

No. 04-35876

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRUTH, AN UNINCORPORATED ASSOCIATION, *et al.*,

Appellants-Plaintiffs,

v.

KENT SCHOOL DISTRICT, *et al.*,

Appellees-Defendants,

Appeal from a Judgment of the United States
District Court, for the Western District of Washington
Civil Case No. C-03-785
The Honorable Marsha J. Pechman

**BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES AND
AFFIRMANCE OF DISTRICT COURT'S RULING**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Anti-Defamation League states that it is a non-profit organization, has no parent corporation and does not issue any stock.

DATED: April 11, 2005

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STATEMENT OF AMICUS INTEREST

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic and religious discrimination in the United States, and to fight hate, bigotry and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's 92-year history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or of a non-minority group, and to assuring that each person receives equal treatment under the law. ADL believes that each person in our country has a constitutional right to be treated as an individual rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs amicus curiae urging that laws or practices are unconstitutional or illegal under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the nation's civil rights laws.¹

¹ See, e.g., ADL briefs amicus curiae filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Miller v. Johnson*, 515 U.S. 900 (1995); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

INTRODUCTION

Two facts about the proposed Bible club named "Truth" at Kentridge High School ("Kentridge School") are outcome determinative: (1) if approved, Truth will receive state funds from the school's Associated Student Body ("ASB"); and (2) Truth restricts general membership on the basis of religion in violation of the school's anti-discrimination policy. These two facts alone justify the district court's denial of ASB status to Truth under two separate and independent lines of legal doctrine.

First, use of public funds to support in any way an institution that discriminates against protected classes is contrary to fundamental principles of Equal Protection. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1982); *Norwood v. Harrison*, 413 U.S. 455 (1973).

Second, student clubs that have discriminatory general membership policies are strictly prohibited. *See, Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996).

Pursuant to the foregoing law, there can be no question that the district court properly denied Truth ASB status because of the club's exclusionary general membership policy based on religion, and its receipt of public funds. This amicus brief seeks further to demonstrate that the district court's ruling is supported by

sound public policy concerns that justify the distinct status accorded by our courts to schools in their efforts to combat discrimination and exclusion.

As discussed below, research uniformly shows that the negative effects of discriminatory practices and policies are most pronounced and enduring in our schools where our vulnerable youth struggle daily to arrive at a sense of self, as well as a sense of other students in an increasingly diverse environment. A non-discrimination policy serves as a foundation for inclusion, communication and co-operation amongst youth of all races, ethnicities, religions, cultures or sexual orientation. History bears witness to schools being both critical battlegrounds for and gateways to the elimination of discrimination in our society as a whole. We therefore must be particularly vigilant in enforcement of anti-discrimination policies in our schools.

For the foregoing reasons, ADL respectfully requests that this Court uphold the district court's ruling.

ARGUMENT

I. THE SUPREME COURT HAS LONG RECOGNIZED THAT ANY EDUCATIONAL INSTITUTION'S USE OF PUBLIC FUNDS TO SUPPORT DISCRIMINATION AGAINST PROTECTED CLASSES IS CONTRARY TO FUNDAMENTAL EQUAL PROTECTION PRINCIPLES.

The district court found that Truth would be receiving state funds from the ASB at Kentridge School. Order at p. 2.² It further found that Truth limited its general membership on the basis of religion. Order at pp. 5-6, 17-18. Such publicly-funded religious discrimination is contrary to fundamental constitutional principles of Equal Protection.

The Supreme Court discussed this doctrine at length in *Norwood*. In that case, parents of public school students in Mississippi brought a class action suit to enjoin in part the enforcement of the state's textbook lending program to private schools that discriminated in their membership on the basis of race. The Supreme Court held that the state was prohibited from providing free textbooks to those private schools that had discriminatory policies, because "[f]ree textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves." *Norwood*, 413 U.S. at

² "Order" refers to the district court's order dated September 23, 2004, granting defendants' motion for summary judgment, and denying plaintiffs' motion for summary judgment.

464. Since providing free textbooks was tantamount to the use of public funds, the Supreme Court stated:

[I]f the school engages in discriminatory practices[,] the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.

Id. at 464-465 (internal quotes and citations omitted). The Supreme Court concluded that a "State's constitutional obligation *requires* it to steer clear ... of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.* at 467 (emphasis added); *see, also, Bob Jones*, 461 U.S. 574 (private schools with racially discriminatory admissions policies were not entitled to tax exempt status).

