion with respect to the issue presented here.

The question in *Hsu* was whether the EAA was implicated by a school's determination that a reli-

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tiorari petition. (The statement in the certiorari petition that the district court issued a stay (Pet. 13 n.5) is in error.)

gious club could not apply a religious test for *leadership positions*. Because the content of speech at a club's meeting would be affected by the beliefs of those holding such positions—who set the agenda for meetings—the Second Circuit concluded that the Act prohibits a school from requiring non-discrimination with respect to leadership positions. 85 F.3d at 857-858.

Indeed, the Second Circuit expressly distinguished the issue in this case, stating that a "religious test" for general membership in a student group would be "plainly insupportable" because "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Hsu,* 85 F.3d at 858 & n.17.

The court below distinguished *Hsu* on precisely this basis. Pet. App. 27a-28a; see also *id.* at 134a (same reasoning by district court). There accordingly is no conflict regarding the statutory issue.

B. The First Amendment

Petitioners contend (Pet. 29-31) that the court of appeals' First Amendment ruling conflicts with *Christian Legal Society* v. *Walker*, 453 F.3d 853 (7th Cir. 2006). That case is plainly distinguishable. Indeed, as with *Hsu*, the Seventh Circuit's holding in *Walker* indicates that it would reach the same result as the court below on the facts presented here.

Walker involved a decision by Southern Illinois University to revoke the official status of the law school's Christian Legal Society chapter after the group refused to allow "active homosexuals" to become voting members or to assume leadership positions. The University concluded that this member-

ship limitation violated its policy prohibiting discrimination on the basis of sexual orientation. 453 F.3d at 858.

Reviewing the district court's denial of a preliminary injunction, the court of appeals concluded that the plaintiffs had a reasonable likelihood of prevailing on their First Amendment expressive association and free speech claims for several reasons. First, the court found a likelihood of success on the claim that the CLS had not in fact violated any university policy. 436 F.3d at 860-861. That determination alone distinguishes the *Walker* holding—petitioners do not contend that the School District's nondiscrimination policy was inapplicable here.

Second, the *Walker* court went on to conclude that application of the nondiscrimination policy "would significantly affect CLS's ability to express its disapproval of homosexual activity" because forcing it to change its standards for "voting members and officers" would inevitably "impair its ability to express disapproval of active homosexuality." 453 F.3d at 862, 863.

That conclusion—as both the court below and the *Hsu* court explained—has no application to membership standards for *non*-voting members. A voting member, by virtue of her ability to vote for the leaders of her choice, can have a significant impact on the agenda of the group. But a non-voting member could not have that impact; indeed, the Seventh Circuit distinguished the impact of the university's action by pointing to the very different situation of requiring that meetings be open to individuals who do not satisfy the membership criteria. 453 F.3d at 863.

Because the present case involves only non-voting members, the Seventh Circuit's conclusion is wholly inapposite. And the court's reasoning seems to indicate that it would reach the same conclusion as the court below on the facts presented here.[7]

The third basis for the *Walker* court's finding of a reasonable probability of success on the merits involved the plaintiff's free speech claim. The court found it unnecessary to determine the nature of the forum—public, limited, or nonpublic—because of the "strong evidence that the [university] policy has not been applied in a viewpoint neutral way." 453 F.3d at 866. The court concluded that "SIU has applied its antidiscrimination policy to CLS alone, even though other student groups discriminate in their membership requirements on grounds that are prohibited by the policy"; the plaintiff therefore "demonstrated a likelihood of success on its claim that SIU is applying its policy in a viewpoint discriminatory fashion." *Id.* at 866-67.

The court below similarly recognized that discriminatory application of a policy could give rise to a

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[7] Petitioners contend (Pet. 12-13, 29) that *Walker* holds that expressive association claims always trigger strict scrutiny analysis, and that the failure of the court of appeals to apply that standard here establishes a conflict with *Walker*. But *Walker* applied strict scrutiny because the court determined that the application of the university's policy "significantly affect[ed] CLS's ability to express its disapproval of homosexual activity" (436 F.3d at 862), and that finding rested on the result of invalidating membership criteria for "voting members and officers" (*ibid.*). Here, where the court's decision related only to the application of a nondiscrimination policy to non-voting members, the predicate for application of strict scrutiny is not present.

