No. 08-1371

IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND STUDENTS FOR LIBERTY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of the Supreme Court Rules, the Foundation for Individual Rights in Education ("FIRE") and Students For Liberty ("SFL") submit this brief as *amici curiae* in support of Plaintiff/Petitioner.[1] *Amici* FIRE and SFL join Petitioner in asserting that the United States Court of Appeals for the Ninth Circuit erred in forgoing analysis of Petitioners' expressive association claim, and that allowing the Ninth Circuit's decision to stand would prove disastrous for student groups holding disfavored or minority viewpoints on public campuses.

FIRE is a national, secular, non-partisan, 501(c)(3) non-profit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of student rights. During its more than ten years of existence, FIRE has advocated on behalf of the fundamental liberties of campus organizations in

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

multiple states and on multiple campuses, including the right to freedom of association.

SFL is a national, secular, non-partisan, 501(c)(3) non-profit educational organization dedicated to providing organizational support for students and student organizations devoted to liberty. Founded and operated by college students, SFL defines liberty as encompassing the economic freedom to choose how to provide for one's life; the social freedom to choose how to live one's life; and intellectual and academic freedom. To promote this understanding of liberty, SFL supports student organizations across the ideological spectrum by providing resources and training to campus leaders and student groups.

Both *amici* believe that if not reversed, the Ninth Circuit's opinion will seriously threaten the expressive and associational rights of student groups on campuses across the country, contradicting decades of this Court's precedents and undermining the role of the public university as what this Court has deemed "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

SUMMARY OF ARGUMENT

The fundamental question in this case is straightforward but profoundly important: May belief-based student organizations participate in the life of a public university without being forced to alter or abandon their core beliefs? This question arises in an associational context: May a religious student organization—or any other belief-based organization,

religious, political, or otherwise—refuse as voting members those whose avowed viewpoints are antithetical to the organization's central tenets? Both the First Amendment and this Court's longstanding precedents make clear that the answer must be yes.

As this Court has repeatedly recognized, the First Amendment implicitly guarantees citizens the right to join together their voices and associate with those of like mind in furtherance of a wide variety of purposes. Consistent with the right to associate with others around a particular set of beliefs is an accompanying right to choose *not* to associate, and to do so without undue governmental interference. This Court has further recognized, in rulings stretching back decades, that students at our nation's public colleges and universities enjoy the full protection of the First Amendment. Accordingly, students do not lose their right to engage in expressive association on public college campuses.

In recent years, however, public colleges and universities have created a new barrier to expressive association: expansive nondiscrimination policies interpreted to prohibit not only true discrimination on the basis of status or immutable characteristics, but also "discrimination" on the basis of belief. In the instant case, Hastings College of the Law has conditioned access to its facilities on compliance with a nondiscrimination policy that prevents a religious student organization from functioning in a manner consistent with its beliefs and principles. The school has taken the remarkable position that a religious student organization is not permitted to discriminate on the basis of *religious belief.* This policy prevents Petitioner Christian Legal Society

from adhering to the very principles that are *the reason for its existence* when making decisions on leadership, voting membership, and—because the group's statements come from its leaders and members—its message. This result is plainly untenable in light of the First Amendment's guarantee of expressive association and religious freedom.

Respondent Hastings' application of its nondiscrimination policy here expands the concept of "discrimination" past its logical breaking point and trivializes the invidious, status-based animus such a policy was presumptively meant to address. Preventing what Hastings deems "discrimination" is akin to prohibiting an environmental group from asking whether prospective voting members or leaders actually have an interest in the environment, or to prohibiting the College Democrats from ensuring that its voting members are not in fact active Republicans. Hastings' nondiscrimination policy ignores the critical difference between status and belief. Expressive organizations must be permitted to make *belief-based choices* when choosing their leaders and voting members. There is a stark difference between making a determination on the basis of an immutable status and doing so on the basis of changeable personal beliefs and rules of conduct.

Because the will to censor disfavored viewpoints exists on campus, upholding the Ninth Circuit's decision will have a devastating impact on all belief-based student groups, be they religious, political, or otherwise ideological. FIRE's decade of experience defending First Amendment rights illustrates that students and administrators on campuses across the country

proactively restrict and disrupt speech with which they disagree, and have attempted on numerous occasions to undermine or even destroy controversial student groups. Worse still, administrators have proven willing to ignore binding legal precedent and exploit arguable loopholes in the law to censor unwanted speech. Given the climate on campus, denying belief-based groups their right to limit voting membership and leadership to those who agree with the organization's purpose will leave any student group formed around an unpopular viewpoint vulnerable to takeover and even dissolution by students and administrators who fundamentally disagree with the group's views and mission.

The Ninth Circuit's perfunctory one-paragraph decision in the instant case ignores this Court's precedents recognizing the right to expressive association and instead cites only its own contrary decision in *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009). In *Truth*, the Ninth Circuit held that a public high school's denial of recognition to a religious student group that required members to sign a statement of faith was reasonable and viewpoint neutral because the school's extracurricular program offering benefits to a wide variety of student groups constituted a limited public forum and rendered student groups' expressive association "school-sponsored." But in both *Truth* and the present case, the expressive association in question was undoubtedly private and could not reasonably be construed as school-sponsored. Indeed, Respondent Hastings explicitly affirms that registered student organizations do *not* engage in school-sponsored speech. In both *Truth* and the instant case, the Ninth Circuit

should have applied the strict scrutiny warranted by regulations over private expressive association, as other federal courts have done when presented with similar questions. Instead, the Ninth Circuit ignored the expressive association claims at issue and allowed forum analysis to swallow whole the First Amendment right to expressive association.

