No. 08-1371

IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF LAW, *Petitioner*,
v.
LEO P. MARTINEZ, ET AL., *Respondents*.

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

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Brief of *Amici Curiae* National School Boards Association, National Association of Secondary School Principals, California School Boards Association, and School Social Work Association of America in Support of Respondents

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INTERESTS OF *AMICI CURIAE* [1]

The National School Boards Association is a non-profit federation of state associations of school boards, representing the 95,000 school board members who govern nearly 15,000 local school districts across the United States. These local public school districts serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. The California School Boards Association consists of the governing boards of school districts located in California.

The National Association of Secondary School Principals (NASSP) is the preeminent organization and the national voice for middle level and high school principals, assistant principals, and aspiring school leaders. NASSP promotes the intellectual growth, academic achievement, character development, leadership development, and physical well-being of youth through its programs and student leadership services.

The School Social Work Association of America (SSWAA) is a non-profit professional

[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 the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

organization promoting the importance of school social work in addressing barriers to student success. SSWAA members create linkages among schools, families, and communities and serve the mental health needs of students and families through early identification, prevention, intervention, counseling, and support.

Amici share a commitment to supporting and encouraging school boards and hundreds of thousands of local administrators in their efforts to promote effective learning environments that consistently reinforce the academic lessons and civic values it is their duty to impart to the heterogeneous population of children in grades K through twelve. As representatives of school boards and administrators, *amici* have an interest in implementing and enforcing reasonable nondiscrimination policies, including policies that in their educational judgment should be applied to school-funded or school-recognized student organizations. *Amici* also have an interest in ensuring that First Amendment law is clear so that school officials, without fear of liability, are able to adopt, implement, and enforce nondiscrimination policies that further educational objectives and respect the constitutional rights of all students while protecting educators and children alike from distractions from the academic mission.

SUMMARY OF ARGUMENT

I. Public school student groups do not have a constitutional right to public funding and other benefits of official school sponsorship while discriminating in contravention of the school's viewpoint-neutral open-membership policy. This Court has consistently held that the First Amendment has circumscribed application in the unique setting of public education, and the Court likewise has long recognized that school officials have broad discretion in managing school affairs. Public school districts are constitutionally permitted to further their vital educational mission by applying a neutral open-membership requirement to all school-recognized student groups.

A. An open-membership policy regulates non-expressive conduct, *i.e.*, bald discriminatory exclusion from the group. Such a policy does not regulate speech or prohibit a religious student organization from expressing in any way its faith and views. It also does not preclude groups from requiring their members with dissenting views to refrain from suggesting that the organization endorses those dissenting views.

B. To the extent that a school's non-discrimination policy regulates student speech, it is still constitutionally permissible. Under a limited-forum analysis, it is plainly viewpoint-neutral and eminently reasonable in light of the purposes of the educational forum.

C. In addition, a public school does not violate the First Amendment by declining to provide

taxpayer funds or attendant benefits of public school recognition to student groups that elect not to comply with an open-membership requirement. It is well-established that the government's decision not to subsidize the exercise of a fundamental right does not infringe the right. Indeed, student groups who wish to maintain exclusionary membership policies may choose to do so by simply declining to receive official school recognition.

II. Whether subject to intermediate scrutiny or a limited forum analysis, an open-membership requirement passes constitutional muster because it is content- and viewpoint-neutral and it furthers several substantial educational interests. School administrators are best situated to weigh the competing interests at work in the educational setting, and they should be given wide latitude in deciding whether to apply neutral nondiscrimination policies to student groups as a condition for receiving public funds or other benefits attendant to official school recognition. The need for such flexibility is particularly evident in the primary and secondary school environment, where students have widely varying ages, maturity levels, developmental needs, and socioeconomic backgrounds.

A. Studies show that student participation in extracurricular activities improves academic achievement. Notably, extracurricular activities may be especially valuable to students from disadvantaged socioeconomic backgrounds, a population often served by public schools. An open-membership requirement obviously furthers a school's legitimate interest in maximizing the

opportunities for students to participate in extracurricular student groups.

