No. 22-15827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES,
AN OKLAHOMA CORPORATION, ET AL.

Plaintiffs-Appellees,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Defendants-Appellants,

Appeal from the United States District Court for the
Northern District of California

4:20-cv-02798-HSG (Hon. Hayward S. Gilliam, Jr.)

BRIEF OF AMICI CURIAE STATE OF MONTANA AND 22 OTHER STATES AFTER GRANT OF REHEARING EN BANC SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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INTERESTS OF AMICI CURIAE

The States of Montana, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia ("States") have compelling state interests in protecting the First Amendment rights of their citizens, including students attending public schools.[1] The amici States additionally have an interest in ensuring that all students, regardless of viewpoint, have a place in the public school system and that school officials do not favor secular student groups over religious ones.

INTRODUCTION

Non-discrimination laws can serve an admirable goal, but not when government officials weaponize these laws to target religious groups. In the school setting, these non-discrimination laws—by their own terms—threaten to eliminate most affinity groups that students form to advance specific, unique interests. The fact that affinity groups exist, though, indicates that these non-discrimination laws often (and necessarily) apply

[1] The amici States file this brief under Ninth Circuit Rule 29-2(a), which permits them to file an amicus brief "when the Court has granted rehearing … without the consent of the parties or leave of court."

inconsistently. That's how these non-discrimination laws become, in fact, discriminatory—they permit government officials to enforce them against groups those officials find objectionable, like religious groups. But the First Amendment does not permit "the government to single out private religious speech for special disfavor." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022). It instead "counsel[s] mutual respect and tolerance … for religious and nonreligious views alike." *Id.*

The clash between religious liberty and non-discrimination policies came to a head in the San Jose Unified School District (the "District"). Fellowship of Christian Athletes ("FCA") unites two passions—faith and athletics. FCA exists in thousands of schools nationwide and has been part of the District's community for over a decade. But in recent years, FCA—like many religious organizations—has come under attack.[2]

In San Jose, a District teacher announced that FCA holds "bullshit" views and that the District should treat FCA the same as a KKK club. This launched a campaign that led the District to revoke institutional benefits to FCA clubs District-wide. At the same time, the District

[2] *E.g.*, *Bozeman High students challenge Christian FCA club for not being inclusive*, NBC MONT. (Nov. 13, 2019), https://perma.cc/Y4UV-LHDK.

approved a new student club—The Satanic Temple Club—which students formed to openly mock and protest FCA's meetings.

The District's actions violate both the Free Exercise and Free Speech clauses. Yet, in the face of outrageous facts and overwhelmingly contrary precedent, the district court concluded that FCA was not entitled to a preliminary injunction. But a three-judge panel of this Court stepped in, correctly holding that the district court's misfire was an abuse of discretion. That victory was short-lived. The full Court vacated the panel decision and granted rehearing en banc.

The District violated FCA's First Amendment rights in several ways. First, for three independent reasons, the District's actions violate the Free Exercise Clause and fail to survive strict scrutiny. Second, the District's actions violate the Free Speech Clause because they discriminate based on viewpoint and do not reasonably further the forum's purpose. Each of these challenges, alone, shows a clear constitutional violation. But together, they show a pattern of targeted discrimination against an organization that espouses values the District doesn't like.

BACKGROUND

FCA welcomes all students to become members and participate in the organization. But those seeking leadership roles in the organization must affirm and conduct themselves according to FCA's Statement of Faith, which recites basic tenets of orthodox Christian doctrine. Relevant here, that includes commitments to traditional beliefs about sex and marriage. FCA still welcomes as members those not willing to affirm this Statement of Faith, but they cannot hold leadership posts. No District student unwilling to affirm this Statement of Faith has ever sought to hold a leadership role.

