Docket No. 22-15827

In the

United States Court of Appeals

for the

Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES, et al.,
Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 20-cv-02798
The Honorable Haywood S. Gilliam, Jr., U.S. District Judge

BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae California School Boards Association and its Education Legal Alliance states that it is a nonprofit corporation organized under Section 501(c)(4) of the Internal Revenue Code, and that it has no parent corporation and no publicly held corporation has an ownership interest of 10% or more.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL CODES/STATUTES

STATE CODES/STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Amicus Curiae, the California School Boards Association ("CSBA") and its Education Legal Alliance ("ELA") submit this brief supporting Appellee San Jose Unified School District and the individually-named Appellees (collectively "District").[1]

CSBA is a non-profit association duly formed and validly existing under the laws of the State of California. As a part of the CSBA, the ELA is composed of nearly 700 CSBA member entities dedicated to addressing legal issues of statewide concern to school districts and county offices of education. As part of its activities, the ELA files *amicus curiae* briefs in litigation which impacts California public educational agencies as a whole.

School districts in California and across the nation are entrusted with educating students from innumerable cultures and backgrounds, including innumerable religious traditions, from pre-school through high school, all while navigating state and federal law that allows for

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or party counsel contributed money to fund this brief. No person other than *amici curiae* made any monetary contribution to fund the preparation or submission of this brief.

discretion in some circumstances, respects the rights of individual students, and requires affirmative policies and actions that protect and promote equal opportunity and inclusion for all students in the public educational experience. CSBA and the ELA have a strong interest in ensuring that the resolution of the issues presented in this case will provide California public schools with reasonable, workable standards for navigating this network of state and federal requirements.

SUMMARY OF ARGUMENT

CSBA and ELA agree with the District that Plaintiffs' claims are not justiciable, for the reasons articulated by the District, and that the Court should dismiss the appeal on that basis and need not address the standard of review and the required elements for injunctive relief. However, should the Court conclude the claims are justiciable or otherwise reach the merits of the appeal, CSBA and ELA contend the district court decision was correct, factually and legally, and should be affirmed. CSBA and ELA offer two arguments here to reinforce two aspects of the District's position, and the correctness of the decision below.

First, despite Plaintiffs' attempt to muddy the proverbial waters

in a variety of ways, this case is clearly about the prospective application of the District's policy regarding non-curriculum related student clubs, which are initiated and run by students in a limited open forum, and are substantively different factually and under federal and state law from District-run programs. The limited open forum at issue in this case is available *only* to student initiated and student run clubs, and Plaintiffs' attempt to expand that forum to include every *District*-run program or activity should not be credited.

Second, as was recognized by the district court and by *Christian Legal Society Chapter v. Martinez*, 561 U.S. 661 (2010), *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008), cert. denied, 557 U.S. 936 (2009), overruled on other grounds, *Los Angeles Cty. v. Humphries,* 562 U.S. 29 (2010), and *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), nondiscrimination requirements are important for public schools to carry out their educational missions and functions, as well as their legal responsibilities. In addition to the case law, research, educational leaders, and expressions of legislative intent in the context of considering and passing legislation designed to create and maintain an educational environment that is welcoming to *all* students, all

reinforce the conclusion that policies like the District's "all comers" policy are important for public schools to be able to create and enforce in pursuit of their educational functions and responsibilities.

ARGUMENT

I. NON-CURRICULUM RELATED STUDENT CLUBS — WHICH ARE INITIATED AND RUN BY STUDENTS — ARE DIFFERENT IN KIND, UNDER BOTH FEDERAL AND STATE LAW, FROM OTHER, DISTRICT-RUN PROGRAMS

A. Public Educational Institutions Should Not be Forced to Choose Between Legal Compliance in Operating their Programs and Creating a Limited Open Forum for Student-Run Programs Under the Equal Access Act

Under Plaintiff's theory of the case, public educational institutions are faced with a choice — not apply and enforce policies prohibiting unlawful discrimination to student-run, school-sanctioned student clubs, thereby allowing them to discriminate against students based on protected classifications, or close the limited open forum for these clubs so the institutions can maintain their programs that, by legal mandate, require giving preference and support to certain groups (e.g., special

education). This is an untenable choice, unsupported by logic or law.