If this Court holds that the First Amendment does not protect a student group's right to exclude those who disagree with its core beliefs, controversial or unpopular groups will be powerless to avoid very real threats to their existence. Depriving belief-based student organizations of equal rights of speech and association simply because those organizations choose to govern themselves according to distinct ideological principles is fundamentally incompatible with this Court's precedents and relegates groups seeking to organize around unpopular or minority viewpoints to an unconstitutional second-class status on campus. To preserve the First Amendment and the robust free expression it guarantees at our nation's public colleges and universities, this Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. BECAUSE THE WILL TO CENSOR EXISTS ON CAMPUS, UPHOLDING THE NINTH CIRCUIT'S INTRUSION UPON ASSOCIATIONAL RIGHTS WILL FURTHER ERODE FIRST AMENDMENT RIGHTS ON CAMPUS

FIRE's decade of experience defending core constitutional liberties at our nation's colleges and universities demonstrates that the will to censor—on the part of both students and administrators—flourishes on our nation's campuses. Many students seek to silence fellow students expressing controversial viewpoints, and many public universities maintain unconstitutional speech codes—overbroad or vague policies restricting speech that would be protected in society at large—enabling punishment of disfavored speech. Further, universities often seize upon ambiguities in the law to silence unwanted or unpopular expressive activity. Upholding the Ninth Circuit's erroneous ruling will therefore not only jeopardize the ability of students to freely associate with others of like mind to espouse unpopular or controversial beliefs on campus, it will also embolden would-be censors at universities and further erode First Amendment protections for student speech. To preserve the right to expressive association, and freedom of expression more generally, for students at public colleges across the country, this Court should reverse the Ninth Circuit's opinion.

A. The Ninth Circuit's Decision Renders Organizations Holding Minority Viewpoints Powerless to Avoid Takeover or Dissolution by Students Who Wish to Silence Their Expression

In FIRE's experience, the challenge to a student group's membership policies often comes not from students seeking, in good faith, to join the group, but rather from students, faculty, or administrators who disagree with the group's core tenets. If the First Amendment right to free association does not give belief-based student groups the power to make belief-based membership decisions, any student groups holding unpopular viewpoints will be vulnerable to takeover and even dissolution by those students who fundamentally disagree with the group's views.

This concern is not simply hypothetical. At Central Michigan University (CMU), for example, Young Americans for Freedom (YAF), a conservative political student group, was told by the administration that because of the university's nondiscrimination policy, it could not exclude from membership students who were explicitly seeking to dissolve the group. In February 2007, CMU students started a group on the social networking site Facebook.com entitled "People Who Believe the Young Americans for Freedom is a Hate Group," where students posted messages suggesting ways to destroy YAF. One post suggested that members of the Facebook group "go to their meetings and . . . *vote eachother* [sic] *onto the board and dissolve the*

group."[2] The post further suggested that if YAF attempted to exclude these individuals from their meetings, they would likely "*slip up and break a [CMU] discrimination policy*."[3]

When the president of CMU's YAF chapter learned of this plan, he contacted the Associate Director of Student Life to ask if his group could prevent students who disagreed with the group's purpose from joining simply to ruin the group.[4] The Associate Director of Student Life responded that "*you may not require members to be 'like-minded'* as that opens yourself up to discrimination based on political persuasion."[5] By this administrator's understanding of CMU's nondiscrimination policy—which mirrors the understanding advanced by Respondents in the instant case—YAF was powerless to control its own message. Such a result illustrates the absurdity and unconstitutionality of defining "discrimination" so broadly as to prohibit student groups from requiring that those who would lead the group actually agree with the group's purposes.

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[2] Screenshots of Facebook.com Group Entitled 'People Who Believe the Young Americans for Freedom is a Hate Group,' Feb. 12, 2007, available at http://www.thefire.org/article/7878.html (emphasis added).

[3] *Id.* (Emphasis added.)

[4] E-mail from YAF President Dennis Lennox II to Director of Student Life Thomas Idema Jr., Feb. 20, 2007, available at http://www.thefire.org/article/7885.html.

[5] E-mail from Director of Student Life Thomas Idema Jr. to YAF President Dennis Lennox II, Feb. 20, 2007, available at http://www.thefire.org/article/7886.html (emphasis added).

In countless other cases, the call for derecognition of student groups has come from students or administrations hostile to the beliefs of those groups. In 2000, the student government at Pennsylvania State University informed its university's YAF chapter that the words of the group's constitution and mission statement, identifying rights as "God-given," constituted religious "discrimination" because the words reflected a "devotion to god."[6] YAF appealed this decision to a student-faculty Appeals Board, which unanimously denied YAF the right to be recognized as a student organization if it kept its "religious" language.[7]

In 2003, the Muslim Students Association (MSA) at Louisiana State University was told by the administration that in order to re-register, it would have to revise its constitution to prohibit discrimination on the basis of, among other things, religion and sexual orientation. The MSA contacted other religious student organizations who stated that they were not asked to make this change, leading the MSA to believe it had been singled out. When the MSA refused to adopt the clause, the university immediately derecognized it and revoked all of its privileges.[8]

At Ohio State University, members of the gay and lesbian student group Outlaw (whose Hastings chapter

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[6] Lou Marano, *Penn State Reverses Policy on Club*, United Press International, Mar. 26, 2001.