The District recognizes student organizations through its Associated Student Body ("ASB") program. 10-ER-2016–17, ¶ 5. This program provides a forum for student groups to organize based on shared interests or beliefs. Student organizations seek ASB status because of the benefits it provides. For example, the schools publicly list ASB organizations as official clubs, feature them in yearbooks, provide meeting spaces, and supply ASB funding. Like all other District programs and activities, the ASB program must abide by the district-wide policy, which forbids discrimination based on race, sex, sexual orientation, and religion. 1-ER-4–

5; 8-ER-1361; 9-ER-1724. In fall 2021, after FCA filed this lawsuit, the District updated this policy (the "Policy") to require all ASB clubs "to permit any student to become a member or leader." 6-ER-1048. This update specifically targeted FCA, which requires leaders to affirm its Statement of Faith. 8-ER-1357 (statement of Deputy Superintendent that "[t]he FCA matter was the starting point for ensuring that we had the right guidance to all the schools").

The District, too, retains discretion in how it applies these policies. ECF No. 111, at 18–20. It permits its own programs and activities, like athletics, to discriminate based on otherwise forbidden criteria where there are sufficiently compelling governmental interests that justify the differential treatment. *Id.* Despite routinely permitting these groups to limit membership based on otherwise discriminatory factors, the District refused to extend this same permission to FCA.

The facts below are startling. While in class, one District teacher called FCA's views "objectionable" and "bullshit." 3-ER-404. Several teachers worked to derecognize FCA on one of the District's campuses. 4-ER-575–76; 4-ER-590; 4-ER-614; 6-ER-914, 195:10-19. The decision to strip FCA of ASB approval was announced in the school newspaper

absent any consultation with FCA or its student leaders. 6-ER-1008; 8-ER-1396–97. Several teachers encouraged students to rally against FCA by forming The Satanic Temple Club to "openly mock" FCA's beliefs. 10-ER-2003. The teachers encouraged protests, confronted FCA guest speakers, and encouraged public ostracization of FCA's members. 5-ER-844; 4-ER-574–75; 10-ER-2002–03; 6-ER-1006; 6-ER-1060; 10-ER-1897; 10-ER-1912.

If these facts seem shocking, it's because they are shocking. The attack against FCA didn't start as a grassroots effort led by students upset with FCA's leadership requirements. It was an organized barrage led by teachers and school officials to stir up dissension and target students with whom they disagreed. And the District's response? "[T]he system worked in the way it's supposed to work." ER.1764. The District aggressively targeted FCA because of its religious tenets. That violated both the Free Exercise and Free Speech clauses of the First Amendment.

ARGUMENT

I. The District's Actions Violate the Free Exercise Clause.

The Free Exercise Clause of the First Amendment—applicable to States through the Fourteenth Amendment—establishes that "Congress

shall make no law … prohibiting the free exercise" of religion. It "protects … the right to harbor religious beliefs inwardly and secretly," and—more importantly—it "protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy*, 142 S. Ct. at 2421. Government entities do not get to decide whether such exercises of religion are "acceptable, logical, consistent, or comprehensible." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). But the District nevertheless ventured in. It determined that FCA possesses unacceptable religious viewpoints and refused to recognize FCA as a student club, denying it access to all the benefits given to other student organizations. And the District did this while simultaneously endorsing other discriminatory, pre-approved activities. 7-ER-1217 (Pioneer Activities Director stating that student clubs can limit their membership based on gender under the Policy); 9-ER-1677; 5-ER-851–53; 7-ER-1144; 2-ER-103; 2-ER-109; *see also* Defs.' Prelim. Inj. Opp'n at 18–20, No. 20-2798 (N.D. Cal. Sept. 3, 2021) (admitting that the District does not apply its policies "to all District programs and activities, or to all in precisely the same way"). The District's actions don't pass constitutional muster—the District lacks a compelling reason to treat FCA differently

than other organizations, and it fails to narrowly tailor its actions to support these interests.

A. The Court must review the District's actions under strict scrutiny.

Courts review state action that isn't neutral or generally applicable under strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The District's discriminatory behavior triggers strict scrutiny because the District (1) exercises unrestrained discretion in considering exemptions from its policy; (2) grants exemptions unequally between student groups; and (3) demonstrated hostility toward FCA because of its religious views.

