No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES, ET AL.,
Plaintiffs-Appellants,

v.

SAN JOSÉ UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
Defendants-Appellees,

Appeal from the United States District Court
for the Northern District of California, No. 20-CV-2798
Honorable Haywood S. Gilliam, Jr.

BRIEF OF THE ROBERTSON CENTER FOR CONSTITUTIONAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL

Michael G. Schietzelt, Jr.
Robertson Center for Constitutional Law
REGENT UNIVERSITY SCHOOL OF LAW
1000 Regent University Drive
Virginia Beach, VA 23464
Tel. 757-352-4908

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Robertson Center for Constitutional Law is an academic center within Regent University School of Law, which has no parent corporation and issues no stock. Accordingly, no publicly held corporation owns ten percent or more of its stock.

s/ *Michael G. Schietzelt, Jr.*
Michael G. Schietzelt, Jr.

TABLE OF CONTENTS

INTEREST OF AMICUS 1

INTRODUCTION 1

ARGUMENT 3

I. The Equal Access Act Forbids Content-Based Regulations On Student Organizations' Speech 3

II. San José Unified School District Excluded FCA Because Of The Content Of Its Speech 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Educ. v. Mergens,
496 U.S. 226 (1990) ... *passim*

Christian Legal Soc'y v. Martinez,
561 U.S. 661 (2010) ... 6, 9

Clark v. Cmty. for Creative Non-Violence,
468 U.S. 288 (1984) ... 7

Gays & Straights for Equality (SAGE) v. Osseo Area Schs.,
471 F.3d 908 (8th Cir. 2006) ... 5

Hosanna-Tabor Evangelical Church & Sch. v. EEOC,
565 U.S. 171 (2012) ... 11

Hsu v. Roslyn Union Free Sch. Dist. No. 3,
85 F.3d 839 (2d Cir. 1996) ... 7, 9, 10

InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ., 534 F. Supp. 3d 785 (E.D. Mich. 2021) ... 10, 11

Mahanoy Area Sch. Dist. v. B.L.,
141 S. Ct. 2038 (2021) ... 4

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) ... 11

Pendleton Heights Gay-Straight All. v. S. Madison Cmty. Sch. Corp.,
2021 WL 6062961 (S.D. Ind. Dec. 22, 2021) ... 5

Prince v. Jacoby,
303 F.3d 1074 (9th Cir. 2002) ... 6

Reed v. Town of Gilbert,
576 U.S. 155 (2015) ... 6

Truth v. Kent Sch. Dist.,
542 F.3d 634 (9th Cir. 2008) .... *passim*

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 4

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 6

Statutes

20 U.S.C. § 4071 .... 3, 5, 6

Other Authorities

Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in
Support of Petitioner, *Christian Legal Soc'y v. Martinez*,
561 U.S. 661 (2010) (No. 08-1371) 2

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889 (2009) 1

Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*,
2008 BYU Educ. & L.J. 89 5

INTEREST OF AMICUS[1]

The Robertson Center for Constitutional Law is an academic center within the Regent University School of Law. Established in 2020, the Center pairs advocacy and scholarship to advance first principles in constitutional law, including separation of powers, religious liberty, and the rule of law. The Center has represented former members of Congress, Christian ministries, and others in matters before the Supreme Court of the United States and other appellate courts.

INTRODUCTION

Constitutional and statutory protections secure for minorities and majorities alike the right to hold views, espouse ideas, and form associations around shared values. These protections are "powerful all[ies]" for religious, political, and cultural minorities, allowing them to find their voices "in places where dominant public opinion" weighs against them. Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 937 (2009). In so doing, these laws guide our polity toward "[a] confident pluralism that conduces

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person or entity (other than *amicus* and its counsel) contributed money intended to fund the preparation or submission of this brief. All parties have consented to this filing.

to civil peace and advances democratic consensus-building." *See* Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371).

The Equal Access Act of 1984 is one such law, creating vital space in public secondary schools for all manner of student associations. The Act ensures equal access to a school's limited open forum for all student groups—whether they advocate Marx, Mises, Buddhism, or board games. Though the Act advances First Amendment values, it does so through a distinct analytical framework that expands the rights of campus groups.

As its name suggests, Fellowship of Christian Athletes (FCA) is a student association formed for student athletes who follow the Christian faith. Their meetings and their membership are open to all students. But students who desire to assume leadership roles within the organization must affirm FCA's Statement of Faith. Because of this requirement, the San José Unified School District has excluded FCA from its Associated Student Body (ASB) program. FCA brought this action, seeking relief under the Equal Access Act and the First Amendment.

In denying that relief, the lower court misapplied the Act's framework, collapsing a critical and long-recognized distinction in Ninth Circuit precedent between a group's general membership and its leadership. That error led the court to conclude, incorrectly, that the Defendants may exclude FCA from its ASB program. The Equal Access Act, applied according to this Court's relevant precedent, entitles FCA to its requested relief.

