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Attorneys for Amici (**pro hac vice* application pending)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH SINCLAIR, CHARLOTTE KLARKE, FELLOWSHIP OF CHRISTIAN ATHLETES, an Oklahoma corporation, and FELLOWSHIP OF CHRISTIAN ATHLETES OF PIONEER HIGH SCHOOL, an unincorporated association,

Plaintiffs,

v.

SAN JOSÉ UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, in its official capacity, NANCY ALBARRÁN, in her official and personal capacity, HERBERT ESPIRITU, in his official and personal capacity, PETER GLASSER, in his official and personal capacity, and STEPHEN MCMAHON, in his official and personal capacity,

Defendants.

CASE No. 5:20-cv-2798

JUDGE: _____

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CAMPUS CRUSADE FOR CHRIST, INC., INTERVARSITY CHRISTIAN FELLOWSHIP/USA, YOUNG LIFE, CHI ALPHA CAMPUS MINISTRIES, AND RATIO CHRISTI IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Hearing Date:	March 3, 2022
Hearing Time:	1:30 PM PT
Courtroom:	Courtroom 8 – 4th Floor
Judge:	Pending Reassignment

Proposed *amici curiae* Campus Crusade for Christ, Inc., Intervarsity Christian Fellowship/USA, Young Life, Chi Alpha Campus Ministries, and Ratio Christi ("Movants") respectfully submit this Motion for Leave to File Brief *Amicus Curiae* in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss. The proposed *amicus* brief accompanies this motion. A proposed order also accompanies this motion.

In support of this motion, Movants state as follows:

I. Movants have significant interests in the outcome of this matter.

Proposed *amici* are religious organizations that have served students on campuses nationwide for many decades. In the aggregate, these religious organizations encompass thousands of student groups. These groups welcome everyone to their meetings, activities, and events. But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs. Thus, they have a strong interest in the outcome of this case.

Specific individual statements of interest for the proposed *amici*, which are also found in the brief, are as follows:

Campus Crusade for Christ, Inc., operates in the United States under the name "Cru." Cru has established affiliated chapters—student organizations—on 1,439 American college campuses and hundreds of high schools, with more than 106,000 students involved. These chapters, like many religious student organizations, require their leaders to articulate Christian beliefs and live a Christian lifestyle. Cru has an interest in upholding the religious, expressive, and associational interests of religious student organizations on college and high school campuses across the nation.

InterVarsity Christian Fellowship/USA is a Christian ministry that establishes and advances witnessing communities of students and faculty who follow Jesus as Savior and Lord on nearly 700 college and university campuses in the United States. Its employees and participants pursue this mission with a commitment to grow in love for God, God's word, God's people of every ethnicity and culture, and God's purposes in the world.

Young Life is a Christian youth ministry organization committed to sharing the Good News of Jesus Christ with adolescents. Through local clubs and destination camps, Young Life desires to provide fun, adventurous, life-changing, and skill-building experiences, preparing kids for a lifelong

relationship with Christ and a love for His word, His mission, and the local church. Young Life provides opportunities for thousands of middle school, high school, and college students of all backgrounds and abilities to form student groups on their campuses to encourage personal spiritual development and create communities of fellowship and campus outreach. Involvement in a local Young Life club has been pivotal in the spiritual growth of countless adolescents throughout Young Life's eighty-year history. As a religious organization governed by a sincerely held statement of faith, Young Life believes it is critical and logical that its employees, volunteers, and student leaders share and support the organization's beliefs as they further the mission of the organization in a leadership role.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. At each of its 320 university chapters across the country, it strives to reconcile diverse groups of students to Christ and to equip them through Spirit-filled communities of prayer, worship, fellowship, discipleship, service, and missions. Chi Alpha chapters welcome everyone to their meetings, activities, and events. But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs.

Ratio Christi campus apologetics alliance is a campus ministry on 125 campuses nationwide that seeks to share the hope and explore the truth claims of Christianity within a welcoming, loving, and intellectually engaging environment. Ratio Christi examines vital questions about faith, reason, and life through panel discussions, lectures, discussion groups, and debates. Ratio Christi trains students who want to discuss their beliefs in a rational manner, hosts events, and fosters dialogue on campus. Indeed, at many of its chapters, more non-Christians than Christians attend its events.

II. The proposed *amicus* brief provides helpful insights into the issues at stake.

As proposed *amici* explain in their brief, they are deeply concerned that Defendants' nondiscrimination policy singles out religion as the one animating belief or ideology that a student group cannot adopt and demand that its leaders share. When the prohibition on considering religion in leadership selection is applied to religious groups, it violates the bedrock rule, under the Free Exercise Clause, that government may not impose special disabilities on the basis of religious status or views. Similarly, as proposed *amici* explain in their brief, Defendants have discriminated against religious

viewpoints in violation of the Free Speech Clause. Such discrimination imposes serious burdens on religious student groups—burdens that that the proposed *amici* further detail from their own experiences. Those burdens include greatly increased costs, reduced access to students, and the stigma of being an unregistered or disapproved group.