Under state law, California kindergarten through twelfth grade public educational institutions are required to have more than ninety (90) policies on a variety of subjects, including numerous nondiscrimination policies. See, e.g. Ca. Educ. Code § 234.1 (policy prohibiting unlawful discrimination, harassment, intimidation, and bullying based on protected characteristics); Ca. Educ. Code §§ 231.5, 231.6 (sexual harassment policy); Ca. Educ. Code § 234.7 (immigration status and confidential information policy); Ca. Educ. Code § 234.4 (cyber bullying policy); Ca. Educ. Code § 56301 ("child find" policy for students with disabilities). The same is true under federal law. See, e.g. 20 U.S.C. § 1415(d) (policy to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education); 29 U.S.C. § 794 (policy to provide for prompt and equitable resolution of complaints under Section 504 of the Rehabilitation Act of 1973); 20 U.S.C. §§ 1681 et seq. (policy and procedure to coordinate compliance with Title IX of the Education Amendments of 1972 and resolution of complaints). Moreover, even when no formal policy is required these agencies are

subject to innumerable legal and regulatory requirements, which Plaintiffs put at issue in their attempt to expand the parameters of the issue before this Court.

An integral part of CSBA's work providing guidance to educational institutions regarding required policies and other, permissive policies, and the implementation of policy to ensure legal compliance. CSBA is concerned that acceptance by this Court of Plaintiffs' position, contrary to the district court's conclusion, this Court's conclusion in *Truth*, and other precedent, that every program or activity existing within a school district must be lumped in with a policy related solely and specifically to the approval and conduct of student initiated and student run organizations, would not only be contrary to precedent but would force California public educational agencies to choose between legal compliance and the elimination of limited open forums under the Equal Access Act. This would undermine the interests of educational agencies seeking to create and reinforce an environment of inclusion and acceptance of differences and would undermine the interests of students including the students Plaintiffs purport to support.

B. The Relevant Forum in this Case is the District's Limited Open Forum Under the Equal Access Act

In 1981, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Supreme Court held that public universities allowing secular student groups to use their campus facilities for meetings create limited public forums and may not deny access to religious groups in those forums simply because of the religious viewpoint of their speech. 454 U.S. at 267. Soon thereafter, Congress passed the Equal Access Act ("EAA"), extending these principles to public secondary schools, which 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). Under the EAA, a "limited open forum" is created when a school "grants an offering to or opportunity for one or more noncurriculum related students groups to meet on school premises during noninstructional time." 20 U.S.C. §4071(b). A protected "meeting," defined by the EAA as "those activities of student groups

which are permitted under a school's limited open forum and are not directly related to the school curriculum," includes physical meetings on school premises, official recognition, and its privileges. 20 U.S.C. § 4072(3); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 247 (1990).

The District has a limited open forum under the EAA, reflected in policy consistent with the language of the EAA. Once approved, meetings must be voluntary and student-initiated, there shall be no sponsorship of the meeting by the school or staff, staff may not promote, lead, or participate in meetings, the presence of staff is for custodial purposes only, and nonschool persons may not direct, conduct, control, or regularly attend activities of student groups. 7-ER-1284-1285; see 20 U.S.C. §§ 4071, 4072. Also, these student-run meetings, of student-initiated and student-run organizations, may not entail the expenditure of public funds beyond the incidental cost of providing the meeting space. *Id.*, and see 20 U.S.C. § 4071(d).

Consistent with the EAA, the District "shall not deny any student-initiated group access to school facilities during noninstructional time on the basis of religious, political, philosophical or any other content to

be addressed" at these student-run meetings. 7-ER-1285; 20 U.S.C. § 4071(a). And, just as the District may not engage in unlawful discrimination, these student-initiated and student-run clubs are prohibited from discriminating against any student, for membership or leadership positions, based on "on any unlawful basis, including on the basis of gender, gender identity and or expression, race, inclusive of traits historically associated with race, … color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation, or the perception of one or more of such characteristics, or on the basis of association with a person who has or is perceived to have any of those characteristics." SER-0665.[2]

[2] This policy is consistent not only with the EAA but with state law: "Membership in student clubs must be open to all students regardless of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability." 5 Ca. Code of Regs. § 4926. Additionally, it is not difficult to recognize the distinction between, for example, students with a 2.0 GPA and a 3.50 GPA, and discrimination against a student or group of students based on membership in a legally-protected classification, and as the District convincingly argues in its Answering Brief, the record is devoid of evidence that any student club achieving official recognition and access to the limited open forum has been allowed to discriminate "on [an] unlawful basis."