First Amendment violation, and it reversed the district court's grant of summary judgment with respect to petitioners' discrimination claim and remanded for further proceedings. Here too, the court below's decision is wholly consistent with *Walker*, because nothing in *Walker*'s free speech analysis cast doubt on the conclusion of the court of appeals here that even-handed application of the nondiscrimination policy with respect to non-voting members does not implicate the First Amendment.

There is yet another reason why *Walker* does not conflict with the decision below: the important differences between the high school and university setting. In particular, this Court has traditionally recognized that school districts have greater latitude in regulating student speech in primary and secondary schools than colleges and universities whose students are older. See, *e.g.*, *Healy* v. *James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is particularly 'the marketplace of ideas.'"); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that university students are "young adults," who are "less impressionable than younger students"); see generally *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (First Amendment is "applied in light of the special characteristics of the school environment").

There is no reason to assume that the First Amendment would apply identically to the high school and university settings with respect to these issues.[8] That is yet another reason why there is no conflict between *Walker* and the decision below.

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[8] For example, a high school is not required to tolerate speech that would undermine its "basic educational mission." *Bethel*

Finally, petitioners argue (Pet. 31-32) that the reasoning of the court of appeals here conflicts with *Cuffley* v. *Mickes*, 208 F.3d 702 (8th Cir. 2000), because the Eighth Circuit did not apply forum analysis to the expressive association claim in that case. The decision in *Cuffley* is identical to the analysis of the free speech claim in *Walker*—the court did not have to consider the nature of the forum because it found that the defendant *had* engaged in viewpoint discrimination.

The question in *Cuffley* was whether the exclusion of the Ku Klux Klan from the Adopt-A-Highway program violated the Klan's First Amendment rights. The court found the State's assertion that it based its decision on the Klan's discriminatory membership policy "so obviously unreasonable and pretextual" that it could only conclude that in denying the Klan's application to participate in the Adopt-A-Highway program the State engaged in "viewpoint-based discrimination." *Id.* at 711-712 (noting that the State admitted, with remarkable candor, that it had paid special attention to the Klan's application because of the Klan's beliefs and advocacy). See *id.* at 706 n.3 (explaining why court did not need to decide whether program was a public forum). Like the Seventh Circuit in *Walker*, the court simply had no need to inquire into the type of forum created by the Adopt-A-

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Sch. Dist. v. *Fraser*, 478 U.S. 675, 685 (1986). The basic educational mission of a public high school involves teaching the "'habits and manners' of civility essential to a democratic society," including "tolerance of divergent political and religious views." *Id.* at 681. In virtue of the relative youth and inexperience of their students, secondary schools have a greater interest in taking steps to teach students to be tolerant than law schools.

Highway program in order to find a constitutional violation.

Far from establishing a conflict, therefore, the decisions cited by petitioners confirm the absence of a conflict regarding the questions presented on the facts of this case.

II. PETITIONERS HAVE AN OPPORTUNITY TO PREVAIL ON THEIR STATUTORY AND CONSTITUTIONAL CLAIMS ON REMAND.

The decision below is interlocutory: the court of appeals reversed the grant of summary judgment with respect to a portion of petitioners' statutory and constitutional claims. Petitioners may receive full redress in the proceedings on remand. If they do not, they may again seek review by this Court of any adverse decision with respect to the remanded claims, and this Court then would be able to assess all of petitioners' claims at once with the added benefit of a fully developed record. That is a compelling additional reason why certiorari should be denied now.

The court of appeals reversed the district court's summary judgment and remanded for further proceedings on the "limited issue" of whether the School District discriminated on the basis of religion or on the basis of the content of petitioners' speech in refusing to grant an exemption from the District's nondiscrimination policy. Pet. App. 29a, 33a, 34a; see also *supra* at 7, 8.

Proceedings in the district court are ongoing (the district court denied the parties' motion for a stay pending this Court's disposition of the certiorari petition) and the parties are actively preparing for trial. If petitioners prevail on remand—showing that "the

District has a policy of enforcing the non-discrimination policy only against religious groups," which "would of course violate the [Equal Access] Act" (Pet. App. 28a) and the Constitution (*id*. at 34a)—they would be entitled to obtain relief.