1. The District's policy gives the school board discretion over whether student groups are exempt from the policy.

Neutral and generally applicable laws, even those that incidentally burden religious practice, don't trigger strict scrutiny. *Emp. Div. v. Smith*, 494 U.S. 872, 878–82 (1990). But a law applies discriminatorily when the government entity "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). And when a government "consider[s] the particular reasons for a person's conduct by providing a

mechanism for individualized exemptions," the law or policy is not generally applicable. *Id.* (internal quotations and citations omitted); *see also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

The Policy applies across the whole district and governs all student clubs, activities, and programs. It purports to ban discrimination based on criteria like race, sex, sexual orientation, and religion. 1-ER-4–5; 8-ER-1361; 9-ER-1724. Clubs seeking ASB approval submit applications to school officials, who review for compliance with this policy. 6-ER-994–1002. Once a club receives approval, the schools do not monitor or enforce this compliance. 5-ER-863–64; 7-ER-1164–65; 9-ER-1677–78; 9-ER-1682.

But the Policy permits exemptions in its express language and in practice. *See Fulton*, 141 S. Ct. at 1877. The Policy, for example, allows clubs to exclude students using "non-discriminatory criteria." 6-ER-1049; 9-ER-1737–38; 9-ER-1938–39, 7-ER-1249. School officials possess "common sense" discretion to apply these undefined criteria on a "case-by-case basis." 9-ER-1739–40; 7-ER-1202; 7-ER-1249. Certain organizations can exclude students based on age, GPA, enrolled student status,

athletic competency, singing ability, and good civic character. 6-ER-1049; 7-ER-1213; 7-ER-1215; 7-ER-1249; 9-ER-1737–38; 9-ER-1938–39; 9-ER-1741–42. In other words, when the District identifies what it deems a compelling reason to treat students differently, it does so. 9-ER-1626–32; 8-ER-1499 (District officials can engage in discrimination where they "believe" it "may influence the students' ability to be successful"); *see also* Defs.' Prelimin. Inj. Opp'n at 18–20, No. 20-2798 (N.D. Ca. Sept. 3, 2021).

And the District does so often.[3] For example, the Latino Male Mentor Group includes only "ninth-grade Latino male students." 9-ER-1816; 9-ER-1641; 9-ER-1644–47; 9-ER-1728–29. The Girls' Circle club offers membership only to "female-identifying students." 2-ER-164. The "Mr. GQ" and "Mr. Mustang" contests are annual male pageants, and during

[3] The district court found that "the evidence regarding these examples does not support Plaintiffs' argument." *Fellowship of Christian Athletes v. San Jose Unified School District Bd. of Ed.*, 20-cv-02798, Dkt. 102, at 17 (N.D. Cal. June 1, 2022). But FCA put forth evidence of affinity groups and events that exist solely based on the so-called discriminatory factors. *See e.g.*, 7-ER-1143–44; 7-ER-1217; see 10-ER-1935–45; 10-ER-2008–13; 9-ER-1677; 5-ER-851–53; 7-ER-1144; 2-ER-103; 2-ER-109; 7-ER-1217.

school-spirit week, schools host sex-segregated events.[4] 10-ER-1966; 10-ER-1968; 10-ER-1970; 10-ER-1865; 6-ER-1008. Similarly, the District organizes the Male Summit Conference for "only males" to encourage graduation and higher education for boys. 9-ER-1821; 9-ER-1646–47. Each of these student organizations seemingly violate the District's non-discrimination Policy. But because the school officials have identified compelling reasons to treat the students differently, the District approves these otherwise discriminatory organizations and activities. 9-ER-1632; 10-ER-1849; 10-ER-1855–57; 10-ER-1850–54; 9-ER-1728; 10-ER-1897. Despite an unmistakable pattern of granting exemptions, the District declined to grant one to FCA. In fact, it denied ASB status to FCA—the first and only time it has denied ASB status to any student group. 7-ER-1089–90.

[4] FCA's purpose and ideology relates more directly to students' educational experiences—of which athletics is an integral part—than many of the other recognized affinity groups on campus. *See, e.g.*, 2-FER-316 (compiling examples of other recognized student organizations like "Bachelor Nation," which is a group focused on discussing the "Bachelor" television show; "Dungeons and Dragons," which is a group that plays "Dungeons and Dragons"; and the "Smash Club," which is a group that plays "Super Smash Brothers.").