[7] *Id.*

[8] Letter from Foundation for Individual Rights in Education to LSU Interim Chancellor William Jenkins, Nov. 11, 2004, available at http://www.thefire.org/article/5431.html.

is a Respondent in the instant case) wrote to the dean in 2003 asking the law school to revoke the Christian Legal Society (CLS)'s student group recognition because its Statement of Faith violated university nondiscrimination policy.[9] In 2004, at Washburn University School of Law, a student filed a discrimination complaint against the school's CLS chapter after the group refused to allow the student, a member of the Church of Jesus Christ of Latter-Day Saints, to lead Bible study sessions in a manner contrary to CLS's tenets.[10] A similar situation precipitated *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), in which the Seventh Circuit issued an injunction against a public law school's application of its non-discrimination policy to violate the expressive association rights of a CLS chapter. Although no student who had sought membership with the group had been denied entry, a discrimination complaint was nevertheless filed against the group by students presumably hostile to the group's core beliefs.[11]

In all of these cases and many others, the universities ultimately acted to preserve the

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[9] *Christian Legal Society Chapter of the Ohio State University v. Holbrook*, No. 04-197 (S.D. Ohio 2004) (Complaint at 10–11).

[10] Erin Adamson, *Regents rethink rule; Faith-based group wants members to support tenets*, Topeka Capital–Journal, Nov. 18, 2004, *available at* http://cjonline.com/stories/111804/loc_legal.shtml.

[11] Declaration of Jeremy Richey, in support of Motion for a Preliminary Injunction, *Christian Legal Society v. Walker*, CV-05-4070 (filed June 7, 2005).

associational rights of the challenged student groups. They did so, however, largely because they became convinced that the First Amendment right of expressive association prohibited them from doing otherwise. At Central Michigan University, for example, the university explicitly cited the fact that the university would not "*oppose established principles as promulgated by the highest courts*" as a reason for revising its policies to allow student organizations to make belief-based membership decisions.[12] In the instant case, Respondents ask this Court to overturn those established principles and decimate the right to engage in expressive association free of undue government interference.

It is critical to note that CLS conditions eligibility for voting membership and leadership positions *not* on a student's innate sexual orientation, but rather on the student's *viewpoint* and avowed actual *conduct*. CLS does not prohibit gay or lesbian students from holding voting membership or leadership positions if the students share CLS's understanding of morality; indeed, CLS has never expelled a gay or lesbian student. Pet'rs' Br. at 7. CLS reasonably believes that sharing their view of morality—a view shared by other major religions—requires students interested in participating in the group to abstain from certain sexual conduct, both homosexual and heterosexual, including adultery and premarital sex. *Id*.

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[12] E-mail from Central Michigan University Office of Student Life to the Presidents of all Registered Student Organizations, Mar. 28, 2007, available at http://www.thefire.org/article/7882.html (emphasis added).

If permitted to stand, the Ninth Circuit's decision will have an impact far beyond the associational rights of CLS and other religious student organizations. By requiring student groups to "accept all comers as voting members even if those individuals disagree with the mission of the group," Hastings effectively eliminates the right to expressive association on its campus. *Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009). This impermissible result forces Christian student groups to accept avowed atheists as voting members, Muslim student groups to accept evangelical Christians, Jewish groups to accept anti-Semites, liberal groups to accept conservatives, and so forth. Indeed, under Hastings' policy, Intervenor-Respondent Outlaw would be required to accept as voting members students who not only believed that homosexual conduct was deeply immoral, but actively protested against such conduct.

Regardless of its intended result, Hastings' "accept all comers" policy actually *diminishes* the diversity of viewpoints on campus by preventing groups like CLS from voicing their worldview without interference from those who disagree. By restricting the ability of students to join in common belief, Hastings' policy seeks a manufactured "diversity" of beliefs *within* a group at the cost of a true diversity of beliefs *among* groups. Indeed, by requiring student groups to accept all comers regardless of agreement with the group's beliefs and stated mission, Hastings effectively limits what beliefs student groups may hold to only those viewpoints accepted by a majority of students. In this way, Hastings dictates what beliefs student groups may "officially" hold on campus.

In the landmark case *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court made clear that the government did not have the power to impose upon public school students any officially mandated position regarding morality, political ideology, or any other area of human knowledge and belief. There, the government could not force a student to pledge to the U.S. flag in violation of religious belief and personal conscience. As this Court wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*. at 642. If Hastings chooses to embrace a diversity of viewpoints on campus, it must do so by heeding the underlying principle in *Barnette*, and not by establishing a *de facto* orthodoxy to which its students are effectively forced to adhere.