If petitioners are not successful on remand, they may obtain review in the court of appeals and, if that too is unsuccessful, seek certiorari and raise their claims relating to both the present determination by the court of appeals as well as the final judgment entered once the allegation of pretext has been resolved. And at that time the Court would have the benefit of the additional factual development on remand, which could well provide important illumination of the issues raised by petitioners.

For these reasons, the Court should deny review now and allow the parties to finish the ongoing remand proceedings.[9]

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[9] Some of petitioners' amici point to the recently-filed certiorari petition seeking review of *Christian Legal Society* v. *Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009), cert. pending, No. 08-1371. But the certiorari petition states that *Kane* involves the application of a nondiscrimination policy to an organization's criteria for *voting* members and leadership positions. *E.g.*, No. 08-1371 Pet. 9 (explaining impact of policy on "criteria for choosing officers and voting members"). The constitutional claims in that case therefore present issues different from those raised in this case, for the reasons explained in the text.

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CHALLENGES TO THE APPLICATION OF THE NON-DISCRIMINATION POLICY.

By ruling consistently with the other courts of appeals, the Ninth Circuit reached the correct result with respect to both the EAA and First Amendment issues presented. The EAA does not protect free-standing associational claims that are not related to protected speech at school-group meetings, and petitioners cannot make the requisite connection. In the same vein, the Ninth Circuit was correct to apply this Court's forum jurisprudence to petitioners' free association claims, and came to the correct conclusion. The consistency between the analysis below and that in the court of appeals decisions cited by petitioners—and the fact that only two judges of the court of appeals' 27 active judges dissented from denial of rehearing en banc—demonstrates that the lower courts need no further guidance on the issues presented.

A. The Equal Access Act

The Ninth Circuit properly began its analysis with the text of the EAA, which makes it "unlawful for any public secondary school * * * [to] discriminate * * * on the basis of the * * * *content of the speech* at such meetings." 20 U.S.C. § 4071(a) (emphasis added). It is elementary that where the language of a statute is clear and unambiguous, courts "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 129 S.Ct. 1058, 1063-1064 (2009); *Massachusetts* v. *EPA*, 549 U.S. 497, 527-534 (2007). The language at issue is absolutely clear: discrimination is prohibited, and only prohibited, with regard to the "content of the speech at [covered] meetings." The word "asso-

ciate" and its cognates are nowhere to be found in the EAA.

Citing to a fragment of legislative history, petitioners argue that the EAA nonetheless impliedly protects associational rights as such. Pet. 16-18. As the court below, and Second Circuit in *Hsu*, held, however, the statutory text protects *speech*, and protects association only insofar as free association is necessary for a group to control its speech. See *Hsu*, 85 F.3d at 859. Hence the Ninth Circuit correctly focused its analysis, first, on whether there was any evidence indicating that the District's denial of ASB status was based on animus towards the group's religious speech, and, second, on whether the general membership limitation was necessary for petitioners to control the content of speech at meetings.

1. The Ninth Circuit correctly concluded that respondents' action did not constitute action that "den[ies] equal access or a fair opportunity to, or discriminate[s] against" Truth on the basis of the content of speech at its meetings. 20 U.S.C. § 4071(a). "Equal access" means offering access to school facilities "on the terms available to other groups." *Widmar*, 454 U.S. at 270-71. Requiring that all student groups seeking ASB status must first comply with district policies and state law prohibiting discriminatory practices offers the same terms to all and does not differentiate based on the "nature of their speech," but rather regulates discriminatory *acts*. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (holding that conditioning access to government benefits on compliance with a non-discrimination policy regulates acts, not speech). Hence denial of ASB status

did not discriminate against petitioners on the basis of the content of their speech.