B. In addition to improved academic performance, studies demonstrate that participation in extracurricular activities enhances leadership, responsibility, and other civic values. Applying an open-membership policy to school-recognized and school-funded student groups therefore helps ensure for all public school students opportunities to develop social and leadership skills and other civic values. The policy thus furthers a school's substantial interest in inculcating fundamental values necessary to preserve democracy, including the development of social and leadership skills and the tolerance of divergent political and religious views.

C. A neutral nondiscrimination policy furthers the broad educational goals of public schools while at the same time protecting schools from burdensome administrative challenges and costly litigation risks. Forcing public schools to exempt certain student groups from an all-comers nondiscrimination policy would risk the perception of school-endorsed conduct or viewpoint—a heightened risk in the context of public primary and secondary schools, where students are younger and more impressionable. In addition, if school districts could not apply an open-membership policy to all student groups, school administrators would be in the untenable position of trying to assess the sincerity of the asserted religious or other expressive-based exclusion. Such significant administrative challenges would, at best, divert already stretched

resources and educators from the primary educational mission of public schools.

III. The Equal Access Act, 20 U.S.C. §§ 4071-4074, reinforces the need for school administrators to maintain flexibility in crafting reasonable policies and setting the terms and conditions of limited forum access. The Act prohibits public secondary schools from denying "equal" limited forum access to school-recognized groups based on the religious, political, philosophical, or other content of their speech. The plain terms of the Act require content and viewpoint neutrality. The Act therefore imposes no greater restrictions on public secondary schools than does the First Amendment.

ARGUMENT

I. A PUBLIC SCHOOL'S NEUTRAL NONDISCRIMINATION POLICY FOR RECOGNIZED STUDENT ORGANIZATIONS IS NOT SUBJECT TO STRICT SCRUTINY

This Court's precedents have consistently considered First Amendment claims by students against public schools in light of the unique setting of public education. Thus, while public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), their First Amendment rights "are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

Furthermore, this Court has repeatedly recognized that nothing in the Constitution "compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 n.4 (1988) (quoting *Fraser*, 478 U.S. at 686 (internal citation and quotation marks omitted)).

This Court also "has long recognized that local school boards have broad discretion in the management of school affairs." *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982) (plurality opinion). The need to balance free speech considerations with educators' responsibility for children is consistent with this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273.

In light of those general principles, this Court should reject petitioner's novel contention that public students have a constitutional right to engage in blatant discrimination while simultaneously demanding official school recognition for student-initiated clubs as well as public funding and other school-sponsored benefits. Rather, the Court should uphold its precedent allowing public schools to implement reasonable, viewpoint-neutral policies to advance legitimate, indeed laudable, educational interests.

A. Schools' Nondiscrimination Policies Regulate Conduct

Public schools may constitutionally regulate student conduct by limiting public funds and school recognition to those student groups that comply with a nondiscrimination or "all-comers" policy. Requiring student organizations that wish to receive such public benefits to abide by an open membership policy "affects what [student groups] must *do* . . . not what they may or may not *say*." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*F.A.I.R.*"), 547 U.S. 47, 60 (2006) (emphasis in original). This Court repeatedly has recognized that rules prohibiting discrimination regulate conduct. *See, e.g.*, *Wisconsin v. Mitchell,* 508 U.S. 476, 486-88 (1993) (recognizing Title VII and other antidiscrimination statutes as permissible content-neutral regulations of conduct); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389-90 (1992) (same); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (same). A student group's exclusion of potential members on the basis of religion or non-marital sexual activity also is not inherently expressive conduct entitled to First Amendment protection. *See F.A.I.R.*, 547 U.S. at 66 (reiterating that First Amendment protection extends "only to conduct that is inherently expressive," and distinguishing exclusion of military recruiters from inherently expressive conduct of flag burning).

As with many public school policies, the Hastings Law School nondiscrimination policy in this case does not restrict a group's expression or ability to communicate the group's message. For instance, nothing in the school's policy purports to

prohibit religious student organizations from expressing their views and faith. Conversely, nothing in the policy bars groups from requiring students with dissenting views to refrain from suggesting that the organization endorses the dissenters' views. In other words, groups remain free to set rules with respect to "inherently expressive" activities. For instance, to the extent the Christian Legal Society ("CLS") has members or leaders who engage in pre-marital sex, CLS presumably could require that members and leaders refrain from speaking or appearing at a CLS event with a t-shirt or banner advocating pre-marital sex or similarly refrain from passing out condoms to students while wearing a CLS t-shirt. An all-comers requirement simply regulates non-expressive conduct, *i.e.*, bald discriminatory exclusion from the group.