Should this Court hold that belief-based organizations may not limit their voting membership and leadership to those who agree with the organization's purpose and worldview, organizations espousing unpopular viewpoints will find themselves powerless to avoid takeover and dissolution by students and administrators wishing to silence speech with which they disagree. Those holding minority viewpoints will be powerless to take advantage of the freedom of association that the First Amendment, in theory, guarantees. FIRE's decade of experience with students and administrators seeking to use any means at their disposal to censor controversial or unpopular viewpoints leaves us sadly confident that this would become a reality on many campuses.

B. Public University Administrators and Students Frequently Seek to Silence Protected Expression on Campus

This Court has long emphasized the essentiality of the First Amendment on campus. In decision after decision spanning decades, the Court has consistently affirmed the college campus' unique role as "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted). Indeed, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), this Court identified the fundamental link between robust freedom of expression at our public institutions of higher learning and the health of our republic, declaring that "[t]he essentiality of freedom in the community of American universities is almost self-evident . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995), it stated that "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." Thus, the Court has long recognized that "the university is a traditional sphere of free expression . . . fundamental to the functioning of our society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

In spite of this well-established jurisprudence, public colleges consistently violate their students' First Amendment rights, frequently at the behest of other

students. FIRE's research indicates that hundreds of public universities have enacted policies prohibiting constitutionally protected expression, while hundreds more have censored protected speech on an *ad hoc* basis. This institutional hostility to free speech has proven to be a corrupting influence on students, who, in often shocking ways, have in turn demonstrated a proclivity to restrict and disrupt speech with which they disagree. The sad reality is that many administrators and students have forgotten the essentiality of liberty where it needs to be most vigilantly protected—the university campus.

1. Students Actively Censor Unpopular Viewpoints on Campus

The Ninth Circuit's decision, which would allow motivated students to take over and dissolve a student group with a less popular viewpoint, gravely threatens the First Amendment because students already initiate far too many instances of campus censorship.

For example, FIRE has received reports of multiple incidents in which students destroyed anti-abortion displays, including an incident at Missouri State University in which students smashed dozens of small crosses placed by a pro-life student group on a campus lawn.[13] When one student who participated in the act of censorship was asked why she had done so, she replied, "Because I don't believe in what you stand for," adding

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[13] Steven Ertelt, *Missouri State University Students Vandalize Campus Pro-Life Cross Display* (Oct. 10, 2008), *available at* http://www.lifenews.com/state3545.html (last visited Jan. 29, 2010).

that "I feel like I have the right to walk across campus without seeing that."[14] In another case, a student at the University of Wisconsin–Stevens Point removed the crosses of a pro-life display, one by one, in broad daylight, rationalizing his actions by declaring, "Since [abortion] is a right, you don't have the right to challenge it."[15]

The theft, mass destruction, or even burning of campus newspapers expressing unpopular viewpoints is common on our nation's campuses. At Dartmouth College, for example, students offended by a satirical cartoon in a campus newspaper brazenly burned copies of the issue.[16] The cartoon depicted a conversation between Friedrich Nietzsche and a male college student about whether the student should take advantage of a drunken female student. Angered by the cartoon, offended students staged a mass-burning of the newspaper outside the newspaper's office. At the University of North Carolina–Chapel Hill, an administrator actually aided students in stealing copies of a student newspaper which was critical of a candidate

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[14] "MSU Bears for Life: Interview with student that vandalized the 'Graveyard of the Innocents,'" available at http://www.youtube.com/watch?v=vexOiSRpdTM&feature=related (last visited Jan. 29, 2010).

[15] "Cemetery of Innocents conflict," available at http://www.youtube.com/watch?v=t5NeLyMZUYM (last visited Jan. 29, 2010).

[16] Posting of Chris Beam to *IvyGate*, http://www.ivygateblog.com/2006/11/cartoon-scandals-so-hot-right-now/#more (Nov. 8, 2006) (last visited Jan. 29, 2010).

for student body president.[17] Supporters of the candidate stole approximately 1,500 copies of the issue, which was slated to come out on the day of the election, and deposited them in the office of the student attorney general. They were aided in their efforts by an administrator who provided keys to the building and allowed them to lock the newspapers inside.

At University of Massachusetts Amherst, students prevented distribution of a campus newspaper containing articles critical of a student group.[18] Angered by the newspaper's mocking of their organization, members of the criticized group physically prevented campus members from accessing copies of the paper and stole copies of the newspaper from a student intending to distribute them. Astonishingly, the university's student government responded to the incident by demanding that the student organization responsible for publishing the newspaper publicly apologize to the student for its constitutionally protected criticism, or else face derecognition by the student government.

At Johns Hopkins University, approximately 600 copies of a campus newspaper that had been distributed to the library were stolen because the issue in question objected to a recent campus appearance by a

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[17] Mike Adams, "UNC administrator implicated in newspaper theft," *Townhall.com*, Aug. 16, 2004, available at http://www.thefire.org/index.php/article/5275.html (last visited Jan. 27, 2010).