As proposed *amici* further explain in their brief, Defendants have also discriminated against religion by refusing to exempt religious groups from their policy while exempting or registering numerous comparable groups that also restrict leadership or membership based on otherwise prohibited grounds. These exceptions—most notably for sports teams, but also for a variety of other groups—show that Defendants' policy is neither neutral toward religion nor generally applicable and thus violates the Free Exercise Clause.

Because of their long experience on campuses nationwide stretching over many decades, proposed *amici* are particularly equipped to provide relevant arguments regarding the legal issues before the Court and the practical impact its ruling will have on many students and religious organizations nationwide.

CONCLUSION

For these reasons, Movants respectfully request that this Court grant this motion and accept for filing the attached *amicus* brief.

Dated: January 13, 2022

Respectfully submitted,

By: */s/ Christopher Mills*

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INTRODUCTION

San Jose Unified School District stripped Pioneer 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 taking the sensible step of asking its leaders to share its beliefs—is unconstitutionally discriminatory. *Amici* religious organizations are on thousands of campuses nationwide. Unfortunately, public schools discriminate against *amici* and other religious student groups all too often.[1] But *amici* have never encountered the level of sustained hostility and blatant discrimination directed by the District against FCA.

[1] *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108–09 (2001) (denying a student group access to meeting space for Bible lessons and scripture readings was viewpoint discrimination); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 246–47 (1990) (a student's request to form a religious group on campus must be granted under the Equal Access Act); *Hsu ex rel. Hsu v. Rosyln Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872 (2d Cir. 1996) (ruling for a religious group that restricted leadership positions to "professed Christians"); *Prince v. Jacoby*, 303 F.3d 1074, 1090–92 (9th Cir. 2002) (school denial of official status to a religious student group violated the First Amendment); *McKee v. Pleasanton Unified Sch. Dist. 344*, No. 2:06-cv-2370, 2007 WL 445192, at *1 (D. Kan. Jan. 30, 2007) (preliminary injunction in favor of FCA club that was denied registered status); *Hoppock ex rel. Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160, 1164 (D. Idaho 1991) (under the EAA, a religious student group must be able to meet and use school facilities); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1299–1300 (C.D. Cal. 2008) (religious student club likely to prevail on EAA and First Amendment claim for equal access to school facilities). Religious groups on college campuses have long encountered similar obstacles. *See, e.g.*, *Christian Legal Soc'y v. Walker,* 453 F.3d 835, 867 (7th Cir. 2006) (a religious group denied recognized status had shown a likelihood of success on expressive association and other First Amendment claims); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 863–64 (8th Cir. 2021) (a university's selective application of its nondiscrimination policy against religious student groups was viewpoint discrimination); *Beta Upsilon Chi Upsilon Chapter v. Machen*, 586 F.3d 908, 918 (11th Cir. 2009) (holding the case moot after a religious fraternity was granted registered status); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 839 (E.D. Mich. 2021) (granting injunction preventing university from revoking religious student groups registered status due to its religious leadership requirements); *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04-cv-765, 2006 WL 1286186, at *3–4 (M.D.N.C. May 4, 2006) (university modified its nondiscrimination policy to permit student organizations that restricted membership on account of religious belief); *Christian Legal Soc'y v. Crow*, No. 04-cv-2572, 2006 WL 8440339, at *5 (D. Ariz. May 1, 2006) (settlement that amended university policy so that religious groups could restrict membership and leadership positions on account of religious belief); Complaint for Damages, Declaratory, and Injunctive Relief at 9, 19, 35, *Ratio Christi at the Univ. of Houston-Clear Lake v. Khator*, No. 4:21-cv-3503 (S. D. Tex. filed Oct. 25, 2021) (involving denial of registered

The District's effort to dismiss the case is the latest manifestation of this hostility. The District is attempting to hound FCA student groups out of existence by bullying students for their religious beliefs. Then, the District believes that it can escape judicial review by declaring the local controversy moot and arguing that the national FCA lacks standing. But the First Amendment cannot be avoided so easily. As Plaintiffs explain, Pioneer FCA continues to meet, despite the District's best efforts to stamp it out and scare students away. And the national FCA faces constitutional injuries when schools discriminate against its clubs. A ruling for the District would effectively allow extermination of unpopular student groups across the country.