A school's non-discrimination policy is constitutional if it "furthers an important or substantial government interest . . . unrelated to the suppression of free expression," and any "incidental restriction" on speech "is no greater than is essential to further that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see Healy v. James*, 408 U.S. 169, 189 & n.20 (1972) (indicating that *O'Brien* intermediate scrutiny applies to the regulation of student group conduct that incidentally burdens expression).

B. A Nondiscrimination Policy, to the Extent It Regulates Speech, Is Subject to a Limited Forum Analysis

To the extent that a viewpoint-neutral all-comers policy regulates speech or burdens the associational rights of students, it is nonetheless constitutional as long as it reasonably furthers a legitimate governmental interest in the forum. This Court's cases addressing expressive association have applied heightened scrutiny because each case involved either a traditional public forum (where interests of private parties are at an apex) or a wholly private forum (where the government's regulatory interests are at their nadir). *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (public forum); *Roberts*, 468 U.S. 609 (private forum); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (private forum); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (private forum). By contrast, nondiscrimination policies adopted by public educational institutions are applied in a limited public forum where the balance of competing interests favors the government. Moreover, because expressive association is derivative of free speech rights, *see F.A.I.R.*, 547 U.S. at 68; *Roberts*, 468 U.S. at 622; *Rotary*, 481 U.S. at 544, expressive association rights in a limited public forum should be no greater than the free speech rights they are designed to further.

Under this Court's free speech precedents, public schools create a limited public forum by providing public funds and benefits to school-

sponsored student organizations. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (concluding that the university's student activities fund was limited public forum). Schools may regulate student expression in that limited forum in a viewpoint-neutral manner reasonably related to the purposes of the forum. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) (applying "[t]he standard of viewpoint neutrality found in the public forum cases" to the student activities fund at issue); *Rosenberger*, 515 U.S. at 830 ("The [Student Activities Fund] is a [limited public] forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

A neutral nondiscrimination policy, *i.e.*, one applied across the board to all school organizations, is not related to the suppression of viewpoint. Quite to the contrary, it is plainly viewpoint neutral. Laws prohibiting discrimination on the basis of enumerated factors, including religion, "make[] no distinctions on the basis of the organization's viewpoint," *Rotary*, 481 U.S. at 549, and are unrelated to the suppression of expression, *see Roberts*, 468 U.S. at 624 (public accommodations law "reflects the State's strong historical commitment to eliminating discrimination"). *See also Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878 (1990) ("[I]f prohibiting the exercise of religion . . . is not the object of the [provision] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). Not surprisingly, Petitioner

concedes the all-comers policy is "nominally neutral." Pet. Br. at 51.

Petitioner nevertheless argues that a concededly neutral policy is unconstitutional because it might have the "systematic effect" of burdening most heavily certain groups. *Id.* Petitioner's argument has been squarely rejected by this Court: "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."). Here, the school's purpose is entirely content-neutral, as all groups are subject to the same policy.

C. Student Organizations Do Not Have a Fundamental Right to Discriminate While Demanding School Recognition and Funding

Because this case involves a request for government funds, assistance, and recognition, the private interests at stake are relatively weak. Public schools do not infringe students' First Amendment rights simply by declining to support discrimination with taxpayer funds or to otherwise facilitate exclusionary policies that offend the school's educational mission. It is well-established that the government's "decision not to subsidize the exercise of a fundamental right does not infringe the right."

Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) ("The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected."); *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009). Given that the Constitution and many state and local laws prohibit public schools themselves from discriminating, *see*, *e.g.*, Resp. Br. at 34, it is hardly surprising that school administrators may decide that the same principles should apply to student organizations that choose to request official school recognition or public funds.

For public primary and secondary schools, moreover, a student's "First Amendment rights [are] circumscribed 'in light of the special characteristics of the school environment.'" *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (citation omitted). Thus, this Court has recognized that a public high school may decline to subsidize student speech even though the school may not freely prohibit that same speech: "The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood*, 484 U.S. at 270-71.