C. Plaintiffs' Attempt to Expand the Scope of the Relevant Forum Should Not be Credited

Plaintiffs initially appear to recognize the District's implementation of this body of relevant law, stating that "the District's program for recognized student organizations" is "known as the Associated Student Body (ASB) program," citing to a declaration by the FCA Metro Director in the Bay Area. AOB, p. 5. This case is about just that, and *only* that — the District's program for *recognized student organizations*, formed by students, run by students, and led by students, in a limited open forum created by the District. But despite an initial acknowledgment that this case is about student organizations and that forum, Plaintiffs attempt to knock down those boundaries and make this case about *all* District programs and activities, whether or not they fall within the forum for student organizations.

Perhaps because staying within the confines of the relevant policy and forum for student-initiated, student-run organizations exposes the weakness of Plaintiffs' position, throughout their opening brief Plaintiffs seek to expand the relevant forum and policy to encompass literally every District program or activity, whether student- or adult-

run, ignoring legal mandates and other distinctions. Thus, according to Plaintiffs, the policy — as they define it — has a "hodgepodge of inscrutable exceptions" in District-run programs and activities which "leaves officials with standardless discretion to find groups in violation when they see fit." AOB, p. 50. This "hodgepodge of inscrutable exceptions" includes policies, to name just two examples, to address and ensure legal compliance for breastfeeding mothers, AOB p. 8; 10-ER-1855 (policy citing requirements of Ca. Labor Code § 1030 *et seq.*, 29 U.S.C. § 207); and policies to ensure legal compliance regarding student marital status, pregnancy, childbirth, false pregnancy, termination of pregnancy, or related recovery, AOB p. 8; 10-ER-1850-54 (policy to ensure legal compliance under various laws and regulations including Ca. Family Code § 7002; Ca. Educ. Code § 54745; 34 C.F.R § 106.40). In Plaintiffs' view, even meeting the requirement of federal law to document an employee's legal right to work in the United States is, in effect, an exercise of "broad discretion" by District officials to discriminate based on immigration status. AOB p. 8; 10-ER-1858 (citing policy reflecting compliance with the legal mandate of 8 U.S.C. § 1324a). And, according to Plaintiffs even *outreach* efforts to recruit

bilingual educators, educators of color, and social workers with experience working with students in poverty are policies amounting to "broad discretion" to engage in unlawful discrimination. AOB p. 8; 9-ER-1632; 10-ER-1849 (District policy promoting and seeking equity and diversity in a variety of ways, including promoting the recruitment of employees that reflect the student demographics of the community).[3] The list could go on.

As the District correctly notes, Plaintiffs and their *amici* are arguing, in effect, that if the District chooses to comply with federal law, e.g. Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) ("IDEA"), etc., "it would have no choice but to allow all religious student clubs to exclude students on the basis of any protected characteristic, be it race, gender, sexual orientation, religion, or disability." AAB p. 42, n. 27. According to Plaintiffs, a school district that has a policy to meet the needs of and legal requirements associated with breastfeeding mothers must give formal recognition and status to

[3] Plaintiffs point to no evidence that the District has engaged in discriminatory hiring practices, chastising the District solely for its commitment to outreach efforts to promote equity and diversity.

a student-run club that discriminates based on race; a school district providing additional supports and services to a student with disabilities under the IDEA triggers an obligation to give formal recognition and status to a student-run club that discriminates based on sexual orientation; a program initiated to meet the unique needs of a specific group of vulnerable and traditionally underserved students, or a program of outreach to recruit teachers to match the student demographics of the school district, opens the door to a requirement to give formal recognition and status to a student club that openly discriminates *against* that same group of students and that same demographic. This is not only unreasonable, but also an apples to oranges comparison; it ignores precedent and seeks to convert prohibitions on discrimination in District programs into a requirement to give its stamp of approval, and associated benefits, to student organizations and their student leaders who by the application process are required to agree to openly engage in discrimination.[4]

[4] To the extent Plaintiffs contend that the religious character of its desire to discriminate substantively distinguishes FCA from other potential clubs with discriminatory restrictions based on other protected classifications, this would run afoul of the EAA, which guarantees religious student organizations equal access, not

An example in state law also highlights the material distinction here. The California Education Code provides:

> It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, equal rights, and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

Ca. Educ. Code § 200. Immediately following, the "Declaration of Purpose" of the above-quoted policy states, among other things, that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment," that "California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity," and "[i]t is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional

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preferential access. 20 U.S.C. § 4071(a); *Truth*, 542 F.3d at 645-47 (EAA prohibits only content-based restrictions on religious groups; it does not preclude burdening their speech or activities and does not grant them special treatment).

bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." Ca. Educ. Code § 201. Tying in other state law, and federal law, the same section articulates the following legislative intent:

> ….[T]his chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.