[18] Press Release, Foundation for Individual Rights in Education, UMass Amherst Stands by as Student Newspaper is Stolen and Censored (Apr. 16, 2009).

pornographic film director and contained a cover photo of the director along with members of the student group that had hosted him.[19] When the newspaper's editor attempted to report the theft, he was told by an administrator that the missing papers did not constitute theft. He was additionally informed that the paper would no longer be allowed to be distributed in residence halls—despite the fact that it, along with other campus publications, had previously been approved for distribution. In still another case, members of a sorority at Stetson University in Florida stole approximately 700 copies of a student newspaper in order to avoid negative publicity.[20] The issue in question reported on the relocation of sorority members after the university declared their sorority house to be in poor condition.

Often, students disrupt speech events on campus in order to silence speakers with whom they disagree, thereby brandishing an unconstitutional "heckler's veto." At the University of North Carolina–Chapel Hill, for instance, students disrupted a campus speech by former Virginia congressman Virgil Goode.[21] At Columbia University, student protestors physically prevented a speech by anti-illegal immigration activist

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[19] Press Release, Foundation for Individual Rights in Education, Student Newspaper Suffers Viewpoint Discrimination at Johns Hopkins University (Jun. 13, 2006).

[20] Marnette Federis, *Sorority Suspected in Student Newspaper Theft* (Oct. 25, 2006), *available at* http://www.splc.org/newsflash.asp?id=1357 (last visited Jan. 29, 2010).

[21] Posting of Robert Shibley to *The Torch*, http://www.thefire.org/article/10516.html (Apr. 24, 2009).

Jim Gilchrist.[22] At Washington State University, students repeatedly interrupted a fellow student's play, claiming they found the content of the play offensive, and even threatened the cast with violence.[23] The latter example is particularly instructive in that the students were placed in the audience by the university, which paid for their admission and later defended their actions as a "responsible" exercise of free speech. The case therefore demonstrates the powerful capacity of students and administrators working together to silence unpopular speech on campus.

These deplorable incidents demonstrate that many students stand all too ready to silence unpopular viewpoints through mob censorship. The Ninth Circuit's decision gives such students the most powerful and destructive tool yet with which to censor student groups espousing unpopular viewpoints.

2. University Administrators Actively Censor Unpopular Viewpoints on Campus

Instances of student-on-student censorship occur in addition to, and are encouraged and abetted by, public universities' own pervasive restrictions on campus speech. Such restrictions take two primary forms.

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[22] Nat Hentoff, *Mugging the Minutemen*, The Village Voice, Nov. 3, 2006.

[23] Press Release, Foundation for Individual Rights in Education, Washington State University Bankrolls Vigilante Censorship (Jul. 18, 2005).

First, many colleges and universities maintain unconstitutional speech codes—regulations prohibiting expression that would be protected in society at large—despite an unbroken string of successful challenges to such codes in federal and state courts dating back over two decades.[24] A 2009 report by FIRE, surveying 273 of the largest and most prestigious public institutions in the country, found that 71 percent of public colleges and universities maintain policies substantially restricting protected expression. Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses* (2009), 6. By their very existence, these restrictions impermissibly chill speech on campus and misinform students about what speech is and is not protected under the First Amendment.[25]

Second, public colleges and universities regularly enforce these speech codes to punish protected expression. For example, in 2007, Valdosta State University in Georgia expelled a student after he spoke in opposition to the university's plans to construct expensive parking garages on campus and created an online collage expressing his views.[26] The collage parodied the university president's references to the garages as his ultimate "legacy" and warned of the

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[24] *See infra* note 27.

[25] *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009).

[26] Press Release, Foundation for Individual Rights in Education, Valdosta State University Expels Student for Peacefully Protesting New Parking Garages (Oct. 24, 2007).

project's potential to cause harm to the environment. This act of protected expression led the university to label the student a "clear and present danger" to the campus. A federal civil rights lawsuit is now proceeding. *Barnes v. Zaccari*, No. 1:2008cv00077 (N.D. Ga., filed Jan. 9, 2008).

In another case, San Francisco State University's (SFSU's) College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags. Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting an SFSU "investigation" that lasted five months. In response, the College Republicans brought a constitutional challenge to SFSU's policies in federal district court. The court, siding with the College Republicans, ordered a preliminary injunction barring SFSU and other schools in the California State University system from enforcing several challenged policies, including a requirement that students "be civil to one another." The ruling also limited the California State University System's ability to enforce a policy prohibiting "intimidation" and "harassment." *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

During the past two years, Tarrant County College (TCC) in Texas has repeatedly prohibited members of Students for Concealed Carry (SCCC) on Campus from participating in a nationwide "empty holster" protest on TCC's campus. The empty holsters are intended to signify opposition to state laws and school policies denying concealed handgun license holders the right to

carry concealed handguns on college campuses. TCC forbade the protesters from wearing empty holsters anywhere on campus, even in the school's designated "free speech zone"—an elevated, circular concrete platform about 12 feet across. TCC informed students it would take adverse action if SCCC members wore empty holsters anywhere, strayed beyond the school's "free speech zone" during their holster-less protest, or even wore T-shirts advocating "violence" or displaying "offensive" material. Recently, after being told that this prohibition would continue, two TCC students filed suit in the United States District Court for the Northern District of Texas, Fort Worth Division, asking the court to ensure that they be allowed to fully participate in the upcoming protests and including a request for a temporary restraining order prohibiting the school from quarantining expression to its designated "free speech zone." The court has granted the students' motion and issued a temporary restraining order against TCC. *Smith v. Tarrant County College District*, Civil Action No. 4:09-CV-658-Y (N.D. Tex, Nov. 6, 2009).