ARGUMENT

I. The Equal Access Act Forbids Content-Based Regulations On Student Organizations' Speech.

Under the Equal Access Act, public secondary schools receiving federal funding and creating a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against," student organizations because of the "content of the [organization's] speech." 20 U.S.C. § 4071(a). The Act reflects a "broad legislative purpose" to shield students' associational rights on public high school campuses. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990). Aimed specifically at ending "discrimination against religious speech in public schools," the Act's protections expand upon those in the First Amendment. *See id.* ("[A]s the language of the Act indicates, its sponsors contemplated that the Act

would do more than merely validate the status quo."). Thus, the Supreme Court has explained that the Act's protections should be interpreted broadly. *Id.*

Though *religious discrimination* prompted Congress to pass the Equal Access Act, the Act protects *all* students. As Justice Kennedy explained in his *Mergens* concurrence, the Act creates space on public high school campuses for student groups with all kinds of offbeat interests and unorthodox beliefs—even those "of a most controversial character." *Id.* at 259 (Kennedy, J., concurring). That protected space is most critical when a group's views challenge conventional wisdom. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' . . . That protection must include the protection of unpopular ideas, for popular ideas have less need for protection."); *cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order."). The Act has long protected the rights of disfavored groups—including sexual

minorities—to associate on equal terms with other student organizations. *See, e.g.*, *Gays & Straights for Equality (SAGE) v. Osseo Area Schs.*, 471 F.3d 908, 913 (8th Cir. 2006) (affirming a preliminary injunction because SAGE was denied equal access to benefits afforded other student organizations); *Pendleton Heights Gay-Straight All. v. S. Madison Cmty. Sch. Corp.*, No. 1:21-cv-02480-JRS-TAB, 2021 WL 6062961, at *2–3 (S.D. Ind. Dec. 22, 2021); *see generally* Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*, 2008 BYU Educ. & L.J. 89, 98–111 (collecting additional examples).

The Act establishes a distinct analytical framework. A public secondary school receiving federal funds violates the Act if it (1) establishes a limited open forum[2] and (2) excludes a student group from that forum (3) because of the content of the group's speech. 20 U.S.C. § 4071(a). A violation of the Act does not trigger balancing tests—like strict scrutiny—that otherwise would apply under the First Amendment.

[2] "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). This definition is one major distinction between the Act's framework and the First Amendment. *See Mergens*, 496 U.S. at 242.

At a minimum, this means that the school's basis for excluding the student group must be content neutral. *See Prince v. Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002). "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Specifically, under the Act, the relevant inquiry is whether the "content of the [organization's] speech" forms "the basis" of the school's decision to exclude the organization from the forum. 20 U.S.C. § 4071(a). So, while the First Amendment's limited public forum doctrine requires only that "access barriers" be "*viewpoint* neutral," *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 690 (2010) (emphasis added), the Act requires that exclusions be based on something other than *content*. The Act does not permit exclusions simply because the school demonstrates its "benign motive" or "lack of 'animus toward' " the organization's viewpoint. *See Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). The upshot is that a

school may apply a policy that complies with the First Amendment in a way that violates the Equal Access Act.

In other words, a facially neutral policy adopted for neutral reasons nevertheless may run afoul of the Act if applied to exclude a club because of the content of the club's speech. The Act does not provide a lower bar for facially neutral policies that incidentally burden speech. *See, e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (describing the analytical framework for incidental burdens on speech under the First Amendment). Nor does it exempt exclusions based on neutral application of facially neutral rules such as nondiscrimination policies. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 860 (2d Cir. 1996) ("The Act mandates that students be given 'equal access,' not that [a s]chool's internal rules be administered uniformly."). Indeed, the Act occasionally requires a school to grant "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express." *Id.*

These protections go beyond those offered by the First Amendment standing alone. School officials possess significant discretion to determine what is proper within a school's limited open forum. But the

Equal Access Act limits that discretion in public secondary schools receiving federal funds through "comprehensive regulation by federal law." *Mergens*, 496 U.S. at 259 (Kennedy, J., concurring). As a result, officials at those schools may not substitute their judgment for Congress's when regulating student clubs' speech.

II. San José Unified School District Excluded FCA Because Of The Content Of Its Speech.

The District Court denied Plaintiffs' request for a preliminary injunction, concluding that Plaintiffs were unlikely to prevail on their claim under the Act. In reaching this conclusion, the court misapprehended *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008).

In *Truth*, a group of students who wished to form a Bible club ("Truth") submitted a charter to the ASB Council at their school. *Id.* at 637. That charter restricted membership in Truth only to Christian students. *Id.* at 639. The ASB Council rejected Truth's charter. *Id.* Following this rejection, Truth sued for recognition.

The school advanced three reasons for excluding Truth from its limited open forum: "1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name 'Truth.' "

Id. at 644. The court looked only at the first of these justifications. *Id.* Concluding that the school's nondiscrimination policy was content neutral as applied to Truth's general membership requirements, the Court held that Truth's exclusion was consistent with the Equal Access Act. *Id.* at 647 ("[*T*]*o the extent they proscribe Truth's discriminatory general membership restrictions*, the policies do not implicate any rights that Truth might enjoy under the Act." (emphasis added)).

Truth's narrow focus on general membership requirements is crucial. The panel in that case explained that general membership requirements are not as likely to require a group to speak or refrain from speaking. *See id.* (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006)).