And, in addition to the odd notion that compliance by the District with state and federal law requires the District to allow student-run organizations to engage in discrimination based on legally-protected classifications, Plaintiffs' attempt to couple the specific and relevant forum in this case with all *District* programs and activities ignores relevant substantive distinctions between the two. Student activities

conducted, operated, and/or administered by the District including, for example, student athletic teams, student drama productions, student bands, student choirs, and cheerleading, are activities where staff is providing more than mere adult supervision, where there is a significant investment of District or school site funds/resources involved in the activity's operation, where the activity is associated with the District as a whole or with a particular school site, and in some circumstances is associated with a class and may be undertaken for credit toward graduation. 4-ER-0673. These are substantive differences that cannot be ignored.

Finally, it should not go unnoticed that the precedent relevant here did not expand the limited open forum related to student-run organizations to include the programs and activities of the organization itself. In *Truth*, for example, plaintiffs alleged "violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause." 542 F.3d at 637. Although this Court did not address all of those allegations, because only some were addressed by the district court, the EAA analysis and the Free

Exercise analysis were limited to the limited open forum for school-approved student organizations, including whether other school-approved clubs were approved *in that forum* that engaged in discrimination prohibited by the policy *for that forum*. *Id.* at 648-650 and n. 2 (holding that a triable issue of fact existed regarding whether the school had "granted ASB recognition [to other clubs] despite violating the District's non-discrimination policy," referring only to other student clubs within the forum and not to, for example, providing extra services and supports under the IDEA to students with disabilities, and also questioning whether plaintiffs would succeed on remand).

D. Plaintiffs' Argument Ignores the Anti-Discrimination Policies Used by Innumerable Educational Institutions

CSBA's mission and purpose includes assisting California school districts and county offices of education with policy development and implementation, including legally-required nondiscrimination policies similar or identical to the District's, from the far reaches of Northern California[5] to the international border,[6] and everywhere in between.

[5] https://perma.cc/44Q9-RKXT (Del Norte School District).

CSBA publishes for its members many Sample Board Policies, including many addressing nondiscrimination, equity and inclusion requirements embedded in state law, such as policies 0410 (Nondiscrimination in Programs and Activities), 0415 (Equity), 5131.2 (Bullying), 5137 (Positive School Climate), 5145.3 (Nondiscrimination/Harassment), 5145.7 (Sexual Harassment), 5145.71 (Title IX Sexual Harassment Complaint Procedures), 5145.9 (Hate-Motivated Behavior), 6145 (Extracurricular and Cocurricular Activities), and 6145.5 (Student Organizations and Equal Access). Evidence at the District level reflects this work: "Relevant District Board Policies ("BPs") and Administrative Regulations ("ARs") relating to discrimination against students include but are not limited to 210, 410, 1312.3, 5131.2, 5144, 5145.3, 5145.7, 6141.2, 6145, 6145.2, and 6145.5." 6-ER-1024. Plaintiff's argument ignores the intent and interpretation of these policies.

Plaintiff's argument also ignores the intent and interpretation of innumerable other similar policies put in place by schools and other educational institutions. The University of California, Hastings College of Law, the defendant in *Martinez*, has a general anti-discrimination

[6] https://perma.cc/7C32-CE9E (San Ysidro School District).

policy that expressly states its intent to be in compliance with federal, state, and local laws:

> The University of California Hastings College of the Law prohibits discrimination against any person on the basis of race, color, national origin, religion, age, sex, gender, sexual orientation, gender expression, gender identity, gender transition status, sex- or gender-stereotyping, pregnancy, physical or mental disability, medical condition (e.g., cancer-related or genetic characteristics), genetic information (including family medical history), ancestry, marital status, citizenship, or service in the uniformed services, including protected veterans.[7]