Recognizing the risk of perceived school imprimatur of student speech in a school-sponsored newspaper, the Court in *Hazelwood* upheld a high school's content-based decision not to subsidize particular student speech (there, student newspaper articles on pregnancy and divorce). *Id.* The Court

explained that, in carrying out the vital responsibilities entrusted to public educators, "a school must be able to take into account the emotional maturity of the intended audience" when assessing student speech issues and "refuse to sponsor student speech that might reasonably be perceived to advocate" conduct inconsistent with civic values "or to associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272.

Here, of course, the non-discrimination policy is content- and viewpoint-neutral. Petitioner, by contrast, argues that discrimination should be permitted based on the content of the group's message. But compelling a *content-based* exemption from a content-neutral nondiscrimination policy would risk that students and parents perceive public endorsement of a group's exclusionary practices. This risk is particularly acute in the context of public primary and secondary schools, where the line between school-endorsed expression and merely allowed expression is often blurred for young, impressionable students and their parents. *See id.* ("[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting."); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 96 (3d Cir. 2009) ("For elementary school students, the line between school-endorsed speech and merely allowable speech is blurred." (internal quotation marks omitted)).

II. A NONDISCRIMINATION POLICY SUBSTANTIALLY FURTHERS LEGITIMATE GOVERNMENTAL INTERESTS

Public schools should not be placed in a constitutional straightjacket that gives school administrators no choice but to permit school-sponsored or school-funded student organizations to discriminate. Public schools should be given wide latitude and flexibility to decide whether to adopt and implement neutral nondiscrimination policies for student groups as a condition for receiving public funds or other benefits, including official recognition. Many substantial governmental interests counsel in favor of establishing and enforcing open membership or other reasonable nondiscrimination policies. As set forth below, an all-comers requirement is reasonably related to the purpose of the public school's limited forum. Any incidental restriction on speech is no more than necessary to further the school's interest in equal access to student groups.

Importantly, school boards and public school administrators are best positioned to weigh the competing interests at stake in light of the "special characteristics" of the public school setting. For instance, public schools have heterogeneous student populations comprised of widely varying ages (ranging from five-year-old kindergarteners to eighteen-year-old high school seniors), maturity levels, developmental and special needs, and socioeconomic backgrounds. This Court has long recognized the distinct characteristics of primary and secondary public schools and the student populations that they serve, holding that the First

Amendment "must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266; *Morse*, 551 U.S. at 397 (same); *see also Fraser*, 478 U.S. at 682 ("the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"); *Southworth*, 529 U.S. at 239 n.4 (Souter, J., concurring) (noting that "high school[] students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education"). Primary and secondary schools must be able to implement reasonable policies—such as an open-membership policy for student groups—that account for the breadth of their institutional mission and the distinct pedagogical needs and developmental characteristics of their students.

A. Participation in Extracurricular Activities Improves Academic Achievement

A school may reasonably decide that requiring all student organizations to adopt an open membership policy maximizes student participation in student organizations and advances academic achievement. Improving student achievement is obviously a compelling objective of all primary and secondary public schools, especially in light of the No Child Left Behind Act.[2]

[2] *See generally* 20 U.S.C. § 6317 ("in order to increase the opportunity for all students . . . to meet . . . student academic achievement standards," statute requires school districts to implement state academic assessments and other indicators to assess whether a school is making adequate yearly progress).

