UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GSA Network, et al.,	§	CIVIL ACTION NO.
	§	4:25-cv-04090
Plaintiffs,	§	
	§	
v.	§	JUDGE CHARLES ESKRIDGE
	§	
Mike Morath, et al.	§	
	§	
Defendants.	§	

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY
IN SUPPORT OF PLAINTIFFS

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STATEMENT OF INTEREST

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors with student chapters at approximately 135 law schools nationwide. CLS embraces biblical teachings on sexual conduct and marriage. As the Supreme Court has stated, "Among [CLS'] tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman" and a person should not "engage[] in 'unrepentant homosexual conduct.'" *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 672 (2010).

A core CLS mission is to protect religious students' equal access to school facilities. CLS represented a student group seeking to meet for Bible study in the first high school equal access case heard by the Supreme Court, *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). CLS represented a religious student group in an early Equal Access Act case before the Court, *Garnett v. Renton School District No. 43*, 874 F.2d 608 (9th Cir. 1989), *cert. granted, vacated, and remanded*, 496 U.S. 914 (1990), *on remand*, 987 F.2d 641 (9th Cir. 1993). CLS has defended religious student groups' right to require that their leaders agree with the groups' religious beliefs, including beliefs about sexual conduct and marriage in *Martinez* and *Fellowship of Christian Athletes v. San Jose Unified School District*, 82 F.3d 664 (9th Cir. 2023) (en banc).

CLS has also defended parents' right to direct the moral and religious upbringing of their children through amicus briefs in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), and *Troxel v. Granville*, 530 U.S. 57 (2000). CLS has defended religious individuals' and institutions' religious exercise and speech rights against LGBT nondiscrimination claims through amicus briefs in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), *Fulton v. City of Philadelphia*, 593

U.S. 522 (2021), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018).

CLS believes that pluralism, essential to a free society, prospers only when the free speech rights of all Americans are protected—regardless of the current popularity of their speech. CLS was instrumental in passage of the Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-74, that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 128 *Cong. Rec*. 11784-85 (1982) (Sen. Hatfield statement) (recognizing CLS' work). For four decades, the landmark EAA has protected both religious and LGBT student groups seeking to meet at their schools. CLS files this brief because of the EAA's importance in protecting religious students' right to meet.

SUMMARY OF ARGUMENT

A state law that denies LGBT students their rights under the EAA could easily be adapted by another state to deny religious students their rights under the EAA. Court decisions protecting LGBT students' EAA rights necessarily reinforce religious students' EAA rights.

This brief focuses solely on one discrete section of Senate Bill 12. Texas Education Code § 33.0815(b) prohibits school districts from "authoriz[ing] or sponsor[ing] a student club based on sexual orientation or gender identity." Section 33.0815(b) prohibits what the EAA requires and therefore "must yield" to the EAA's requirements. *Garnett v. Renton Sch. Dist.*, 987 F.2d 641, 646 (9th Cir. 1993).

Congress enacted the EAA in response to a Fifth Circuit decision denying high school students permission to meet for prayer and Bible study at school. *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1045-46 (5th Cir 1982). As introduced,

the EAA applied only to religious groups' meetings. But to secure passage, it was broadened to protect "religious, political, philosophical, or other content of the speech." 20 U.S.C. § 4071(a).

This language helped the Supreme Court uphold the EAA's constitutionality in *Board of Education v. Mergens*, 496 U.S. 226, 249 (1990). The Court set forth core principles to guide lower courts' consideration of EAA claims. One principle demolishes Defendants' claim here that § 33.0815(b) regulates government speech: "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250. Nor does a school sponsor or endorse a student group's speech protected by the EAA.

Defendants assert that *Christian Legal Society v. Martinez,* 651 U.S. 661 (2010), rescues § 33.0815(b). But *Martinez* actually reveals § 33.0815(b)'s unconstitutionality.

Federal courts have consistently applied the EAA to protect LGBT groups. An exception is *Caudillo v. Lubbock Independent School District*, 311 F. Supp. 2d 550 (N.D. Tex. 2004). Because it was narrowly decided based on two facts specific to the particular school district and student group, *Caudillo* does not salvage § 33.0815(b)'s blanket ban prohibiting all school districts from authorizing any LGBT group.