By contrast, restrictions on leadership requirements can profoundly impact a group's speech. To maintain the integrity of its message, a group must retain control over its messengers. *Martinez*, 561 U.S. at 680 (2010) ("[*W*]*ho* speaks on [a group's] behalf . . . colors *what* concept is conveyed."); *Hsu*, 85 F.3d at 856 ("[T]he principle of 'speaker's autonomy' gives a speaker the right, in some circumstances, to prevent certain groups from contributing to the speaker's speech, if the groups'

contribution would alter the speaker's message."). Leadership selection "is essential to the expressive content of [a group's] meetings and to the group's preservation of its purpose and identity." *Hsu*, 85 F.3d at 848; *see also InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 822 (E.D. Mich. 2021), *recons. denied*, 542 F. Supp. 3d 621 (E.D. Mich. 2021) ("Preventing groups . . . from selecting leaders who are in ideological agreement with the organization they propose to lead can undermine vital interests of maintaining the group's character and expressing its beliefs in a coherent and authentic way."). One might think of it this way: The leadership decides the content of the message that will be conveyed, while the membership is the audience that receives the message.

The Second Circuit has explained that " 'tests' of an officer's commitment to the group's cause allow the group to ensure that its agenda will be advanced at its meetings." *Hsu*, 85 F.3d at 860. For this reason, the panel in *Truth* strongly implied that its analysis would have been different had the student organization applied its restrictions only to leadership positions. *See* 542 F.3d at 647 (distinguishing between the general membership restrictions at issue in *Truth* and the leadership

restrictions at issue in *Hsu*); *id.* at 645 n.1 (noting that, of the three reasons given by the District for excluding Truth, "some" of them were "based on the content of Truth's speech"). *At most*, *Truth* held that when nondiscrimination policies regulate *who may join* a group, they are content neutral. But *Truth* expressly refused to extend this reasoning to policies that regulate *who may speak on behalf of* a group. As *Truth* and *Hsu* make clear, such policies are content based. And content-based discrimination is forbidden.

The Equal Access Act demands at least this much. Otherwise, schools could completely undermine religious speech on campus through nondiscrimination policies, requiring organizations to accept *as leaders* students who reject the organizations' beliefs. *InterVarsity*, 534 F. Supp. 3d at 822 ("If Plaintiffs were forced to accept faithless, non-Christians as faith leaders, . . . it is indisputable that the nature of Plaintiffs' religious group would fundamentally change."); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (explaining that "the selection of the individuals who play certain key roles" within a religious institution is "essential to the institution's central mission"); *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 565 U.S. 171, 200

(2012) (Alito, J., joined by Kagan, J., concurring) (noting that autonomy over selecting "those who serve in positions of leadership" is "essential to the independence of practically all religious groups"). This outcome is incompatible with Congress's aim of alleviating discrimination against faith-based student groups. *See Mergens*, 496 U.S. at 239.

In this case, the lower court collapsed the distinction between membership and leadership. It misinterpreted *Truth* and incorrectly concluded that the Defendants' policy does not regulate speech. The Defendants in this case *agree* that "student leaders" are expected to "communicate the message of the club" and are "important . . . for setting its direction." ER 906–07. Yet district officials excluded FCA solely because its student leaders must affirm a Statement of Faith that the district found objectionable under its policies. This is precisely the type of exclusion *Truth* described as being "based on the content of" an organization's speech.

This case is straightforward. The Equal Access Act reflects "a broad legislative purpose" to eliminate schools' restrictions on student organizations' speech. *See Mergens*, 496 U.S. at 239. Its protections must receive "[a] broad reading." *Id.*

Only FCA's leadership requirements are at issue. The record clearly establishes that FCA's meetings and membership are open to *all* students. And the distinction between membership and leadership is important. The district court failed to appreciate the importance of this distinction. As a result, it improperly narrowed the Act's protections. That decision threatens to erode protections for *all* student groups. While allowing students with opposing views to attend a club's meetings may not change the club's speech, *see Truth*, 542 F.3d at 647, allowing those same students to lead that club unavoidably would.

By excluding FCA from its ASB program because of FCA's leadership requirements, the Defendants have denied FCA equal access to a limited open forum based on the religious content of FCA's speech. This is a violation of the Equal Access Act, and it should be enjoined.

CONCLUSION

To preserve the rights of all marginalized groups, amicus respectfully requests that this Court reverse the district court.

Date: June 14, 2022

Respectfully submitted,

s/ *Michael G. Schietzelt, Jr.*
Michael G. Schietzelt, Jr.
Robertson Center for Constitutional Law
REGENT UNIVERSITY SCHOOL OF LAW
1000 Regent University Drive
Virginia Beach, VA 23464
Tel. 757-352-4908

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing amicus brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5), 9th Cir. R. 27-1(1)(d), and 9th Cir. R. 32-3(2), because it contains 2,560 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare this brief. I certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

s/ *Michael G. Schietzelt, Jr.*
Michael G. Schietzelt, Jr.

Date: June 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 14, 2022. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ *Michael G. Schietzelt, Jr.*
Michael G. Schietzelt, Jr.