Notably, several studies have concluded that student membership in extracurricular activities results in higher academic performance. *See*, *e.g.*, Herbert W. Marsh & Sabina Kleitman, *Extracurricular School Activities: The Good, the Bad, and the Nonlinear*, 72 HARV. EDUC. REV. 464, 501-02 (2002) (finding that extracurricular activity participation had beneficial effects on a variety of outcomes, including academic achievement and educational and occupational aspirations); Susan B. Gerber, *Extracurricular Activities and Academic Achievement*, 30 J. RES. & DEV. EDUC. 42, 48 (1996) (concluding that research "results are consistent with the argument that participation in [extracurricular activities] promotes greater academic achievement"); Herbert W. Marsh, *Extracurricular Activities: Beneficial Extension of the Traditional Curriculum or Subversion of Academic Goals?*, 84 J. EDUC. PSYCHOL. 553, 557 (1992) (finding that extracurricular participation had positive effects on several educational outcomes, including GPA); *see also* Juan Antonio Moriana, et al., *Extra-curricular Activities and Academic Performance in Secondary Students*, 4 ELEC. J. RES. EDUC. PSYCHOL. 35, 36 (2006) (finding that extracurricular participation "yielded better academic performance"); National Center for Education Statistics, *Extracurricular Participation and Student Engagement* (June 1995) (finding that extracurricular participation is positively associated with academic achievement, consistent attendance, and aspirations for continuing education beyond high school); Neil G. Stevens & Gary L. Peltier, *A Review of Research on Small-School Student Participation in Extracurricular Activities*, 10 J. RES.

RURAL EDUC. 116, 118 (1994) (finding that "students who participate in high school activities are more likely to have a higher grade-point average and better attendance records"). Extracurricular activity participation may be particularly beneficial to students from disadvantaged socioeconomic backgrounds—a population more likely to attend public schools. *See* Marsh & Kleitman, *supra*, at 508 (noting that the benefits of extracurricular activity participation "tend to be larger, certainly not smaller, for disadvantaged students").

B. Participation in Extracurricular Activities Free from Discrimination Provides Students with Opportunities to Develop Social and Leadership Skills That Advance Democracy

Education furthers "the very foundation of good citizenship" and is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Hazelwood*, 484 U.S. at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Public schools, particularly primary and secondary schools, also are entrusted to "'inculcat[e] fundamental values necessary to the maintenance of a democratic political system.'" *Pico*, 457 U.S. at 876 (Blackmun, J., concurring) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)); *see Fraser*, 478 U.S. at 681 (same); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized the public schools as a most vital civic institution for the preservation of a democratic

system of government." (internal citation and quotation marks omitted)).

The pedagogical objectives of public schools include the inculcation of civic values, such as "tolerance of divergent political and religious views." *Fraser*, 478 U.S. at 681. Creating a learning environment free from discrimination and fostering interaction, tolerance, cooperation, and mutual respect among students of widely varying backgrounds are integral and essential to the educational mission of American public schools. *See*, *e.g.*, *id.* at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").

Studies have shown that student participation in extracurricular activities "is likely to provide the opportunity for enhanced leadership, responsibility, and perseverance" and thereby helps develop important social and leadership skills. Stevens & Peltier, *supra*, at 118; *see also* Patricia A. Harrison & Gopalakrishnan Narayan, *Differences in Behavior, Psychological Factors, and Environmental Factors Associated with Participation in School Sports and Other Activities in Adolescence*, 73 J. SCH. HEALTH 113, 118 (Mar. 2003) (finding for adolescents that "participation in extracurricular activities other than sports appears to have a unique association with doing homework and avoiding alcohol use, marijuana use, and vandalism").

Accordingly, public schools have a strong interest in ensuring that *all* students have the

opportunity to develop social and leadership skills that result from participation in extracurricular student organizations. *See generally Southworth*, 529 U.S. at 233-34 (acknowledging the educational value derived from extracurricular activities); *id.* at 242 (Souter, J., concurring); *Rosenberger*, 515 U.S. at 824 (noting university's recognition that the availability of a broad range of extracurricular opportunities for its students tended to "enhance the University environment," and was related to its educational purpose); *cf. Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.").

C. A Neutral Nondiscrimination Policy Protects Schools from Burdensome Entanglements and Litigation Risks

Petitioner recognizes that a religious group's purported right to discriminate stops at the point it is invidiously based on race (or perhaps sex) *or*, in other words, at the point the exclusion is not necessary to protect its particular group identity or freedom of expression. Pet. Br. at 43. Schools may legitimately decide, however, that such a framework would be unworkable in practice, or worse, would seriously divert educators and administrators from their primary mission of *educating* and would expose the school to substantial risk of costly and protracted

litigation. An all-comers policy thus has the salutary effect of obviating the need for school administrators (and their counsel) to assess whether a student was permissibly excluded from participation in a school-recognized student group. Without an open-membership requirement, school administrators would need to make fact-intensive inquiries and judgments as to the sincerity of a student group's religious-based exclusion of a particular student.