ARGUMENT

I. The Equal Access Act ("EAA") Protects Students' Ability to Meet for "Religious, Political, Philosophical, or Other" Speech.

President Reagan signed the EAA on August 11, 1984, after it passed the Democratic-controlled House (337-78) and the Republican-controlled Senate (88-11). Judge Ken Starr,

who as Solicitor General of the United States defended the EAA in the Supreme Court, characterized "[t]he concept behind the act" as "straightforward." Ken Starr, *Religious Liberty in Crisis*: *Exercising Your Faith in an Age of Uncertainty* 61 (2021). "If a secondary school received any federal funds, and the school allowed one or more student-led extracurricular groups to meet on campus, then the school was obliged to provide 'equal access' to all extracurricular groups, including religious groups." *Id.* at 61-62.

The EAA's plain text makes it unlawful for:

> *any* public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, *any* students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, *or other content of the speech* at such meetings.

20 U.S.C. § 4071(a) (emphasis added). If one noncurriculum-related student group meets, a school may not deny equal access to another student group based on the "content of the speech at such meetings." *Id.* at § 4071(b).

The Texas Legislature adopted Texas Education Code § 33.0815, which permits school districts to "authorize or sponsor a student club" but prohibits districts from "authoriz[ing] or sponsor[ing] a student club based on sexual orientation or gender identity." School districts are on the horns of a dilemma: if a school district complies with § 33.0815(b), it violates the EAA. But public secondary schools nationwide must comply with the EAA regardless of contrary state law. "The EAA provides religious student groups a federal right. State law must therefore yield." *Garnett v. Renton Sch. Dist.*, 987 F.2d 641, 646 (9th Cir. 1993) (citing the Supremacy Clause, U.S. Const., Art. VI, § 2).

A. Congress passed the EAA in response to decisions by the Fifth and Second Circuits.

As the Supreme Court explained, Congress enacted the EAA "in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239. *See* Starr, *Religious Liberty in Crisis* 72-73.

These troubling decisions arose in the Second and Fifth Circuits. *Mergens*, 496 U.S. at 239. In *Brandon v. Guilderland Board of Education*, 635 F.2d 971 (1980), the Second Circuit held that a religious student group could be denied permission to meet for prayer before school. The court claimed that allowing a few students to meet for prayer might violate the Establishment Clause by creating an impression of school endorsement that was "too dangerous to permit." *Id.* at 978.

In *Lubbock Civil Liberties Union v. Lubbock Independent School District*, the Fifth Circuit adopted *Brandon*, including its "too dangerous to permit" language. 669 F.2d 1038, 1045-46 (5th Cir 1982). Utilizing the now-discredited *Lemon* test, the court held that the Establishment Clause was violated by a school district allowing students to meet for religious speech on the same basis as other student groups. *Id.* at 1044-47.

B. To secure passage, the EAA was expanded to protect "religious, political, philosophical, or other content of the speech."

When introduced, the EAA protected only religious student groups' meetings. H.R. 5345, 98th Cong. (1984). Because Speaker O'Neill refused to allow the EAA to be brought to the floor, Chairman Carl Perkins of the House Education and Labor Committee obtained a floor vote using a special procedure called "Calendar Wednesday," which required a two-thirds

supermajority for passage. In May 1984, the EAA won a majority but fell short of the two-thirds requirement.

To obtain additional votes, Chairman Perkins accepted numerous amendments, including expanding protection to "religious, political, philosophical, or other content of the speech at the meetings." H.R. 1310, 98th Cong. (1984). The expanded bill passed the Senate, 88-11, in June 1984. On July 25, 1984, the EAA passed the House, 337-77. President Reagan signed the EAA on August 11, 1984.