As in the foregoing cases, the Constitution forbids the Kentridge School from using public funds to support Truth because of its discriminatory general membership policy.

II. HSU STRICTLY PROHIBITS EXCLUSIONARY GENERAL MEMBERSHIP POLICIES OF STUDENT CLUBS—SUCH AS TRUTH'S MEMBERSHIP POLICY.

As stated above, the district court found that Truth limited its general membership on the basis of religion. It further found that this practice violated the Kentridge School's anti-discrimination policy which provided that "equal

educational opportunity and treatment for all students in all aspects of the academic and activities program" regardless of religion. Order at 20. The law again is clear that discriminatory general membership policies of student clubs are strictly prohibited.

The district court followed the lead of *Hsu* which is the only published case to address the permissibility of restrictive membership by a student club in a public high school in violation of the school's anti-discrimination policy. At issue in *Hsu* was a student Bible club whose charter required that all of its officers be Christian. In determining whether the club could permissibly restrict its officers to members of the Christian faith, *Hsu* made clear in no uncertain terms that under no circumstances would discriminatory general membership policies be permissible.³ The court stated a "religious test for membership or attendance" was "plainly insupportable." *Hsu*, 85 F.3d at 858. The court further added that "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Id.* at 858 n.17.

³ Although not at issue in the present case, ADL respectfully disagrees with *Hsu* to the extent that it exempted leadership positions within non-curricular, student-led religious clubs from application of public school anti-discrimination policies. It is ADL's position that public schools have an overriding compelling state interest in uniformly applying such policies to club leadership and general members. This position, however, does not undermine the portion of *Hsu* directing application of anti-discrimination policies to religious clubs' general membership policies.

Hsu's bright line rule against discriminatory general membership policies prohibits the School from granting Truth ASB status.

III. COURTS HAVE RECOGNIZED THE DISTINCT STATUS OF SCHOOLS IN THE STRUGGLE AGAINST DISCRIMINATION.

Courts have long recognized the distinct status of schools in the battle against discrimination. The cases discussed in this brief amply illustrate this point:

- The Supreme Court in *Norwood* stated, "discriminatory treatment exerts a pervasive influence on the entire educational process." 413 U.S. at 469.
- The Supreme Court in *Bob Jones* stated, "[t]he governmental interest at stake here is compelling. ... [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education.... That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of religious beliefs." 461 U.S. at 604. This principle is not limited to racial discrimination, but applies to other forms of invidious discrimination such as religious discrimination. *See, Norwood*, 413 U.S. at 467.
- The Second Circuit in *Hsu* captured this principle by holding that "since the students' right to expressive association here is based on a statute applicable to public schools—where free speech rights receive somewhat *less* protection generally—it is *not* at all apparent that a governmental

interest need be 'compelling' to override the expressive association rights at issue here." 85 F.3d at 859 (emphasis added). The school has valid concerns and grounds for prohibiting exclusionary clubs because "a club's discriminatory policies would disadvantage, subordinate, or stigmatize the excluded students, debase the morals of students who practice the exclusion, or frustrate the teaching of the 'fundamental values necessary to the maintenance of a democratic political system." *Id.* at 871.

As discussed below, extensive public policy research fully justifies the distinct status accorded to schools in the fight against discrimination.

IV. THE GOVERNMENT'S INTEREST IN ENFORCING ANTI-DISCRIMINATION POLICIES IS PARTICULARLY COMPELLING IN THE SCHOOL CONTEXT.

A. Schools Today Are Faced With The Problems Of Discrimination In Its Various Forms And The Harms That Result From It.

Schools, like our nation as a whole, are faced with tensions and conflicts among people of different characteristics and backgrounds, many of which are born out of the exclusion of certain groups from various aspects of our society.

See, e.g., Educational Resources Information Center Development Team, *ED414113 1997-10-00 Improving Ethnic and Racial Relations in the Schools*, at

<http://www.eric.ed.gov> (recognizing "conflicts among students of different backgrounds" and noting that "[m]any patterns of racial and ethnic group relations

in our schools are based on the ways that members of a given racial or ethnic group have been included or excluded within American society.”). Such exclusion of people who are different often arises out of prejudice—defined as “an attitude, opinion, or feeling formed without prior knowledge, thought or reason”—and discrimination—defined as “differential treatment that favors one individual, group, or object over another.” See National Association of School Psychologists, *Position Statement on Racism, Prejudice, and Discrimination*, at http://www.nasponline.org/information/pospaper_rpd.html (defining prejudice and discrimination).