Public colleges and universities, as well as their students, continue to demonstrate that the will to censor is robust on campuses. It is therefore dangerous to provide these institutions with arguable loopholes in the law that allow—indeed, invite—them to restrict expressive activity.

3. Public Colleges and Universities Will Exploit Any Arguable Loophole in the Law to Silence Unwanted or Unpopular Protected Speech

FIRE's experience demonstrates that colleges and universities will seize upon any arguable loophole in the law to restrict unwanted or unpopular expressive activity.

For example, one week after the United States Court of Appeals for the Seventh Circuit handed down its decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006) (holding that public universities may regulate the content of student newspapers in a manner similar to high schools), the general counsel for the California State University (CSU) system wrote a memorandum to CSU institution presidents in favor of campus censorship, relying on the *Hosty* decision for justification. The memorandum expressed the view that *Hosty* "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf (last visited January 20, 2010). *Hosty* in fact held that the university's decision in that case to censor a student newspaper may have been unconstitutional, but that the law was not "clearly established" in this area. 412 F.3d at 731, 738–39. The inclination on the part of the CSU system's general counsel to read openings in the law in favor of censorship is sadly common on college campuses. A decision by this

Court to uphold the Ninth Circuit's flawed ruling would likely result in a rush by college administrators across the country to derecognize unpopular or unwanted student groups.

Similarly, many universities continue to defiantly maintain harassment policies that restrict protected student speech, despite the fact that federal and state courts have consistently invalidated such policies on First Amendment grounds.[27] Across the country, institutions continue to misapply peer harassment law despite the guidance supplied by this Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding that peer harassment in education must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"). In addition to *Davis*, public college administrators have received policy guidance from the Department of Education's Office for Civil Rights in a 2003 open letter sent to all colleges that accept federal funding that clarified the relationship between sexual harassment policies and the First

[27] *See, e.g.*, *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *The UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Mich. 1993); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995). That every speech code to be litigated to a final decision has ultimately been struck down—and that not a single speech code has been upheld by a court—speaks to the well-established judicial consensus regarding the primacy of free expression on public campuses.

Amendment.[28] Nevertheless, public colleges across the country continue to maintain vague and overbroad harassment policies that restrict protected speech on campus, demonstrating a tendency to interpret the law in favor of campus censorship.

A decision by this Court to uphold the Ninth Circuit's erroneous ruling will send a message to public universities across the country that they may employ their nondiscrimination policies to deny the freedom of association of student organizations, thereby ignoring their obligations under the First Amendment. Given that universities have already demonstrated a proclivity to apply nondiscrimination policies against the associational rights of ideological student groups, a decision by this Court in favor of such practices will further embolden universities.

Universities have already proven all too willing to derecognize and punish student organizations wishing to associate around shared beliefs. In recent years, student groups have brought federal civil rights lawsuits in response to being denied recognition at public universities including Southern Illinois University–Carbondale, the University of Minnesota, Rutgers University, the Ohio State University, Pennsylvania State University, the University of North Carolina at Chapel Hill, Arizona State University, Southwest

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[28] "First Amendment: Dear Colleague" (Jul. 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html (last visited Jan. 20, 2010) (stating that federal harassment regulations "do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment").

Missouri State University, the University of Oklahoma, and the University of Florida. Other instances of denial of recognition that did not result in litigation have occurred at California State University–San Bernardino, Louisiana State University, Purdue University, Castleton State College in Vermont, the University of Arizona, the University of Wisconsin at Madison, the University of Wisconsin at Eau Claire, and Wright State University.

Given this recent history, a decision by this Court to uphold the Ninth Circuit's ruling will result in public colleges across the country denying recognition to student organizations that reasonably wish to limit voting membership and leadership to only those students who actually agree with the group's core tenets. Consequently, student organizations will be forced to make the unconstitutional choice between compromising their core beliefs and organizational message in order to gain official recognition, or preserving their associational identity at the cost of being denied the same access to university resources as other groups.

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND DISREGARDS THE CORE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSIVE ASSOCIATION

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

The First Amendment secures the right of freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (holding that "a corresponding right to associate with others in pursuit of a wide variety of . . . ends" is "implicit" in the First Amendment). Freedom to associate with others of like mind is a necessary corollary to the First Amendment freedom of expression because "the right to speak is often exercised most effectively by combining one's voice with the voices of others." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). Determining the conditions of one's associations without undue government interference is a "crucial" aspect of freedom of association because it prevents state coercion of "groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000). To ensure group autonomy, "freedom of association also plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Freedom of association therefore grants an organization the right to make belief-based membership decisions, including the decision to exclude from the organization those who do not share its core beliefs. Put another way, freedom of association at its core grants a right to "discriminate" on the basis of belief.

Distinguishing "discrimination" on the basis of *belief* from invidious discrimination based on *status* is critical. The right to exclude members based on status as opposed to belief does not follow from the right to form expressive organizations, because immutable characteristics such as one's skin color, gender, or sexual orientation do not define one's beliefs. However, the right to exclude people who do not share a common *belief* central to the group's purpose *is* fundamental to the right to expressive association.