That the expansion would allow "homosexual groups" to meet was discussed in the floor debates. On the day of the second House vote, a *New York Times* editorial warned that the EAA would "admit a little prayer before or after classes, but in a perversely liberal way: it would also admit some atheism, politics and perhaps even homosexual agitation on an equal basis." "Schoolhouse Free-For-All," *New York Times*, July 25, 1984. This editorial was entered into the record at the beginning of the floor debate by a leading opponent of the EAA. 129 *Cong. Rec*. 20937-38 (July 25, 1984) (statement of Rep. Edwards). An EAA supporter, Rep. Dan Coats (R-IN), responded that "[s]ocialists, homosexuals, and vegetarians already have their hour under the court interpretation. We are simply trying to add the right of students after hours to meet for religious purposes as these others have the right." *Id.* at 20940 (statement of Rep. Coats).

II. In *Mergens*, the Supreme Court Announced Core Principles for Applying the EAA.

The Supreme Court, 8-1, held that the EAA did not violate the Establishment Clause and lower courts should interpret its terms broadly to ensure equal access for religious students'

meetings. *Mergens*, 496 U.S. at 226. A high school student sought equal access for a Bible Club at her school, which the board refused. The Court held the EAA required the Bible Club be given official recognition, access to school media, and reserved meeting space like other noncurriculum-related groups at the school enjoyed. *Id.* at 247. The Court rejected the board's claim that none of the school's 30 student groups was noncurriculum-related and, therefore, the EAA did apply. The Court's broad test for determining whether student groups are noncurriculum-related has meant that the EAA is easily triggered. The Court also ruled that the EAA did not violate the Establishment Clause.

The Court's opinion prescribed core principles for lower courts to follow. Under these principles, § 33.0815(b) cannot be reconciled with the EAA.

A. The EAA must be broadly interpreted to prevent discrimination against students' meetings because of the content of their speech.

The Court emphasized that the EAA "reflects at least some consensus on a broad legislative purpose" "to address perceived widespread discrimination against religious speech in public schools." *Id.* at 239. The Court concluded that "[a] broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes." *Id.* The Court chose "a commonsense interpretation of the Act that is consistent with Congress' intent to provide a *low threshold* for triggering the Act's requirements." *Id.* at 239-240 (emphasis added).

The Court affirmed that "even if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs*, on the basis of the content of their speech*, equal access to

meet on school premises during noninstructional time." *Id.* at 236 (emphasis supplied); *id.* at 240 (same).

A Ninth Circuit judge recently elaborated on the EAA's protection of the content of a student meeting in *Fellowship of Christian Athletes v. San Jose Unified School District*, 82 F.4th 664 (9th Cir. 2023) (en banc). There the Ninth Circuit held that the First Amendment and the EAA protected a religious student group's equal access to official recognition and its benefits. *Id*. at 694 n.12. In concurring, Judge Forrest provided an in-depth analysis of the EAA, observing that "the First Amendment and the EAA are not coextensive." *Id.* at 702 (Forrest, J., concurring) (citing *Mergens*, 496 U.S. at 241-42). Critically, "a school subject to the EAA is *categorically* prohibited from discriminating based on the content of a group's speech, regardless of whether the school's policy or regulation is reasonable." *Id.* (original emphasis).

First Amendment precedent, however, does inform what the EAA means by "content of the speech." *Id.* at 703. To that end, the Supreme Court has made clear that a law "is content based where it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Id.* at 703 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). "A policy may be content based where the policy itself contains content-based distinctions or because the policy cannot be justified without reference to speech content." *Id.* (citing *Reed*, 576 U.S. at 163-64).

Section 33.0815(b) is a content-based restriction. As such, it violates the EAA's requirement that student groups not be denied equal access based on the content of their speech.

B. State and local officials must not circumvent or evade the EAA.

School officials may not "arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content" because "[t]his is exactly the result that Congress sought to prohibit by enacting the [EAA]." *Mergens*, 496 U.S. at 234. Schools may not "evade the Act." *Id.* at 244. Government officials may not "render the Act meaningless" or "circumvent the Act's requirements." *Id.* at 234. Courts are to examine "a school's actual practice rather than its stated policy" in determining compliance with the EAA. *Id.* at 244.