It should surprise no one that this policy or a similar policy related to school programs and activities was not considered relevant in *Martinez* to the Court's analysis of the limited public forum for approved student-run organizations and the "all comers" policy associated with that specific forum. Similarly, the University of California, Los Angeles has an antidiscrimination policy that reflects applicable federal and state laws and prohibits "discriminate on the basis of race, color, national origin, religion, sex, gender identity, pregnancy …, physical or mental disability, medical condition …, ancestry, marital status, age, sexual orientation, citizenship, or service in the uniformed services …."[8]

[7] https://perma.cc/NJ99-J9XX.
[8] https://perma.cc/8FYK-YHYW

Needless to say, hundreds of similar policies could easily be found and described, from public educational institutions throughout California and the nation. Do these policies preclude the schools from denying approval to a student-run and school-approved organization, with associated benefits, that discriminates in membership and/or leadership on the basis of religion, or sexual orientation, or race, or national origin? Of course they don't. Do these policies require the institutions to allow male students to try out for the softball team? No.

All of these policies including the District's policies reflect and are based on the requirements of state and federal law, and are as the District correctly notes, "entirely different policies that apply to the District's *own* programs, which are not subject to the policy challenged here." AAB p. 16 (emphasis added). Plaintiffs' contention that these policies and others like them in schools and universities all over California and the nation, applicable to *District* programs, run and supervised by adults, with a significant investment of district funds and resources, associated with and bearing the imprimatur of the school and/or district, and often associated with a course and for credit, can be injected into, misinterpreted, and applied to a policy governing the

approval of *student*-initiated and *student*-run organizations, is supported by neither facts nor law.

II. NONDISCRIMINATION REQUIREMENTS ARE IMPORTANT FOR PUBLIC SCHOOLS, TO SERVE THEIR EDUCATIONAL FUNCTIONS AS WELL AS THEIR LEGAL RESPONSIBILITIES, REINFORCING THE REASONABLENESS OF THE DISTRICT'S "ALL COMERS" POLICY

As the District thoroughly articulates in its Answering Brief, courts from the Supreme Court and down, including the district court, have recognized the reasonableness of anti-discrimination, "all comers" policies for participation and leadership in recognized student organizations in limited public forums created by public educational institutions. AAB pp. 34-37, citing *Martinez*, *Truth*, *Alpha Delta*, and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). CSBA endorses the conclusions of the district court, which quoted *Alpha Delta* for the conclusion that the District's policy "served 'to remove access barriers imposed against groups that have historically been excluded.'" 1-ER-0011. The importance of removing these barriers cannot be reasonably questioned. See, e.g. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (noting that discrimination "forces individuals to

labor under stereotypical notions that often bear no relationship to their actual abilities," "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life," and that the "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race"); *Martinez*, 561 U.S. at 694 (educational institutions "may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate"). CSBA's sample policies referenced above, used by the vast majority of school districts in California, provide districts with one method to remove access barriers, promote the benefits of wide participation in political, economic, and cultural life, and avoid the stigmatizing injury imposed on students through school-sanctioned exclusion from full participation based on religion, sexual orientation, or any other protected characteristic.

Indeed, this reasonableness is bolstered by other, non-judicial authorities. Studies have shown that an inclusive, nondiscriminatory classroom environment is beneficial to the educational and social

development of *all* students. *See e.g.,* Silvia Molina Roldán et al., *How Inclusive Interactive Learning Environments Benefit Students Without Special Needs*, (April 29, 2021);[9] see also Jaana Juvonen et al., *When and How Do Students Benefit from Ethnic Diversity in Middle School?* (June 20, 2017);[10] and Nancy Tenney, *Note, The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 Brook. L. Rev. 1599, 1614 n. 67 (1995) ("Allowing anti-gay behavior calls into question one of the most important values the schools attempt to teach their students — tolerance and respect for those who are different"). United States Secretary of Education Miguel Cardona has correctly recognized that "[d]iscrimination … can negatively impact students' abilities to learn, grow and thrive" and that "students deserve access to safe, supportive schools and classrooms." U.S. Department of Education, *U.S. Department of Education's Office for Civil Rights Seeks*

[9] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8116690/ (students without special educational needs benefit from participating in interactive learning activities with peers with such needs by, among other things, learning to respect others, accept differences, and acknowledge different abilities, thereby creating opportunities for new friendships to develop).