Petitioners claim that allowing schools to differentiate between student groups based on groups' discriminatory membership criteria would render the EAA's protection of speech a "hollow guarantee." Pet. 14. However, this Court's precedents prove that robust protection of speech need not inhibit appropriate government policies that regulate certain categories of acts. The fact that a policy prohibiting certain pernicious acts has a differential effect on groups holding particular viewpoints does not render that policy facially viewpoint discriminatory; whether the policy is viewpoint discriminatory depends on the government's intention with respect to the speaker's message. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 385 (1992) ("[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."); *Madsen* v. *Women's Health Center*, 512 U.S. 753, 762-63 (1994) (holding that an injunction against anti-abortion protesters was not viewpoint discriminatory because "none of the restrictions imposed by the court were directed at the contents of petitioner's message").

Petitioners failed to provide any evidence establishing that the non-discrimination policies were created "with reference to the content of a message Truth's discriminatory conduct may attempt to convey." Pet. App. 27a. Without that evidence, there is no foundation to petitioners' claim that the non-

discrimination policies are facially viewpoint discriminatory.

2. To the extent that the EAA protects expressive association, it does so only to safeguard "the content of the speech at [school group] meetings." 20 U.S.C. § 4071(a). But, as the Second Circuit pointed out in *Hsu*, it is "difficult to understand" how permitting non-Christians to be low-level, general members would undermine a religious student group's control over the speech at its meetings. 85 F.3d at 858 n.17. Because any implicit protection of expressive association under the Act is aimed at protecting student groups' right to speak, the District's requirement that general members be admitted on a non-discriminatory basis does not pose a threat to Truth's expressive activities as protected by the EAA.

Petitioners have no persuasive response on this score, arguing only that "[a]llowing those who lack desire to have a relationship with Jesus Christ" to be general, non-voting members "would significantly undercut the core message Truth is seeking to convey inside and outside of its group." Pet. 24. Insofar as the EAA seeks to protect only "speech" at "meetings," not inchoate messages conveyed "outside of [a] group" by excluding students from non-voting membership, Truth's alleged associational communication is not within the EAA's sweep.

3. The Ninth Circuit's analysis is consonant with this Court's analysis of expressive association rights in the constitutional context. Although the Court in *Boy Scouts of America* v. *Dale*, indicated that deference should be given "to an association's view of what would impair its expression," it went on to note: "That is not to say that expressive association can erect a shield against antidiscrimination laws simply

by asserting that mere acceptance of a member from a particular group would impair its message." 530 U.S. 640, 653 (2000). In *Dale,* the Court weighed how different membership levels would affect the Scout's expressive activity to varying degrees, and deferred to the Scouts' reasonable conclusion that being forced to accept a "gay rights activist" as a troop leader would necessarily impair the Scouts' anti-homosexual message to a degree that First Amendment protections applied.

Here, Truth has provided no reasonable explanation of how the exclusionary criterion for non-voting membership advances its speech, beyond the conclusory assertion just quoted. *Dale* permits—indeed, requires—that courts look behind such allegations to ascertain whether they have a reasonable basis to which deference is appropriate. No such basis has been offered; and petitioners' conclusory claim is undercut significantly by their willingness to open meetings to all attendees. Thus, contrary to petitioners' claims, the *Hsu* and *Truth* courts' use of similar calculus (and their distinction regarding leaders) in the EAA cases is in keeping with this Court's expressive association jurisprudence.

B. The First Amendment

Petitioners argue that the Ninth Circuit's use of forum analysis to determine a student group's First Amendment rights is inappropriate when associational rights are at stake, and that the decision below is thus in conflict with *Boy Scouts of America* v. *Dale* and *Healy* v. *James*, 408 U.S. 169 (1973). Pet. 14. This contention relies on an overly broad reading of *Dale* and its antecedent cases, and on a failure to recognize *Healy*'s place in the historical development of forum doctrine. The Ninth Circuit's use of forum

analysis to determine the level of protection afforded to speech in a limited public forum (and thus, to expressive association in such a forum) correctly applies this Court's First Amendment precedents.

1. Petitioners note that this Court has not itself applied forum analysis in its expressive-association cases. Hence *Dale*, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), and *Bd. of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), involved discriminatory membership conditions, but were decided using an expressive association analysis that did not involve forum analysis. See Pet. 24-26.