Contrary to the Court's interpretation in *Mergens* of Congress' directive, § 33.0815(b) "arbitrarily den[ies] access to school facilities to an[] unfavored student club on the basis of its speech content." *Id.* at 234. A Florida federal district court found that "not a single case supports [the school district's] position that it can avoid the EAA's dictates by excluding specific open forum subgroups of this type." *Gay-Straight All. of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F. Supp. 2d 1233, 1237-38 (M.D. Fla. 2009). Otherwise, "[i]f this strategy was available, a school board could, for example, refuse to provide a limited open forum for discussions regarding religion, totally defeating the EAA's goal of protecting school based religious groups." *Id.*[1]

[1] The EAA does permit the parental consent requirement for club participation as required by § 33.0815(c) as long as the requirement is applied evenhandedly to all noncurriculum-related student groups. *See Gonzalez v. Sch. Bd. of Okeechobee Cnty.* 571 F. Supp. 2d 1257, 1268 (S.D. Fla. 2008).

C. Contrary to Defendants' assertion, a student group's speech at its meetings is not government speech or government-endorsed speech.

Mergens flatly contradicts any claim that § 33.0815(b) merely regulates government speech. Its Establishment Clause holding rests on the basic understanding that students' speech is private speech, not government speech. "[T]here is a *crucial difference between government speech* endorsing religion, which the Establishment Clause forbids, *and private speech* endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (emphasis supplied). The speech of student groups meeting under the EAA's aegis is not government speech. *See Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022) (community group's religious flag on government flagpole at city hall not government speech).

Neither is it government-*endorsed* speech. As the Court explained, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 15 (1984).

Mergens rejected the argument that "because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would . . . endorse participation in the religious club, and provide the club with an official platform to proselytize other students." 496 U.S. at 247-248. Instead, "[a] school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student groups to do, does not convey a message of state approval or endorsement." *Id.* at 252. Relying on Congress' factfinding, the Court echoed that "secondary school students are mature enough and are likely to understand that a school does not endorse or support

student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250. The "broad spectrum of officially recognized student clubs" and the "fact that students are free to initiate and organize additional student clubs" "counteract any possible message of official endorsement." *Id.* at 252.

Because § 33.0815(a) ensures a "broad spectrum of officially student clubs," an LGBT student groups' speech is not government-endorsed speech unless the school or school officials take affirmative steps to endorse it. School officials' "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students." *Id*.

D. The EAA protects controversial student speech, setting parameters that state and local officials must respect in making decisions regarding student groups.

Justices Kennedy and Scalia, observed that "[i]t must be apparent to all that the Act has made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law." *Id*. at 259 (Kennedy, J., concurring joined by Scalia, J.) ("This decision, however, was for Congress to make, subject to constitutional limitations.") The two justices agreed "that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind." *Id.*

The Court affirmed that "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." *Id.* at 241. As Judge Starr noted, "[t]he Court sustained federal legislative

power to regulate local school authorities receiving federal funds and to prohibit them from discriminating against religious perspectives." Starr, *Religious Liberty in Crisis* 65.

E. *Martinez* demonstrates § 33.0815 is unconstitutional.

Defendants cite *Christian Legal Society v. Martinez,* 561 U.S. 661 (2010), to defend § 33.0815(b)'s ban on student clubs. But, correctly understood, *Martinez* actually establishes its unconstitutionality.

In its 5-4 decision, *Martinez* held that the Constitution permitted—but did not require—a law school to have a novel "all-comers" policy requiring a religious student group to accept as leader a student who did not agree with its religious beliefs—but only if the policy was applied uniformly to *all* student groups. *Id.* at 694-97. The Court found that the policy "draws no distinction between groups based on their message or perspective." *Id.* at 694. The policy was viewpoint neutral because the school's requirement was "'justified without reference to the content [or viewpoint] of the regulated speech.'" *Id.* at 696 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (original brackets)).

The en banc Ninth Circuit rejected a school district's reliance on *Martinez* and held the First Amendment and the EAA protected a religious student group. *Fellowship of Christian Athletes*, 82 F.4th at 694 n.12. "Fairly read, *Martinez* affirms that the District's All-Comer's Policy as applied is neither neutral nor generally applicable, and thus is subject to strict scrutiny." *Id.* at 694. Concurring, Judge Forrest emphasized that *Martinez* did not allow government to "'single out organizations for disfavored treatment because of their points of view.'" *Id.* at 704 (quoting *Martinez*, 561 U.S. at 694)).

