No. 22-15827

United States Court of Appeals for the Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 20-CV-2798
HON. HAYWOOD S. GILLIAM, JR., PRESIDING

BRIEF OF CAMPUS CRUSADE FOR CHRIST, INC., INTERVARSITY CHRISTIAN FELLOWSHIP/USA, YOUNG LIFE, RATIO CHRISTI, AND THE NAVIGATORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each *amicus*, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock

s/ *Christopher Mills*
Christopher Mills

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici religious organizations collectively have over 300 years of experience on school campuses nationwide, and they currently support 11,000 campus chapters and 500,000 students. They share a concern in protecting the ability of religious organizations to follow their beliefs and select leaders who adhere to those beliefs. Public schools discriminate against *amici* all too often. But *amici* have never encountered the level of sustained hostility and blatant discrimination directed by the San Jose Unified School District against Pioneer FCA.

The District stripped FCA of its status as an Associated Student Body (ASB) student group on the basis that FCA violates the District's non-discrimination policy and its newly minted "All Comers Policy" by asking its student leaders to sign a statement of faith: that is, to commit to the beliefs that animate the Fellowship of Christian Athletes as an organization. This decision—penalizing a group for asking its leaders to share its beliefs—is unconstitutionally discriminatory.

The District has engaged in at least two forms of prohibited discrimination against FCA and its clubs based on their religious beliefs. First, the District's non-discrimination policy singles out religion as the one animating belief or ideology that a student group cannot adopt and demand that its leaders share. The District's policy allows other students groups to discriminate based on sex, age, ethnicity, GPA, and character. By prohibiting religious groups from considering religion in

leadership selection, the District has violated the bedrock Free Exercise rule that government may not impose special disabilities based on religious status or views. For the same reason, the District has discriminated against religious viewpoints in violation of the Free Speech Clause. And the District's policy imposes serious burdens on religious student groups, including difficulty hosting events, procuring meeting space, and communicating with students and administrators.

Second, the District has discriminated against religion by refusing to exempt religious groups from the policy while exempting comparable groups that also restrict leadership or membership based on otherwise prohibited grounds. The District has unconstitutionally devalued FCA's religious reasons for "discriminating"—that is, setting criteria for its leaders—by judging them to be of lesser import than other organizations' reasons.

An immediate injunction pending appeal is necessary to protect FCA's constitutional rights. For years, the District has tried to hound FCA student groups out of existence by bullying students for their religious beliefs. This sustained, official pressure by the District on individual students poses an imminent threat to the survival of the student groups. By their nature, school communities are transient and often fragile. School children are easily impressionable. And schools are characterized by an "inherent power asymmetry," as officials control both the policy and the tone of the school environment. *Arizona Students' Ass'n v. Arizona Bd. of Regents*,

824 F.3d 858, 869 (9th Cir. 2016). Few children would be willing to stand against continual pressure by those in authority. And the District knows this: after its officials viciously demeaned the beliefs of FCA students for years, it came to court claiming mootness because its campaign of intimidation has driven many students away. Immediate relief is necessary.

Religious discrimination against student groups like *amici*'s is unfortunately nothing new. But the District's discrimination is as egregious as anything encountered by *amici*. Letting that discrimination continue would effectively allow extermination of unpopular student groups across the country. To vindicate the constitutional prohibition on discrimination against religious exercise and speech, this Court should grant an injunction pending appeal.[1]

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person or entity (other than *amici* and their counsel) contributed money intended to fund the preparation or submission of the brief.

ARGUMENT

I. The District's policy discriminates against religion.

Government discrimination against religion violates the Free Exercise Clause. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). Government discrimination against religious viewpoints violates the Free Speech Clause. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The District's policy, when applied to bar a religious group from requiring that its leaders adhere to its religion, violates both clauses. By its policy's structure and operation, the District singles out religious groups as the only groups that cannot set their animating beliefs as criteria for the selection of student leaders.

A. The District's policy violates free exercise.

The District stripped Pioneer FCA of its ASB status after it concluded that the club's beliefs were "of a discriminatory nature." ER.315. As the District admitted, FCA remains the only ASB-approved club in the District to be derecognized for its leadership requirements. *See* ER.871.

But the District's new policy is riddled with exemptions. Most notably, it permits ASB-approved clubs to exclude students based on so-called "non-discriminatory criteria." The District does not know or define what qualifies as

"nondiscriminatory," instead leaving enforcement to the "common sense" discretion of each District school. ER.1046–47; ER.509; ER.556. FCA's statement of faith constitutes its animating beliefs and ideology, but the District has exercised its sweeping discretion and determined that such a statement does not qualify as a nondiscriminatory criterion. The District thus penalized FCA, singling it out—as a religious group—as the one kind of group that cannot require its leaders to commit to its animating beliefs or ideology. This differential treatment violates the Free Exercise Clause, which forbids government from "impos[ing] special disabilities on the basis of religious views or religious status," including denial of benefits. *Trinity Lutheran*, 137 S. Ct. at 2021.