But the absence of forum analysis in these decisions is entirely to be expected, since *no government fora were at stake*. *Dale*, *Roberts*, and *Rotary Club* each involved groups whose broad right to operate with discriminatory membership criteria was contested under state public accommodations laws.[10] These cases thus provide no guidance as to the proper analytical frame for viewing a case that involves discriminatory membership criteria *and* a lim-

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[10] Petitioners' citation of *Democratic Party* v. *Wisconsin*, 450 U.S. 107 (1981), is inapposite. That case involved a state open primary law's attempt to require a national political party, not to take members that did not subscribe to its principles, but to conform its conduct to the votes of those nonmembers. *Id*. at 120 ("The question in this case is not whether * * * the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether * * * [Wisconsin] may then bind the National Party to honor the binding primary results * * *."). Moreover, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer." *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000) (quotation marks and citation omitted).

ited public or nonpublic government forum. There is therefore no tension between the private membership cases and the Ninth Circuit's decision here.

2. Petitioners cite *Healy*, a case in which a college attempted to prevent development of a Students for a Democratic Society chapter, for the proposition that expressive association is the only doctrinal lens through which to view school group exclusion cases. Petitioners suggest that forum analysis is inappropriate here because it was not employed in *Healy*. Pet. 27.

The argument stumbles for failure to note *Healy*'s place in the historical development of forum doctrine. In 1972, when *Healy* was unanimously decided, this court had *never* applied forum analysis to college or secondary school campuses, in the speech or association context.[11]

Forum analysis was first extended to academic environments in *Widmar* v. *Vincent*, which rejected a university's ban on a religious student group's use of its facilities where the exclusion was explicitly "based on the religious content of a group's intended speech." 454 U.S. 263, 269 (1981). As petitioners acknowledge, the *Widmar* Court was clear that "it is on the bases of speech *and association rights* that we decide the case." *Id.* at 273 n.13 (emphasis added); see Pet. 17. Hence *Widmar* establishes, if *Healy* left any doubt, that expressive association claims arising in government-controlled forums are subject to the same forum analysis as claims to pure speech.

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[11] Indeed, neither the opinion under review nor the parties' briefs in *Healy* so much as mention forum analysis. *See Healy* v. *James*, 445 F.2d 1122 (2d Cir. 1971); Br. for Petrs., No. 71-452, 1972 WL 135557; Br. for Resps., No. 71-452, 1972 WL 135558.

Healy is also distinguishable from the instant case because it involved far more extreme restrictions on student speech than those claimed here. Not only did Connecticut State College deny SDS the right to form an approved student group, but SDS was also forbidden from using any sort of campus property for public postings, and students were even forbidden from meeting informally in the coffee shop to discuss SDS. 454 U.S. at 176. In this way *Healy* is closer to *Dale* than to the instant case: A substantial imposition on a group's ability to conduct its affairs, rather than a minimal non-exclusion requirement that does not even arguably challenge the group's ability to engage in its core speech. And of course *Healy* involved college, not secondary-school students', speech. *Id.* at 180.

3. Petitioners' objection to the Ninth Circuit's deployment of forum analysis in the expressive association context—and their claim that expressive association is a "distinct, elemental constitutional purpose," Pet. 28—stem from a fundamental misreading of this Court's First Amendment jurisprudence. The right to expressive association does not exist in a vacuum. Its protection stems from the protection we afford to the underlying rights to free speech and assembly. Government infringements on association rights are objectionable when they interfere with a group's expression of thoughts or ideas. Mere exclusion is not, itself, a protected mode of communication. See, *e.g.*, *Dale*, 530 U.S. at 647-48 ("Implicit in the right * * * protected by the First Amendment is a corresponding right to associate with others * * * . Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.") (quotation marks and citation omitted); *Rumsfeld*,

547 U.S. at 68 ("We have recognized a First Amendment right to associate *for the purpose of speaking*, which we have termed a 'right of expressive association.'" (emphasis added)). Because expressive association is protected for its role in furthering expressive *speech*, the Ninth Circuit was correct to conclude that the level of scrutiny applied to infringements on expressive association tracks the level of protection warranted by the underlying speech right.