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

The First Amendment's protections fully extend to the public university campus.[29] This extension encompasses freedom of association, as this Court has previously affirmed the importance of students' associational rights in the university setting.[30] That

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[29] *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1971) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

[30] *See id.* at 184 ("[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right . . . .") *See also Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding that by denying a religious student group the use of campus facilities for meetings, a public university violated the group's right to free exercise of religion and freedom of speech and association).

student groups at public colleges and universities have the same right as other private expressive organizations to limit membership based on shared beliefs was recognized by the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). The facts in *Walker* are directly analogous to those in the present case. In *Walker*, Southern Illinois University School of Law, a public law school, cited a violation of a nondiscrimination policy to deny recognition to the school's chapter of the Christian Legal Society (CLS) because the group's membership requirements excluded individuals who unrepentantly affirmed or engaged in homosexual conduct.[31] The Seventh Circuit held that forced inclusion would violate the group's expressive associational rights: "It would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. To the Seventh Circuit, the expressive association analysis was straightforward; the court observed that to ask the question of "whether application of SIU's antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity" was "very nearly to answer it." *Id.* at 862. Finding that the law school did not demonstrate a compelling state interest sufficient to justify its interference with the

[31] While expecting members to refrain from engaging in homosexual conduct—as well as premarital or extramarital sexual conduct—the Christian Legal Society accepted officers and members who had engaged in homosexual conduct in the past or who had homosexual inclinations but did not engage in or affirm homosexual conduct. *Walker*, 453 F.3d at 858.

group's associational rights, the Seventh Circuit issued a preliminary injunction ordering the group's official status to be restored. *Id.* at 867. The Ninth Circuit's ruling in the instant case contravenes the well-established Court jurisprudence that *Walker* upholds.

C. By Affirming *Truth v. Kent School District*'s Flawed Analysis, the Ninth Circuit's Decision Below Impermissibly Restricts the Right to Expressive Association at Public Colleges and Universities

Like *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), the sole precedent upon which it relies, the Ninth Circuit's perfunctory, one-paragraph opinion below misconstrues or simply ignores well-established First Amendment doctrine. *See Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009), *citing Truth*, 542 F.3d at 649–50.

In *Truth*, the Ninth Circuit held that a public high school did not violate the First Amendment rights of a Christian student group by denying the group's application for official recognition because the group required all voting members and officers to sign a "statement of faith" that the school claimed was in violation of its nondiscrimination policies. In upholding Kentridge High's denial of official recognition to Truth, the Ninth Circuit construed the school's extracurricular program offering funding, access to facilities, and other benefits to a wide variety of student groups as a limited public forum because the benefits granted to recognized groups rendered their expressive association "school-

sponsored." *Truth*, 542 F.3d at 648–49. It further held that the school's exclusion of Truth from that forum for refusing to abide by the school's nondiscrimination policy was permissible because such an exclusion need only be reasonable and viewpoint neutral. *Id.* at 649–50; *see also Truth v. Kent School District*, 551 F.3d 850 at 850–51 (9th Cir. 2008) (concurring in denial of rehearing *en banc*).

In the instant case, the Ninth Circuit relied exclusively on *Truth* in ruling that because Hastings' policy requires that "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group," the school's conditions for group recognition are "therefore viewpoint neutral and reasonable." *Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009). The Ninth Circuit's decision directly contradicts this Court's precedents and impermissibly restricts students' right to expressive association. If it is allowed to stand, student groups at public colleges and universities will find their right to assemble with others of like mind on campus in grave jeopardy or eliminated altogether.

1. *Truth* Applied the Wrong Standard of Review

In *Truth*, the Ninth Circuit erroneously applied a reasonableness standard in evaluating the student group's denial of recognition. The court applied a reasonableness standard after ruling that the student group's expressive association was sponsored by the school, and thus constituted participation in a limited

public forum as opposed to a public forum.[32] Because it deemed the group's speech to be "school-sponsored," the Ninth Circuit found limited public forum analysis to be controlling, without any reference to Truth's expressive association claim. In denying CLS's claim in the instant case, the Ninth Circuit again applied the limited public forum analysis employed in *Truth*.

But classifying the speech at issue in either *Truth* or the instant case as "school-sponsored"—a classification which the Ninth Circuit cited as justifying its limited public forum analysis—is unreasonable. Hastings recognized approximately 60 registered student organizations during the 2004–2005 academic year advocating on behalf of a wide range of ideological interests, including Intervenor-Respondent Hastings Outlaw, the Clara Foltz Feminist Society, Hastings Republicans, the Hastings Democratic Caucus, the Hastings Association of Muslim Law Students, and many more. Pet'rs' Br. at 3–4. Further, Hastings itself clearly disclaimed all sponsorship of registered student organizations, and required each organization to inform members and outside parties that it is not school-sponsored. Pet'rs' Br. at 4.

As if this explicit acknowledgment of non-sponsorship was not sufficient to render *Truth*'s justification for limited public forum analysis inapplicable to the instant case, this Court has repeatedly held that a public school providing funds and other resources, such as empty classrooms, to a variety

[32] *Truth*, 542 F.3d at 648–49 (emphasis added) (internal citations omitted).