"On the surface," non-discrimination policies seem like "an admirable goal." 9-ER-1728–29. But this differential treatment exemplifies concerns over "unfettered and silent discretion" and shows why courts review the exercise of this discretion under strict scrutiny. *See Fellowship of Christian Athletes (FCA) v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1096 (9th Cir. 2022); *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) ("[G]reater discretion in the hands of governmental actors" makes their actions "more, not less, constitutionally suspect"). That discretion allows government entities to treat individuals or organizations differently based on arbitrary distinctions in violation of the Free Exercise Clause.

In this case, the District's policy is not generally applicable. The District gets to "consider the particular reasons" for "individualized exemptions" to its Policy. *Fulton*, 141 S. Ct. at 1877, 1879. But the District "may not refuse to extend that system [of individual exemptions] to cases of religious hardship," as it did here, without a compelling reason. *Smith*, 494 U.S. at 884 (internal quotation omitted). Laws with discretionary exemptions differ from neutral laws of general applicability, and the Court must apply a higher constitutional standard when reviewing these

laws. *Id.* Given the District's "openended, purely discretionary" authority to issue exemptions to other student organizations, the Court must review the District's actions under strict scrutiny. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081 (9th Cir. 2015).

2. The District gives exemptions to secular student groups.

The District's favorable treatment of secular student groups and activities also mandates strict scrutiny review. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *see Fulton*, 141 S. Ct. at 1877 ("[I]f it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," the law is subject to strict scrutiny). The District treats comparable "secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. And it treats them differently despite the same risks the activities pose. *Id.* FCA poses no different threat to the District's non-discrimination interests than the Girls' Circle or the Latino Male Mentor Group. The difference, it seems, is the District's distaste for FCA's religious tenets.

To determine whether two activities are comparable when identifying differential treatment, the Court must consider "the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct.

at 1296. In *Lukumi*, for example, the city prohibited the "unnecessary" killing of animals. 508 U.S. at 524–28. The city claimed that the prohibition protected public health because of the threat posed by disposing of animal carcasses in the open. *Id.* at 544. But the city did not similarly regulate hunters disposing of animal carcasses or restaurants disposing of their garbage. *Id.* at 545. This regulatory scheme was subjected to—and failed—strict scrutiny. *Id.* at 545–46.

Like the city's policy in *Lukumi*, the District's Policy allows it to treat different student organizations differently—which the District indeed does. To school officials, it seems to matter greatly—indeed, dispositively—whether the exemption is for a ninth-grade male Latino student organization that excludes non-Latinos, non-males, and sophomores from membership or whether it's for a faith-based student organization that excludes from leadership individuals who don't embrace basic Christian beliefs. Does this disparate treatment make sense in light of the District's interests in non-discrimination? *Tandon*, 141 S. Ct. at 1296. Here, it absolutely does not.

The District claims that FCA harms the District's interests in "equal access for all students to all programs" and in prohibiting

discrimination on "enumerated bases" in all its school programs and activities. 9-ER-1722; 9-ER-1726; 8-ER-1361. But allowing only Latino ninth-grade males in the Latino Male Mentor Group and only female-identifying students in the Girls' Circle also harms these interests. Neither group offers equal access to membership—both expressly discriminate. Similarly, the District allows the National Honor Society to exclude individuals based on their "character," "GPA," "leadership," and service." 6-ER-1049; 9-ER-1737–38; 9-ER-1938–39; 7-ER-1249. It allows athletic teams and the Big Sister/Little Sister club to exclude individuals based on gender. 7-ER-1287–88; 10-ER-1990, ¶ 24; 5-ER-869–70; 9-ER-1677; 5-ER-851–53. And the South Asian Heritage Club "prioritize[s] south asian" membership. 2-ER-103; 2-ER-109; 7-ER-1217. Each of these clubs disturbs the District's interests in equal access for all students to all programs—they explicitly exclude individuals based on discriminatory criteria. Yet the District approved each of these organizations.[5]

[5] The panel opinion rightly rejected Defendants' argument that it couldn't consider these instances of selective enforcement because they occurred under the then-controlling "Non-Discrimination Policy" and not under the newly-implemented "All Comers Policy" because the "two policies are effectively one and the same." *FCA*, 46 F.4th at 1097.