Prejudice and discrimination in schools today take various forms, ranging from subtle to overt. In schools, name calling and acts of social exclusion are common examples of discriminatory behavior and prejudicial thinking. With respect to social exclusion, researchers have found that, left to their own devices, students in multiethnic schools “tend to resegregate themselves.” See Educational Resources Information Center Development Team, *ED414113 1997-10-00 Improving Ethnic and Racial Relations in the Schools*, at <http://www.eric.ed.gov>. For example, members of an ethnic group may exclude members of other groups from friendship cliques and social activities and may try to limit the status and popularity of members of other groups. *Id.* Schools must strive to prevent, and certainly must not formally approve in the form of an official school group, this

type of discriminatory exclusion. Such discriminatory exclusion can lead to racial and ethnic conflicts, which distract students' focus from academics. *Id.*

Discriminatory exclusion and the conflicts that arise from it can, at their worst, rise to more serious forms of discrimination, such as ongoing harassment and, at the most extreme, bullying⁴ and even hate crime⁵.

⁴ Bullying may be verbal (e.g., taunting, malicious teasing, name-calling, threats), psychological (e.g., spreading rumors, manipulating social relationships, or promoting social exclusion, extortion, or intimidation), or physical (hitting, kicking, spitting, pushing).” See California Department of Education, Counseling and Student Support Office, *Bullying at School*, at 7 (2003) (hereinafter “*Bullying at School*”); Tonja R. Nansel, Mary Overpeck, Ramani S. Pilla, W. June Ruan, Bruce Simons-Morton, & Peter Scheidt, *Bullying Behaviors Among US Youth: Prevalence And Association With Psychosocial Adjustment*, JAMA, Vol. 285, No. 16, April 25, 2001, at 2094 (hereinafter “*Bullying Behaviors Among US Youth*”). Student bullying is, at least in part, born out of prejudice or children’s intolerance of differences in their peers. One study reported that 61.6% of victims of bullying were belittled about their looks or the way they spoke. See *Bullying Behaviors Among US Youth* at 2097. The same study showed that 25.8% of bullying victims were belittled about their religion or race. *Id.* The California Department of Education also has recognized that bullying can be hate-motivated—including taunting one’s race, religion, national origin, sexual orientation, or physical or mental disabilities. See *Bullying at School* at 8.

⁵ Hate crimes are criminal offenses that are “motivated by an offender’s bias against a race, religion, disability, sexual orientation, or ethnicity.” See United States Bureau of Justice Statistics, Special Report, *Hate Crimes Reported in NIBRS, 1997-1999*, September 2001, NCJ 186765, at 1 (hereinafter “*NIBRS Hate Crimes Reports*”). According to FBI hate crime reports from 1997 to 1999, more than a third of hate crime offenders (31% of violent offenders and 46% of property offenders) and nearly a third of hate crime victims were under 18 years of age. See *NIBRS Hate Crimes Reports* at 1, 4. Moreover, these FBI reports showed that 12% of hate crimes occurred at school or college. *Id.* at 1, 6.

ADL does not assert that the exemption from Kentridge School's anti-discrimination policy sought by Truth would result in hate crime or violent bullying. Indeed, we think it highly unlikely. Nonetheless, Kentridge School's policy is appropriate, because hate crime and bullying pose a serious threat to our nation's public school students and studies on these issues, which will be discussed in sub-point B(2) *infra*, confirm that anti-discrimination policies and policies of inclusion are effective tools for reversing attitudes of prejudice and bigotry which left unchecked can lead to hate-motivated violence.

Discrimination in schools can cause numerous significant harms to students. To name only a few, discrimination leads to the development of feelings of worthlessness, lower achievement in schools, higher school drop-out rates, and lower aspirations for the future. See National Association of School Psychologists, *Position Statement on Racism, Prejudice, and Discrimination*, at http://www.nasponline.org/information/pospaper_rpd.html (defining prejudice and discrimination). The most serious forms of discrimination cause the destruction of students' academic, social, psychological and physical well-being.⁶ In fact,

⁶ See Tonya R. Nansel, Wendy Craig, Mary Overpeck, Gitanjali Saluja, W. June Ruan, & the Health Behavior in School-aged Children Bullying Analyses Working Group, *Cross-National Consistency in the Relationship Between Bullying Behaviors and Psychosocial Adjustment*, 58 Archives of Pediatric Adolescent Medicine 730, 733-34 (August 2004) (cross-national study showing that "youth involved in bullying—as bully, victim, or both—consistently reported significantly

students' academic potential and their social, psychological and physical development and well-being depend on their ability to learn in a *safe and inclusive* environment. *See infra* pages 13-15. Therefore, schools must be supported in their policies that prohibit discrimination and exclusion and instead promote inclusion and the ultimate well-being of all students.