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

Because the speech at issue both in *Truth* and in the instant case was *not* school-sponsored and thus private, the Ninth Circuit should have applied the strict scrutiny standard of review that governs regulation of private expressive association. *Roberts*, 468 U.S. at 623 ("Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

2. The Ninth Circuit Ignored the Expressive Association Claims at Issue, Allowing Forum Analysis to Swallow Expressive Association Whole

By failing to analyze the expressive association claims brought by Petitioner, the Ninth Circuit reduces freedom of association to a merely theoretical right, without the possibility of practical application or vindication.

This Court provided specific guidance in *Dale* for evaluating claims of undue government interference with expressive association: The government must prove its regulation furthers "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). But despite the obvious expressive association claims at issue in both *Truth* and the instant case, the Ninth Circuit's decision in each failed to impose *Dale*'s strict scrutiny requirement. Instead, as the dissent notes in *Truth*, the Ninth Circuit mistakenly applied "a *Rosenberger* 'free speech' analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* 'freedom of association' case (which deals with the formulation of the content of such speech)." *Truth*, 551 F.3d at 853 (Bea, J., dissenting).

Dale indeed is controlling and compels a different result. As in *Dale*, the government action at issue here forces CLS to fundamentally alter its expressive message and allows Hastings to "impos[e] its views on groups that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647–48. As in *Dale*, the government action here would "force the organization to send a message"—namely, that behaviors or beliefs patently inconsistent with CLS's mission are nevertheless unobjectionable positions for voting members and group leaders to hold and espouse. *Id.* at 653. This Court has held that a government actor cannot compel *indirectly* a result that it is constitutionally prohibited from achieving *directly*. *Healy*, 408 U.S. at 183. By permitting Hastings to

require CLS to change its organizational message before being allowed to broadcast it effectively, the Ninth Circuit has sanctioned precisely such unconstitutional government compulsion.

The Seventh Circuit correctly recognized the facts in *Walker* as presenting a "'forced inclusion' case," as in *Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).[33] Accordingly, the Seventh Circuit applied the *Dale* standard, holding that "[i]nfringements on expressive association are subject to strict scrutiny." *Walker*, 453 F.3d at 861. Finding that "CLS's beliefs about sexual morality are among its defining values," the Seventh Circuit concluded that "forcing [CLS] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* Critically, the Seventh Circuit distinguished the student group's expressive association claim from a concordant free speech claim, addressing each in separate sections of the opinion. This approach allowed each distinct First Amendment claim to be considered discretely, with the proper scrutiny, and in the correct analytical framework.

In sharp contrast, rather than accord expressive association a distinct analysis befitting its importance (and demanded by precedent), the Ninth Circuit in *Truth*—and, by extension, in the instant case—reduces expressive association to "simply another way of

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

speaking," indistinct from other speech claims. *Truth*, 542 F.3d at 652 (Fisher, J. concurring). In doing so, it robs expressive association of its unique value as "a correlative freedom" to other First Amendment protections, "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

3. In Contravention of This Court's Precedent, *Truth* Holds That Expressive Association May Be Violated to Further Government-Approved Viewpoints

In *Truth*, the Ninth Circuit held that the school's exclusion policy was justified because it would "instill[ ] the value of non-discrimination" in students. *Truth*, 542 F.3d at 649. Properly analyzed under strict scrutiny, however, this justification is clearly insufficient. The school could not have prevented the students in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), for example, from wearing their anti-Vietnam armbands on school property in order to instill the value of patriotism. *Tinker*, 393 U.S. at 512–14 (schools may regulate students' on-campus speech only when it causes "disruption of or material interference with school activities"). In violation of this Court's precedent, the Ninth Circuit's holding in *Truth* means that schools may violate students' fundamental associational rights in order to teach "correct" values. But this Court has repeatedly held that the state cannot interfere with expressive organizations' ability to form and to express their

messages "for no better reason than promoting an approved message." *Dale*, 530 U.S. at 661 (quoting *Hurley*, 515 U.S. at 579).

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

Addressing a program similar to the one at issue here, this Court held in *Healy* that a public university cannot require a student group to forego its expressive association rights in order to receive school recognition. *Healy*, 408 U.S. at 181–82. The Court stated in *Healy* that the fact that a student group maintains a "possible ability to exist outside the campus community" nevertheless "does not ameliorate" the unconstitutional burden placed on the student group by a denial of recognition. *Id.* at 183.

CONCLUSION

As this Court has long recognized, public colleges and universities serve as our nation's premier marketplaces of ideas, and students are entitled to the full enjoyment of their First Amendment rights on campus. Denying belief-based student groups the fundamental First Amendment right to associate around shared beliefs would thus be anathema to this Court's understanding of the role of public universities in our modern liberal democracy. Public universities may not exclude minority viewpoints and the organizations—religious and secular—that promote them. In *Barnette*, this Court protected "individual freedom of mind" rather than an "officially disciplined uniformity for which history indicates a disappointing and disastrous end." 319 U.S. at 637. Consistent with that principled decision, the Court should overturn the Ninth Circuit's ruling and uphold the freedom of association of public university students.

For all of the reasons stated above, this Court should rule in favor of Petitioner and reverse the Ninth Circuit's opinion.

Respectfully submitted,

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February 4, 2010