The panel opinion identified still another example of the District's selective enforcement of its Policy. *See FCA*, 46 F.4th at 1097 (explaining that the District's "double standard was no aberration"). The panel found unrebutted evidence showing that the District granted ASB recognition to the Senior Women of Leland High School Club, even though it "maintains a discriminatory membership criterion that violates" the Policy. *Id.* at 1094. And the absence of formalized exemptions for secular groups, like those in *Fulton*, didn't sanitize the District's free exercise violation. "If anything," said the panel, the "District's unspoken and ad hoc exemption practice poses a *more insidious and severe danger* to the Free Exercise right than the formalized exemptions in *Fulton*." *Id.* at 1096 (emphasis added).

In its petition, the District faults the panel for relying on a single comparator to find that it selectively enforced the Policy and for ignoring Circuit precedent requiring evidence that the District intentionally targeted FCA. *See* Defs.' Pet. Reh'g or Reh'g En Banc, No. 22-15827, ECF No. 93-1, at 8–12 (9th Cir. Oct. 3, 2022). But, as discussed above, the panel didn't rely on a single comparator. *See FCA*, 46 F.4th at 1096–98. Even if it had looked only at one example—as the District alleges—

comparators are not necessary to find a free exercise violation. *See Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) (any "law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions"). To the extent that this Circuit's precedent requires evidence that the District intentionally targeted FCA, *see* Defs.' Pet. at 9–10, it is no longer good law. When government officials exempt secular groups from a generally applicable policy, but not religious groups, the policy discriminates against religion in violation of the First Amendment, even if that wasn't the policy's purpose or policymaker's intent. *See Tandon*, 141 S. Ct. at 1296 (government policy triggers strict scrutiny under the Free Exercise Clause "whenever [it] treats any comparable secular activity more favorably that religious exercise"); *Fulton*, 141 S. Ct. at 1877 (government policy triggers strict scrutiny "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way").

The district court's conclusion that this case doesn't trigger strict scrutiny means that the government has a higher interest in restricting the requirements of a private leader in a private religious organization than in general membership in the school's other student clubs and

activities. But "a law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment)); *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.) (explaining that such underinclusiveness "can raise the inference … that [the District's] most compelling interest may actually be discrimination against, or at least indifference to, [FCA's] religious liberties"). Because the District permits some discrimination but prohibits other so-called discrimination, the Policy "must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

3. The District exhibited animosity toward FCA.

Finally, under the Free Exercise Clause, if the government's actions raise "even slight suspicion" that they "stem from animosity to religion or distrust of its practices," they must survive strict scrutiny. *Lukumi*, 508 U.S. at 547. The Free Exercise Clause bars even "subtle departures from neutrality." *Id.* One "indication" of the government's failure to act neutrally is "the difference in treatment" it affords people of faith. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719,

1730 (2018). Here, the "stench of animus against the students' religious beliefs pervades the Pioneer High School campus," triggering strict scrutiny review. *FCA*, 46 F.4th at 1099 (Lee, J., concurring).

The Supreme Court denounced this type of overt discrimination in *Masterpiece Cakeshop*. There, state officials punished a cake-shop owner who declined to create a custom wedding cake celebrating same-sex marriage because of his religious beliefs. 138 S. Ct. at 1730. These same officials, however, took no action against three other bakers "who objected … on the basis of conscience" to requests for "cakes with images that conveyed disapproval of same-sex marriage." *Id.* The Supreme Court noted that "[a] principled rationale … cannot be based on the government's own assessment of offensiveness." *Id.* at 1731. The Supreme Court thus determined that the state officials' decision was "inconsistent with what the Free Exercise Clause requires." *Id.* at 1732.