Because § 33.0815(b) targets specific student clubs based on the content and viewpoint of their speech, it violates the First Amendment under *Martinez*.

III. State Law Must Yield to the EAA.

No state has passed a law like § 33.0815(b) that directly conflicts with the EAA's requirement that public secondary schools not deny student groups equal access based on the content of their speech. "The EAA provides religious student groups a federal right. State law must therefore yield." *Garnett*, 987 F.2d at 646 (Washington State Constitution must yield). *See also, Prince v. Jacoby*, 303 F.3d 1074, 1084 (9th Cir. 2002) (Washington State administrative regulations must yield); *Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 883 (9th Cir. 1997) (California State Constitution must yield). The Third Circuit noted *Garnett*'s conclusion that "the Equal Access Act preempts contrary state law." *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3rd Cir. 1993).

In *Garnett*, the district court had ruled that the Washington State Constitution precluded the EAA from "requiring the use of school premises by a religious club," concluding the "EAA does not preempt the Washington State Constitution." 987 F.2d at 643-44. The Ninth Circuit reversed, invoking the federal Constitution's Supremacy Clause. Preemption is inferred where "it is impossible to comply with both [the EAA and the state law]" or where "the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Id.*

Section 33.0815(b) must yield to the EAA, as it stands as an obstacle to Congress' objective in the latter.

IV. The EAA Protects LGBT Student Groups' Meetings.

Lower courts consistently have held that the EAA protects LGBT student groups. As two courts have observed, "when passing the EAA, Congress did not pass an Access for All Students Except Gay Students Act." *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1142 (C.D. Cal. 2000); *Yulee*, 602 F. Supp. 2d at 1236.

The Eighth Circuit ordered equal access for an LGBT student group. It emphasized that "[o]nce triggered, the EAA forbids a school from prohibiting other groups, based on the content of their speech, from having 'equal access' to meet on school premises." *Straights and Gays for Equality v. Osseo Area Schools-Dist. No. 279*, 540 F.3d 911, 913-14 (8th Cir. 2008).

Federal district courts in Kentucky, Utah, Indiana, California, and Florida have held that the EAA protects LGBT student groups' access. *Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty.*, 483 F. Supp. 2d 1224, 1227 (S.D. Fla. 2007). *See, e.g.*, *Pendleton Heights Gay-Straight All. v. South Madison Cmty. Sch. Corp.*, 577 F. Supp. 3d 927, 929 (S.D. Ind. 2021); *Yulee*, 602 F. Supp. 2d 1233; *Boyd Cnty. High Sch. Gay Straight All. v. Bd. of Educ. of Boyd Cnty., KY*, 258 F. Supp. 2d 667, 688-91 (E.D. Ky. 2003); *Colin*, 83 F. Supp. 2d 1135; *Franklin Cent. Gay/Straight All. v. Franklin Twp. Cmty. Sch. Corp.*, 2002 WL 32097530 (S.D. Ind. 2002); *East High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000); *East High Gay/Straight All, v. Bd. of Educ.,* 81 F. Supp. 2d 1166 (D. Utah 1999).

An exception is *Caudillo v. Lubbock Independent School District*, 311 F. Supp. 2d 550 (N.D. Tex. 2004), wherein a court scrutinized one student group's request in one school district. But here, § 33.0815(b) violates the EAA by categorically banning student groups in all school districts based on their speech.

CONCLUSION

For the above reasons, the Court should hold that § 33.0815(b) violates the EAA.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the total number of words in this amicus brief, exclusive of the matters designated for omission, is 3,935 words as counted by Microsoft Word Software.

/s/Steven T. Collis
Steven T. Collis

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December 2025, a copy of the forgoing document was served via this Court's electronic filing system to all counsel of record and will be emailed to any counsel who have not yet appeared.

/s/Steven T. Collis
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