Prohibiting religious discrimination in the selection of leaders makes sense as to student groups that are not organized around religious beliefs. The Chess Club has no legitimate interest in asking leaders to sign a statement of Christian faith. And prohibiting religious discrimination poses no meaningful restriction to nonreligious groups; the policy leaves them free to discriminate based on their nonreligious animating views.

Here, for instance, the District supports the Latino Male Mentoring Group at Pioneer. ER.1123. Likewise, the Male Summit Conference is a District program for "[o]nly males," intended to encourage higher education for boys. ER.954. And the District has long permitted sex-segregated student events, celebrations, and

games. *E.g.*, ER.1272–78. Each of these official school activities may restrict participation as part of its organizational mission, and it makes sense that these activities may not discriminate based on religion.

For religious groups, however, shared beliefs are inextricably linked to shared status, and these groups have no other way to define their mission apart from this protected characteristic. Thus, policies like the District's end up "singl[ing] out religion as belief for uniquely unfavorable treatment." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 916 (2009).

The District has claimed that its rule is facially neutral because it applies to all student clubs and is not undermined by individual exemptions like those in *Fulton v. City of Philadelphia*. But in *Fulton*, the Supreme Court struck down a policy that reserved the application of a system of individual exemptions to the "sole discretion" of a commissioner. 141 S. Ct. 1868, 1879 (2021). Here, the District claims for itself capacious discretion to determine when exclusionary rules fall under the "non-discriminatory" exemption of its policy. Such sweeping discretion renders the policy not generally applicable. If anything, the "non-discriminatory" exemption poses a greater threat of swallowing the entire policy than any of the narrow exemptions in *Fulton*.

For its part, the district court said that the policy does not give the District "an impermissible degree of discretion" because "discriminatory criteria are enumerated in the list of protected characteristics, so non-discriminatory criteria must be criteria not based on those characteristics." ER.16. That circular explanation misses the point. There are virtually *infinite* secular criteria on which the policy permits discrimination, and the District gets to pick and choose among them. That is the constitutional problem. More, the District has also permitted groups and activities to discriminate based on the protected characteristics in the policy itself. *See* Part II *infra*.

Thus, in its "real operation," *Lukumi*, 508 U.S. at 535, the District's policy targets religious student groups, barring them from requiring that their leaders adhere to the group's beliefs but allowing almost all other groups to do so.

B. The District's policy violates free speech by discriminating against religious viewpoints.

For similar reasons, applying the District's policy to FCA discriminates against religious viewpoints in violation of the Free Speech Clause. When a public school opens a limited public forum, such as here, it may not "discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829. A "[r]eligion is [itself] [a] viewpoint from which ideas are conveyed." *Good News Club*, 533 U.S. at 112 n.4. As just shown, the District's policy denies only religious groups the ability to preserve their animating beliefs and viewpoints.

Courts look beyond a policy's face to determine whether its application to a religious group is unconstitutional viewpoint discrimination. In each of the Supreme Court's decisions protecting religious student organizations—*Lamb's Chapel*, *Rosenberger*, *Good News Club*, and *Widmar v. Vincent*, 454 U.S. 263 (1981)—the schools might have argued that their policies were neutral because they prohibited "all organizations" from engaging in religious language, activity, or purposes. Of course, the Supreme Court would—and did—reject that artificial argument as discriminatory against religious viewpoints. But the notion that a religious group should ignore religion in choosing its leaders, because nonreligious groups must ignore it, is just as incongruous as the notion that a religious group should pursue nonreligious language or purposes because nonreligious groups do so. Just as nonreligious groups may choose leaders who will advance their mission, religious groups must be able to as well.

In the district court's view, the policy "is neutral as to content and viewpoint" "because it serves a purpose unrelated to the suppression of expression" and "because it does not preclude religious speech but rather prohibits acts of discrimination." ER.11, 15 (cleaned up). Neither reason is sound. First, whatever the new policy's other supposed purposes, it has been *applied* to exclude only religious viewpoints. "[E]xclud[ing] speech based on religious viewpoint" always "consti-

tutes impermissible viewpoint discrimination" and "violate[s] the Free Speech Clause." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1593 (2022) (cleaned up).

Likewise, a regulation can govern conduct and still be viewpoint discriminatory. The government could not forbid racial discrimination only when groups espousing religious beliefs engage in it; that would be viewpoint discrimination. In *R.A.V. v. City of St. Paul*, the Supreme Court held that even categories of unprotected activity may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." 505 U.S. 377, 383–84 (1992). The District's exclusion of FCA is exactly the kind of selective restriction that *R.A.V.* condemns.

The district court relied on *Christian Legal Society v. Martinez*, which suggested "other available avenues for the group" in that case "to exercise its First Amendment rights." 561 U.S. 661, 690 (2010); *see* ER.10–13 & nn. 4–5. But the opinion in *Martinez* emphasized these "other available avenues" only *after* finding that the "access barriers" there were "viewpoint neutral." 561 U.S. at 690. When a policy's application discriminates against religion, strict scrutiny applies regardless of the burden.