Other courts have concluded the same. The Tenth Circuit found a free exercise violation where a university unfairly granted a religious exemption to a Jewish but not a Mormon student. *Axson-Flynn*, 356 F.3d at 1282, 1298. The Third Circuit, likewise, held that a police department's no-beard policy violated the Free Exercise Clause because the

department granted medical but not religious exemptions. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360–61 (3d Cir. 1999). In these examples, government entities treated individuals disparately *because of* their religious beliefs and practices—far above the "slight suspicion" necessary to trigger strict scrutiny.

Here, the District displayed obvious and overt animosity toward FCA. *See FCA*, 46 F.4th at 1099 (Lee, J., concurring). School officials discussed FCA's "objectionable" statement of faith in class. 10-ER-1920. They described FCA's views as "bullshit" and without "validity." 10-ER-1897–98; 10-ER-1924–27. They called FCA members "charlatans." *Id.* They held protests outside FCA's meetings. 10-ER-1932; 10-ER-1973–81; 6-ER-1058–59; 10-ER-1947–48. They confronted guest speakers. ECF 137-5 at 6, ¶ 20. They encouraged school reporters to photograph FCA students and went so far as to call one of the reporters an "idiot" for "feel[ing] bad" for FCA. 10-ER-1892; 8-ER-1523.

Even after FCA lost ASB recognition, the "inquisition" continued. *FCA*, 46 F.4th at 1100 (Lee, J., concurring). The same faculty member who pinned FCA's Statement of Faith and Sexual Purity Statement to his classroom whiteboard then sought "to ban FCA completely from

campus." *Id.* at 1101. He concocted a theory that "*teenagers*—meeting privately to discuss the Bible—were creating a hostile work environment for *adult faculty*" in violation of the District's sexual harassment policy. *Id.* (emphasis in original). It is hard to imagine more overt hostility and animosity than this. *Cf. Lukumi*, 508 U.S. at 547 (noting that "upon *even slight suspicion* that [government action] stem[s] from animosity to religion … all officials must pause to remember their own high duty to the Constitution and to the rights it secures").

Because the District's actions go beyond a "slight suspicion" of animosity" and show a pattern of overt hostility toward FCA *because of its religious tenets*, strict scrutiny must apply. *See Lukumi*, 508 U.S. at 547; *FCA*, 46 F4th at 1099 (Lee, J., concurring).

B. The District can't justify its conduct under strict scrutiny.

The District's behavior can only survive strict scrutiny if it advances "interests of the highest order" and achieves those interests through narrow tailoring. *Lukumi*, 508 U.S. at 546. The District can show neither.

The District expressed a broad and generalized interest in non-discrimination. But *Fulton* instructs that courts cannot rest this analysis

on "broadly formulated interests." 141 S. Ct. at 1881 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–32 (2006)). Generalized interests in non-discrimination aren't enough. The analysis depends not on whether the District "has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" to FCA. *Id.*

The District's decision to deny FCA an exemption from its Policy does not advance a "highest order" interest. *Lukumi*, 508 U.S. at 546; *see also Fulton*, 141 S. Ct. 1881. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547. As discussed above, the District claims an interest in keeping student organizations open to all individuals. Yet the District allows specific organizations to close off membership altogether, selecting members based on specific criteria. According to the District, though, FCA's *leadership* requirements harm the District's interests in non-discrimination while other organizations' overtly discriminatory *membership* requirements don't. No compelling reason, accordingly, explains why the District "has a particular interest

in denying an exception" to FCA while making the same exceptions available to others. *Fulton*, 141 S. Ct. at 1882.

The District also failed to narrowly tailor its actions to promote these interests. If the District "can achieve its interests in a manner that does not burden religion, it must do so." *Id.* at 1881. In other words, the District must show that its actions were "the least restrictive means" of achieving its interests. *Thomas*, 450 U.S. at 718. It cannot, because—as discussed above—the District continues to grant exemptions to other student groups, sports teams, and events.

Because the District's unfavorable treatment of FCA isn't the least restrictive means of advancing any compelling government interest, the District's actions fail to survive strict scrutiny. This Court must reverse.