If schools were unable to apply an all-comers requirement across-the-board to all groups, public schools would be forced to try to discern which extracurricular organizations engage in "religious" or other "group" expression such that permitting discrimination is constitutionally mandated. Schools invariably and quickly would become embroiled in controversies with no easy answers, such as deciding whether the ability to discriminate is necessary for the religious expression of organizations centered around yoga, Scientology, Kabbalah, or Branch Davidians, or whether a claim of religious expression is merely a veil for invidious discrimination. *Cf.* A. BURLEIN, LIFT HIGH THE CROSS: WHERE WHITE SUPREMACY AND THE CHRISTIAN RIGHT CONVERGE (2002); *Hsu v. Rosyln Union Free Sch. Dist. No. 3*, 85 F.3d 839, 869 (2d Cir. 1996) (noting that "[i]f authorized by the School, [a] private act of invidious discrimination by a student club also constitutes a state act of invidious discrimination" in violation of the Equal Protection Clause). Schools should not have to be caught in the crosshairs of cultural battles—accusations of religious discrimination and counter-accusations of religious favoritism—which

would seriously divert scarce resources and educators from their primary mission.

For example, suppose a student group seeks to exclude African-Americans and other non-Caucasians, from its membership or leadership because it claims that, according to its religious beliefs, members of the Caucasian race are God's (or Allah's or Elohim's or Jehovah's) chosen people. Or suppose a student group seeks to exclude women for asserted religious reasons. Regardless of whether the school administrator ultimately concluded that the asserted religious belief is sincere, the distraction from educational objectives that such line-drawing would create would likely be only compounded by the ensuing controversy if, for example, school administrators permitted one religious group to exclude a seventh-grade girl or waived an all-comers requirement for other groups asserting a spiritual ground for their exclusionary acts.

Nor could an easy line be drawn that would permit religious organizations to exclude certain students from leadership positions. Public schools would then have the unenviable task of determining which of the group's various leadership positions—treasurer, social chair, secretary, among others—involved duties integral to the group's religious expression. *See, e.g.*, *Hsu*, 85 F.3d at 857-58 (finding that club's president, vice-president, and music coordinator are "calculated" to affect the religious content of the club's speech, but the club's secretary and activities coordinator were not). Such distinctions "are not easy for anyone to draw (whether federal judges or school principals)," *id.* at

858 n.18, and forcing school administrators to engage in such line-drawing is neither sensible nor constitutionally required. Giving public school administrators the flexibility to adopt an all-comers requirement minimizes distractions from educational goals, including controversy from an actual or perceived personal bias or inconsistency in granting exemptions.

Public schools are already common battlegrounds for the cultural wars waged in this country. Calling upon school administrators to engage in such line-drawing would further increase the risk of costly litigation. Those student groups denied a requested religious exemption from an open-membership requirement might challenge the denial on First Amendment grounds. And those students excluded from groups to whom schools granted religious exemptions likewise might charge the school (or individual administrators) with unlawful religious favoritism. According to one recent report, three of California's five largest school districts collectively paid $32.8 million in litigation costs in 2005 alone. *See* Citizens Against Lawsuit Abuse, *The Fourth 'R' of California's School Districts: 'Ripped off by Litigation'* 4 (Jan. 2008). Higher insurance premiums resulting from increased litigation costs would only add to the strain on public school resources.

Particularly at a time when public school budgets are already stretched, the threat of costly litigation—including increased consultation with outside attorneys prior to making a potentially controversial waiver decision, as well as litigation and settlement costs should litigation ensue—would

negatively affect public education, educators and the children they serve.

In addition, decisions that have the effect of subjecting educators to litigation and personal liability, even decisions rendered in good faith, exacerbate the challenge of school boards in recruiting and retaining qualified education officials. *See, e.g.*, Sarah Redfield, *The Convergence of Education and Law: A Class of Educators and Lawyers*, 36 IND. L. REV. 609, 623 (2003) (quoting school district attorney's statement that "educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all").