B. Schools Must Promote An Environment Of Inclusion And A Sense of School Membership Among All Students In Order To Prevent Discrimination and Victimization Among Students And To Foster Students' Academic, Social, Psychological and Physical Well-being.

Schools can and should play a vital role in supporting our nation's goals of non-discrimination and equality. Because schools are both educating and socializing institutions, schools have the potential and the obligation to establish frameworks that challenge discrimination, exclusion, and intolerance, and instead promote safety, fairness, respect for, and inclusion of people of different religions, races, ethnicities, cultures, genders or sexual orientations. That is the goal of non-discrimination policies in public schools and that goal must be supported for the welfare of all students. Indeed, a failure to support programs that prohibit discrimination and promote respect for diversity can exacerbate the various

higher levels of health problems, poorer emotional adjustment, and poorer school adjustment than noninvolved youth"); People Reaching Out Uniting Diversity, *Frequently Asked Questions About Hate Crime 3*, at <http://www.walkproud.org/faqs.asp> (explaining that hate crimes can cause a debilitating psychological disorder, known as posttraumatic stress disorder, with symptoms such as intense

inequities and social tensions present in the hallways of our nation's schools today. We must strive to prevent that and instead to promote the inclusion and well-being of all students.

1. Ensuring A Sense Of Inclusion And Membership Leads To Students' Overall Well-Being.

Creating a school culture of membership and inclusion, as opposed to discrimination and exclusion, has been linked to greater academic, psychological, behavioral and even physical well-being among students and fewer incidents of in-school victimization.

One study, conducted by a research scientist in Canada who looked at 2,400 ninth grade students, found that a positive school culture led to feelings of school membership among students and that students "reporting a strong sense of school membership were in turn less likely to report academic and behavioral difficulties and poor mental health." See David DeWit, Christine McKee, Jane Fjeld, & Kim Karioja, Voices for Children, *The Critical Role of School Culture in Student Success*, December 2003, at 4, available at www.voicesforchildren.ca. In that study, a student's sense of school membership was measured based on the student's feelings of: (1) classmate support, (2) teacher support, (3) acceptance/respect and inclusion in activities, (4) acceptance/respect from teachers, and (5) general acceptance and belonging. See David J. DeWit & Kim Karioja,

feelings of vulnerability, anger, depression, physical ailments, learning problems,

Centre for Addiction and Mental Health, *Sense of School Membership: A Mediating Mechanism Linking Student Perceptions of School Culture with Academic and Behavioral Functioning (Baseline Data Report of the School Culture Project)*, August 2002, at 109 (hereinafter “*School Culture Project*”).

Data from the study showed, specifically, that students with a strong sense of school membership reported less frequent use of substances, lower thrill-seeking behavior, fewer incidents of in-school victimization, lower levels of school misconduct, fewer disciplinary referrals, lower rates of truancy, better grades, and fewer symptoms of depression, anxiety, and externalizing behavior problems. See *School Culture Project* at 1-2; Mark Totten and Perpetua Quigley, Canadian Public Health Association Discussion Paper, *Bullying, School Exclusion And Literacy*, at 20 (May 2003).

Along similar lines, a study conducted on students in eighth through twelfth grades showed that students’ feelings of being included—being respected and accepted by their peers—were a major determinant of students’ expectations for their own futures. See Moshe Israelashvili, *School Adjustment, School Membership, and Adolescents’ Future Expectations*, 20 *Journal of Adolescence* 525, 533 (1997). In other words, this study found that the more students feel accepted by their peers, the more positive they are about their futures. Such

and difficulties with interpersonal relationships).

positive future expectations in turn lead to other positive outcomes, such as more active coping mechanisms, positive cognitive functioning, enhanced socio-emotional adjustment at school, health, and longevity. *Id.* at 525-26.

2. Ensuring A Sense Of Inclusion And Membership And Fostering Students' Learning About Each Other's Similarities And Differences Is Also Necessary To Prevent Discrimination And Related Acts Of Hate, Such As Bullying And Hate Crime, That Sometimes Result From Discrimination.