II. The District's Actions Violate the Free Speech Clause.

The District's actions also violate the Free Speech Clause because student groups like FCA must be able to select leaders who affirm their beliefs. In *Christian Legal Society v. Martinez*, the Supreme Court recognized that "[*w*]*ho* speaks" for student organizations "colors *what* concept is conveyed." 561 U.S. 661, 680 (2010). After all, a religious group's leaders "personify its beliefs." *Hosanna-Tabor Evangelical Lutheran*

Church & Sch. v. EEOC 565 U.S 171, 188 (2012). The "messenger matters." *Id.* at 201 (Alito, J., concurring). It follows, then, that an organization's control over who gets to lead the organization is "an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.* FCA's requirement that its leaders affirm its beliefs is essential to the organization's ability to speak to its members and the public.

Because leadership selection correlates with expressive speech, the Supreme Court notes that "expressive-association and free-speech arguments merge." *Martinez*, 561 U.S. at 680. These hybrid cases use the limited public forum test, which asks whether the District's actions (1) "discriminate against speech on the basis of … viewpoint" or (2) are not "reasonable in light of the purpose served by the forum." *Id.* at 685. Here, the District's actions discriminate based on viewpoint and do not reasonably serve the forum's purpose.

A. The District's actions discriminate against FCA because of its religious views.

"Viewpoint discrimination is poison to a free society …. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not

tolerate viewpoint discrimination." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302–03 (2019) (Alito, J., concurring). While the *Martinez* Court ultimately concluded that no discrimination existed, the Court reiterated that public universities may not "deny[] student organizations access to school-sponsored forums because of the groups' viewpoints." 561 U.S. at 668; *see also Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (condemning viewpoint discrimination involving benefits the public universities gave to recognized student groups). This Circuit, likewise, concluded that a university may not "exempt[] certain student groups from [its] nondiscrimination policy" while withholding the same exemptions from other groups because of their "viewpoint." *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011).

The District, here, clearly applied its policies in a discriminatory manner based on viewpoint. The District never revoked a student organization's status on campus until it revoked FCA's status, despite other groups' overt discriminatory membership criteria. Again, the Latino Male Mentor Group excludes all students except ninth-grade Latino males. The Girls' Circle excludes all students except female-identifying students. And sports teams exclude based on gender. In each of these

examples, the organizations don't just exclude individuals from leadership opportunities—they exclude them *from membership altogether*. The difference, though, is that FCA's viewpoints are religious and—apparently—unpopular. The District's differential treatment based upon an organization's viewpoint establishes a constitutional violation.

B. The District's actions don't reasonably advance the forum's purpose.

The Court must assess the District's actions "in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985). The Court "owe[s] no deference" to the District. *Martinez*, 561 U.S. at 686. Instead, the Court looks to whether the District follows the "boundaries it has itself set." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Here, the record reveals a District that intentionally defies its own rules—allowing groups to exclude individuals from membership based on classifications the District, itself, defines as discriminatory.

The purpose of the forum here—the ASB—is to help students form communities around "similar interests" with "other students that are like them." ER.405–06. These other groups can select members and leaders

based on certain characteristics that advance the groups' purposes. But FCA, which opens membership to all, cannot select leaders based on criteria central to the organization's core purpose. Regardless of whether teachers, students, the District, or the district court find these criteria offensive, FCA's leadership selection criteria further the forum's purpose because it furthers FCA's purpose. *See* 4-ER-652 (guaranteeing clubs "rights to express ideas … even when such speech is controversial or unpopular"). This unreasonable revocation of FCA's ASB status violates the Free Speech Clause.

CONCLUSION

Non-discrimination laws may be "admirable" "on the surface." ER.1035. But the District's targeted discrimination against FCA shows that its non-discrimination abets the District's punishment of disfavored beliefs and views. Because of the requirement that FCA's leaders affirm its Statement of Faith, the District refused to extend the same treatment as it does to other student organizations. The District's actions, therefore, violate the First Amendment, and this Court must reverse.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Kathleen Smithgall, an employee in the Office of the Attorney General of the Montana, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,185 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)–(7), and Circuit Rule 29-2(c)(3).

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