Thus, while it is true that *Dale* and its antecedent cases hold that "regulations affecting a group's ability to associate or disassociate must survive strict scrutiny," Pet. 24-25, these cases applied strict scrutiny because the alleged infringement on association affected the group's core speech and expression. *Dale*, *Roberts*, and *Rotary Club* concerned public accommodations laws that were being applied to encompass the *entirety* of an organization's *private and public* activities. The Ninth Circuit was correct to recognize that, in the instant case, restrictions on general, non-voting membership had no cognizable relationship to petitioners' protected speech or expression meriting strict scrutiny review of the imposition of non-discrimination requirements.

4. Unlike *Dale*, *Roberts*, and *Rotary Club*, the instant case involves contested rights of access to a government forum. In a limited public forum or nonpublic forum, governments may impose "viewpoint neutral" regulations that are "reasonable" in light of the forum's purpose. *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106-107 (2001).

The court below correctly understood that petitioners' First Amendment claims are subject to forum analysis. Pet. App. 30a-31a. That doctrine has frequently been held to encompass government-

provided funds and other schemes that further speech. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (applying forum analysis to a university student activities fund that provided funding to student publications); *Texas* v. *Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (applying forum analysis to state Adopt-a-Highway program); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985) (applying forum analysis to examine government's exclusion of certain groups from participating in federal workplace charity drive).

The Ninth Circuit correctly applied forum analysis to ascertain that ASB status constitutes a "limited public forum." The government creates a "limited public forum" when it intentionally "opens a non-public forum to certain kinds of speakers or to the discussion of certain subjects." *Husain* v. *Springer*, 494 F.3d 108, 121 (2d Cir. 2007) (quotation marks and citation omitted); see also *Good News Club*, 533 U.S. at 106 ("When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" (quoting *Rosenberger*, 515 U.S. at 829) (alteration in original)). Restrictions on speech must be "'reasonable in light of the purpose served by the forum" and "must not discriminate against speech on the basis of its viewpoint.'" *Id.* at 106-107 (citing *Rosenberger* and *Cornelius*).

Mandating that potential speakers comply with a non-discrimination policy in order to gain access to a limited government forum is both "reasonable" and "viewpoint neutral." *R.A.V.*, 505 U.S. at 390 ("Where

the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.") See also *Boy Scouts of America* v. *Wyman*, 335 F.3d 80, 98 (2d Cir. 2003) (group's removal from nonpublic forum did not violate right to expressive association); *Evans* v. *City of Berkeley*, 129 P.3d 394, 402 (Cal. 2006) (same). The Ninth Circuit correctly concluded that—provided respondents' administration of the ASB program was not a pretext for viewpoint discrimination—the restriction on petitioners' ability to exclude students from non-voting membership should be upheld as an appropriate regulation of its limited forum. *Cf. Cornelius*, 473 U.S. at 811-13 (noting that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination," and remanding for determination of "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view").

5. Petitioners' argument that expressive association claims must *always* receive strict scrutiny, even when arising from restrictions on a limited public forum, therefore borders on the absurd. Following petitioners' rule, expressive association would receive greater protection than the underlying right to *speech* in the forum. The Ninth Circuit correctly rejected that claim since, as explained *supra*, the associational right is itself only an outgrowth of the relevant right to speech in the forum. Pet. App. 37a (Fisher, J., concurring).

Indeed, petitioners' proposal would undo decades of law establishing that "strict scrutiny [does not]

appl[y] whenever [government] subsidizes some speech, but not all speech." *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (upholding denial of charitable exemptions to organizations attempting to influence legislation); see also *Grove City College* v. *Bell*, 465 U.S. 555, 575-76 (1984) ("Requiring [petitioner college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the program [providing federal financial assistance] infringes no First Amendment rights of the College or its students."); *Cammarano* v. *United States*, 358 U.S. 498 (1959) (upholding Treasury regulation that denied business expense deduction for lobbying activities). Restrictions on associational exclusion, like other restrictions on expressive activity in limited public forums, must be subject to reasonable, viewpoint-neutral regulation.

* * *

The Ninth Circuit correctly concluded that neither the EAA nor the First Amendment confers greater rights of associational exclusion than they do rights of speech; that the ASB status at issue in this case is properly analyzed as a limited public forum; and that, under established doctrine, respondents were entitled to apply reasonable, viewpoint-neutral nondiscrimination restrictions on applicants for ASB status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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