Organizations that have studied problems of discrimination and discriminatory behaviors such as bullying and hate crime in schools have recommended combating these problems with, among other things, policies of inclusion that can lead to opportunities for students to learn about their similarities and differences. For example, one such organization, the Educational Resources Information Center (“ERIC”), has recommended that schools expose “students and teachers to accurate information about other groups” to allow “them to learn about intergroup similarities and differences.” *See* Educational Resources Information Center Development Team, *ED414113 1997-10-00 Improving Ethnic and Racial Relations in the Schools 4*, at <http://www.eric.ed.gov>. Such an approach recognizes that “[a]s students and educators gain knowledge about other groups and their histories, they will be more likely to respect members of those groups and cooperate with them.” *Id.* ERIC recommends that schools pursue structures and policies to promote intergroup contact, encouraging students from different social

groups to pursue joint activities and cooperative learning. *Id.* A non-discrimination policy that prohibits groups from excluding students who are different furthers this goal of promoting intergroup contact, activities and learning.

Organizations have recommended similar approaches to address the serious problem of bullying in schools, which can be a form of prejudice and discrimination against students who are different. The California Department of Education (“CDE”) has recognized that one factor contributing to bullying in schools is “a lack of awareness of or responsiveness to individual differences, including those related to ethnicity.” *See* California Department of Education, Counseling and Student Support Office, *Bullying at School*, at 15 (2003). To prevent bullying, the CDE has recommended “[f]ostering student relationships” by “identifying an appreciation for differences in culture or customs.” *Id.* For example, schools are encouraged to “[p]rovide schoolwide and classroom activities designed to build students’ self esteem” and teachers are encouraged to “[i]ncorporate activities that foster mutual understanding and appreciation” among students. *Id.* at 19-20. The National Resource Center for Safe Schools has recommended similar policies of inclusion to prevent bullying, such as: providing “cooperative learning activities to reduce social isolation,” discussing “how [students] are different and how they are the same,” and promoting “friendship between students who differ from each other.” *See* National Resource Center for

Safe Schools, *Recognizing and Preventing Bullying*, Fact Sheet No. 4 (Winter 1999).

Similarly, to prevent discrimination rising to the level of hate crimes in schools, the California Department of Education has called on schools to “ensure that students understand the concept of diversity” by “teach[ing] students about the many *similarities* they share in common with people whose race, religion, sexual orientation, or culture may differ from their own.” *See* California Department of Education, Counseling and Student Support Office, *Bullying at School*, at 24 (2003). The CDE has specifically called on schools to support those student-led groups “that promote appreciation and respect for people’s differences and encourage and promote the dignity, physical safety and emotional safety, and support of all students.” *Id.* at 27. Likewise, the United States Department of Education has recommended, among other things, that schools promote integration in school-sponsored activities so that “[y]oung people can begin to interact across racial and ethnic lines” and “[m]ulti-ethnic teams of students can work together on community service projects, to organize extracurricular events, or to complete class projects.” *See* U.S. Department of Education, *Preventing Youth Hate Crime: A Manual for Schools and Communities* 5, at <http://www.ed.gov/offices/OESE/SDFS> or <http://www.usdoj.gov/topical.html>.

3. Non-Discrimination Policies Such As The One Developed And Implemented By Kentridge Are Policies Of Inclusion That Serve To Eliminate Prejudice And Discrimination And To Promote Students' Overall Well-Being.

A non-discrimination policy, such as that adopted and implemented by the Kentridge School, is a policy of inclusion that embraces the exact principles discussed in the foregoing sections. A non-discrimination policy serves as a foundation for inclusion and the elimination of discrimination by literally prohibiting the exclusion of groups of youths based on characteristics such as race, ethnicity, religion, culture, gender, sexual orientation, or disabilities. Requiring student groups to be inclusive creates the opportunity for students to interact with people of different backgrounds in school groups and activities and to learn from and about each other in the process. Having such a non-discrimination policy is clearly consistent with the approaches recommended by organizations that have studied the problems of discriminatory exclusion, bullying and hate crime in schools, and is supported by research that shows that feelings of inclusion and membership lead to students' overall well-being. Thus, a non-discrimination policy could not be more central to promoting inclusion and students' overall well-being and to eliminating prejudice and discrimination in all forms. As such, ADL respectfully submits that this Court must give great weight to and support Kentridge School's interest in implementing its non-discrimination policy.

CONCLUSION

For all the foregoing reasons, ADL respectfully requests that this Court uphold the district court's ruling.

Dated: April 11, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32(a)(7)(c), I certify that this Brief is double-spaced (except for footnotes and quotations) and is printed in a proportionately spaced typeface of 14 points, and contains 4,025 words.

DATED: April 11, 2005

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