In short, public secondary and primary schools must retain the ability to establish and uniformly apply reasonable, age-appropriate nondiscrimination policies, including policies that require school-recognized student religious groups to accept all comers. Their authority to do so is consistent with well-established First Amendment law.

III. A PROPER INTERPRETATION OF THE EQUAL ACCESS ACT REINFORCES THE NEED FOR SCHOOL ADMINISTRATORS TO HAVE WIDE FLEXIBILITY AND WORKABLE RULES

The Equal Access Act applies to all public secondary schools that receive federal assistance and have created a "limited open forum" by "offering [an] opportunity for one or more noncurriculum related

student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The Act bars schools from denying equal access to that forum "on the basis of the religious, political, philosophical, or other content of the speech at [a student group's] meetings." *Id.* § 4071(a). Consistent with this Court's First Amendment jurisprudence, the Act does not compel public schools to subsidize or endorse practices of student groups that opt not to comply with their neutral, generally applicable nondiscrimination policies. *Cf. Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

As discussed, rules conditioning public benefits on a nondiscriminatory access policy are *conduct* based, not speech based. *See*, *e.g.*, *F.A.I.R.*, 547 U.S. at 60; Section I.A, *supra*, pp. 8-10. The Act thus does not prohibit neutral regulations of student conduct. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990) (noting that through the Act, "Congress extended the reasoning of *Widmar* to public secondary schools"); *Widmar v. Vincent*, 454 U.S. 263, 277 & n.1 (1981) (prohibiting "exclusion from a public forum based on the religious content of a group's intended speech" but affirming the university's "right to exclude . . . First Amendment activities that violate reasonable campus rules"). Furthermore, because an all-comers requirement is content-neutral, it does not implicate the Act even if such a requirement were construed to regulate expression. By its terms, the Act is triggered only by content-based speech regulations. *See* 20 U.S.C. § 4071(a). Congress in passing the Act "clearly sought to prohibit schools from

discriminating on the basis of the content of a student group's speech." *Mergens*, 496 U.S. at 241; *see Truth v. Kent Sch. Dist.*, 542 F.3d 634, 646 (9th Cir. 2008).

Departing from the above principles, at least one lower court has held that conditioning access upon compliance with a neutral nondiscrimination policy violates the Act if the policy has the effect of burdening the speech of religious groups. For example, in *Hsu v. Roslyn Union Free School District No. 3*, the Second Circuit held that a public high school violated the Equal Access Act by denying forum access to a student religious group that required its officers to be Christians (contrary to the school's nondiscrimination policy). 85 F.3d at 850. The court concluded that the group was denied access on the basis of the religious content of its speech "to the extent that [its exclusionary officer policy] is reasonably designed to assure that a certain type of religious speech will take place at the Club's meetings." *Id.* at 856. As discussed above, however, determining whether a regulation is content-based by assessing its incidental effect on speech—as the *Hsu* court did—is an approach that has been squarely rejected by this Court. *See supra* p. 12 (addressing *Ward* and *Madsen*).

The Act mandates *equal* access; it should not be read to require public secondary schools to grant religious student groups *superior* access to a limited open forum. To interpret it as such would arguably compel public schools to become entangled in thorny and burdensome line-drawing and controversies that seriously detract from the primary mission of educators. *See supra,* pp. 21-24. Moreover, an

interpretation of the Act that grants superior access to religious groups would raise Establishment Clause concerns. *See Mergens*, 496 U.S. at 248-49 (finding that the Act did not offend the Establishment Clause because it offered access on identical terms to religious and non-religious groups, thereby conveying a message of neutrality); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (holding no Establishment Clause violation occurred where a student religious club sought "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups").

The Act by its plain terms does not grant religious student groups a right to unqualified access, and school administrators must maintain wide latitude to fashion workable, age-appropriate rules, including setting the terms and conditions for equal access to a limited open forum. "The Court has long recognized that local school boards have broad discretion in the management of school affairs." *Pico*, 457 U.S. at 863; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Because the Equal Access Act requires only that any access granted student groups be content neutral, the Act places no greater restrictions on schools than the First Amendment would require. To construe it otherwise not only would contravene the plain language of the Act, but would create uncertainty and significant administrative challenges that would detract from the vital educational mission of the nation's secondary schools.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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