C. Denial of recognized status seriously burdens student religious groups.

In any event, the District's discrimination against religious groups like FCA significantly burdens their rights of religious exercise, speech, and association.

1. Burdening a religious group's ability to select its leaders is a serious harm.

The Supreme Court has repeatedly affirmed that a religious group must have "control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). Without that autonomy, a religious group could not "shape its own faith and mission," *id.*: "a wayward [leader]'s preaching, teaching, and counseling could contradict the [group's] tenets and lead the congregation away from the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). These interests apply to FCA's student leaders, who "lead and participate in prayer, worship, and religious teaching" and "help decide the religious content of meetings." ER.1325.

2. Derecognition of a group seriously burdens it.

The district court minimized the burdens of deregistration, noting that FCA could "meet on campus" and "advertise through 'non-[school] electronic resources.'" ER.10 n.5. These "alternative avenues" (*id.*) are far from registered Main Street. To give only a few examples:

Loss of Club Benefits. By stripping FCA of ASB status, the club loses access to resources, means of communication and funding, and even participation in the yearbook. ER.1329–30.

Stigma. Deregistration also stigmatized FCA and its members. The first removal of FCA's ASB status began when a teacher wrote a message on his class-

room board asserting that FCA's views were an injury "to the rights of others in my community." ER.1199; *see also* ER.1204; ER.1219; ER.1227; ER. 1312; ER.1322. Echoing school officials, students led loud protests right outside Pioneer FCA's meeting, carrying signs disparaging the beliefs of FCA as "HATRED." ER.1239. Pioneer granted recognition to a Satanic Temple Club chapter formed to "openly mock" FCA's beliefs. ER.1309–10.

Intimidation. Unsurprisingly, the cloud of stigma that now surrounds FCA has intimidated students and made recruitment of new leaders and members for the Pioneer club much harder. ER.1709–12. Lack of ASB approval discourages students from becoming student FCA representatives and club leaders. The District-sanctioned message to students interested in FCA is clear: stay away and keep your religious views to yourself. For impressionable students whose academic success depends on the very teachers and administrators belittling their beliefs, this official pressure is often overwhelming.

These severe burdens confirm both that strict scrutiny of the District's discriminatory actions is required and that an injunction pending appeal is necessary.

II. The District devalues religious exercise by allowing other groups to discriminate.

The District has also discriminated against religion by exempting other groups that restrict leadership or membership based on otherwise prohibited grounds, while refusing to provide the same protection to religious groups.

Under Supreme Court precedent, laws that burden religious exercise are subject to strict scrutiny unless they are neutral and generally applicable. "[G]overnment regulations are not neutral and generally applicable" "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

The District has allowed multiple organizations to set leadership or membership criteria on grounds otherwise prohibited by its policy but has refused to recognize FCA's religious reason for doing so. The District has thus "unconstitutionally devalued [FCA's] religious reasons for [setting criteria] by judging them to be of lesser import than [other organizations'] reasons." *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

First, the District justified its categorical exception allowing student athletics teams to discriminate based on sex in their leadership and membership because they fall "under a different umbrella," though they too have ASB accounts. ER.176; ER.443; *accord* ER.17 n.10. But the District cannot avoid strict scrutiny by arbitrarily classifying all groups that *do* engage in prohibited discrimination as outside the ASB program. "Comparability is concerned" not with the government's own classification, but "with the risks various activities pose" to "the asserted government interest." *Tandon*, 141 S. Ct. at 1296. Here, the district court said that it

would be "reasonable" to think that "students cannot engage in the school community if they are prohibited from joining clubs or holding leadership positions because of" a "other protected characteristic." ER.10. This generic interest applies equally to *all* school activities. And the right of religious organizations to select their leaders is at least as fundamental as any interest in recreational events. *Hosanna-Tabor*, 565 U.S. at 183–84.[2]

The District's asserted policy is not applied to comparable activities either, as noted above. Other District programs discriminate based on race and parental status. ER.939; ER.1156–61; ER.1035. The District has protested that all these types of discrimination are "reasonable." But once again, that only underscores the impermissible value judgment that the District is making *against* religious exercise. This discriminatory treatment is unconstitutional.

CONCLUSION

The Court should grant an injunction pending appeal.

[2] Of course, the problem is not single-sex sports teams, but undervaluing religious rationales for selection.

Respectfully submitted,

s/ *Christopher Mills*

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JUNE 10, 2022

CERTIFICATE OF COMPLIANCE

I, Christopher Mills, do hereby certify that the foregoing Brief:

1) Complies with the type-volume limit of Fed. R. App. P. 29(a)(5) (suggesting half the length of the party's filing for *amicus* briefs), 9th Cir. R. 27-1(1)(d) (party's motion limited to 20 pages), and 9th Cir. R. 32-3(2) (20 pages equals 5,600 words), because it contains 2,754 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare this brief; and,

2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

/s *Christopher Mills*
Christopher Mills

Dated: June 10, 2022

CERTIFICATE OF SERVICE

I, Christopher Mills, do hereby certify that I filed the foregoing Brief electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 10, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Christopher Mills*
Christopher Mills