[10] https://perma.cc/BZ52-D9X9.

Information on the Nondiscriminatory Administration of School Discipline, U.S. Department of Education (June 4, 2021).[11] The U.S. Department of Education's Office for Civil Rights has also expressed the important role of nondiscriminatory practices in schools to address academic discrepancies among racial groups, including differences in reading proficiency, enrollment in higher education programs, and representation in engineering, science and mathematics. Office for Civil Rights, *The Guidance Counselor's Role in Ensuring Equal Educational Opportunity*, U.S. Department of Education (1991).[12] The District's "all comers" policy promotes its reasonable, research-supported effort to benefit all students through the creation of an inclusive, nondiscriminatory classroom and school environment.

Additionally, the California Legislature has recognized the negative impact of discrimination on student's academic success in the passage of legislation designed to protect students from bullying. An Assembly Floor Analysis for Assembly Bill 9, in 2011, noted that "[s]chool-based harassment, discrimination, intimidation and bullying

[11] https://perma.cc/4PMG-2974.
[12] https://perma.cc/W97Y-W2UQ (describing the critical role of counselors in ensuring equal access to educational opportunity).

can create a school climate of fear and disrespect that can result in conditions that negatively affect learning." Assembly Floor Analysis AB 9, 1 (2011).[13] A later Assembly Floor Report on the same legislation concluded:

> Research shows that students who are harassed at school frequently suffer long-term social, emotional, and psychological harm. *The most effective way to reduce the harm is to create a school-wide culture of inclusion and respect for differences.* Existing law does not adequately protect young people from school-based discrimination and harassment. AB 9 will ensure that existing laws are effective and enforced by requiring every school district to take concrete steps to improve school climate.

Id., link to 09/02/11 Assembly Floor Analysis (emphasis added).[14]

The Legislature has clearly tasked schools with teaching students, including student leaders, the importance and benefits of inclusion and

[13] https://perma.cc/GFR5-5SVW, link to 05/31/11 Assembly Floor Analysis.

[14] No one suggests that Plaintiffs seek permission to bully or harass students based on their religion or sexual orientation. The point here is that the District's "all comers" policy, requiring every sanctioned student club to be open to all students, is an attempt to create and reinforce "a school-wide culture of inclusion and respect for differences" — to avoid the stigmatizing injury that accompanies the denial of equal opportunity. Plaintiffs' desire to require their student leaders to exclude students based on their sexual orientation and/or religion, *and* to obtain school and District endorsement of that exclusion, is the issue.

nondiscrimination instead of the detrimental impact of exclusion and discrimination.

The District's desire to promote and create a school-wide culture of inclusion and respect for differences through its "all comers" policy for school-approved student organizations is reasonable, educationally-sound, and non-discriminatory. As in *Truth, supra*, as cited by the court below, "the policy did not 'preclude or discriminate against religious speech,' but rather proscribed discriminatory conduct," making it content neutral. 1-ER-0011, quoting *Truth*; see also *Alpha Delta*, 648 F.3d at 801, 803 ("the fact that a regulation has a differential impact on groups wishing to enforce exclusionary membership policies does not render it unconstitutional"). Allowing Plaintiffs to exclude fellow students based on their religion and/or sexual orientation would not only run counter to those educationally-sound goals, but would necessarily result in a requirement that other clubs receive school recognition and support even if they exclude participation or leadership based on race, or disability, or national origin. No such group is legally entitled to an exception to the District's "all comers" policy, and the District's insistence that no exceptions be allowed is important for

public schools to carry out their educational functions in support of all students.

CONCLUSION

For the foregoing reasons, the decision of the district court denying Plaintiffs' motion for a preliminary injunction should be AFFIRMED.

Date: July 25, 2022

Atkinson, Andelson, Loya, Ruud & Romo

/s/ Mark R. Bresee
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Attorneys for California School Boards Association and its Education Legal Alliance

CERTIFICATE OF COMPLIANCE

I am counsel for amicus curiae California School Boards Association and its Education Legal Alliance. This brief contains 5,093 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I certify that this brief is an amicus brief and complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5).

Signature /*s*/ Mark Bresee **Date** July 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: July 25, 2022

/s/ Mark Bresee
Mark Bresee