Rather than dismiss the case, this Court should grant a preliminary injunction against the District. 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. That discrimination against religion triggers strict scrutiny, which the District cannot hope to satisfy. Strict scrutiny is independently warranted because of the serious burdens that the District's policy imposes on religious student groups, including difficulty hosting events, procuring meeting space, and communicating with school 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. These exemptions—most notably for sports teams, but also for various

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status to religious student group); Verified Complaint at 24–30, *Ratio Christi of Kennesaw State Univ. v. Olens*, No. 1:18-cv-745 (N.D. Ga. filed Feb. 20, 2018) (involving speech limitations on religious student group); Plaintiffs' Verified Complaint at 4, 19, *Ratio Christi at the Univ. of Colo. v. Sharkey*, No. 1:18-cv-2928 (D. Colo. filed Nov. 14, 2018) (involving denial of registered status to religious student groups based on leadership selection).

other groups and activities—show that the District's policy is neither neutral toward religion nor generally applicable and therefore violates the Free Exercise Clause. 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.

To vindicate the constitutional prohibition on discrimination against religious exercise and to redress the District's egregious conduct, this Court should deny the motion to dismiss and grant a preliminary injunction.

INTEREST OF *AMICI CURIAE*

Amici curiae are religious organizations that have served students on thousands of school campuses nationwide for many decades. They share a concern in protecting the ability of religious organizations to follow their beliefs and select leaders who adhere to those beliefs. *Amici* include:

Campus Crusade for Christ, Inc., operates in the United States under the name "Cru." Cru has established affiliated chapters—student organizations—on 1,439 American college campuses and hundreds of high schools, with more than 106,000 students involved. These chapters, like many religious student organizations, require their leaders to articulate Christian beliefs and live a Christian lifestyle. Cru has an interest in upholding the religious, expressive, and associational interests of religious student organizations on college and high school campuses across the nation.

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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); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020). 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." ECF No. 102-1, at 345. The District then granted an exemption to all student groups during the 2020 school year because of the ongoing pandemic, but then again stripped Pioneer FCA of its ASB status based on its newly minted "All Comers Policy," which requires "ASB recognized student groups to permit any student to become a member or leader." *Id.* at 385. As the District admits, FCA was and remains the first and only ASB-approved club in the District to be derecognized for its leadership requirements. *See* ECF No. 102, at 9.

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. ECF No. 102, at 16. 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. *See id*. 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 to "impose special disabilities on the basis of religious views or religious status." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (citation omitted); *accord Lukumi*, 508 U.S. at 533. The Supreme Court has strongly reaffirmed the rule against "'impos[ing] special disabilities on the basis of religious status,'" including denial of benefits. *Espinoza*, 140 S. Ct. at 2254 (quoting *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. For example, LGBTQ groups could limit leadership to those who share their policy goals, thereby imposing requirements based on (permissible) shared beliefs rather than (prohibited) shared status. Here, the District supports the Latino Male Mentoring Group at Pioneer, in which male Latino seniors mentor male Latino freshmen. *See* ECF No. 102, at 18. Likewise, the Male Summit Conference is a District program for "[o]nly males," intended to encourage graduation and higher education for boys. *Id*. The District also permits gender or gender-identity segregation in the classroom during "class discussions" or for "sexual education." *Id*. And the District has long permitted sex-segregated student events and celebrations, such as Leland's "Mr. GQ" contest (the school's "annual male pageant show[s]"), Pioneer's similar "Mr. Mustang" contest, and "Mustang Madness" games that segregate boys and girls for competitions. *Id*. Each of these official school activities is permitted to restrict participation as part and parcel of their 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). Groups who favor nonreligious causes may control their membership and leadership, while groups exercising a fundamental liberty—freely exercising religion—may not. That perverse result contradicts the First Amendment.

The District claims that its rule against religious discrimination in leadership and membership is "facially neutral" because it applies to all student clubs and is not undermined by a "system of individual exemptions" like that in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). ECF No. 111, at 30 (calling *Fulton* "a narrow, fact-based decision"). But *Fulton* cannot be brushed aside so easily. There, the Supreme Court struck down a policy that reserved the application of a system of individual exemptions to the "sole discretion" of a commissioner. *Fulton,* 141 S. Ct. at 1879. Here,

the District claims for itself similarly capacious discretion to determine when the exclusion of some students from club membership or leadership positions fall under the "non-discriminatory" exemption of its policy. *See* ECF No. 102, at 24. 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*.

The Supreme Court has made clear that "[f]acial neutrality is not determinative"; the Free Exercise Clause "forbids subtle departures from neutrality" too. *Lukumi*, 508 U.S. at 534. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*. *Lukumi* held that ordinances prohibiting the ritual sacrifice of animals were neither neutral nor generally applicable, not just because of their text but because of their "real operation" in conjunction with other laws: they prohibited Santeria sacrifices while leaving unpunished "killings that are no more necessary or humane in almost all other circumstances." *Id*. at 535–36. Similarly, in its "real operation," 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 exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (citations omitted); *accord Lamb's Chapel*, 508 U.S. at 392–93; *Good News Club*, 533 U.S. at 106–07. *Amici* agree with FCA that forbidding religious groups from requiring commitments from their leaders is unreasonable given the forum's purpose. *See* ECF No. 102, at 28–29. We write to address the District's viewpoint discrimination.

As already shown, the District's actions have singled out religion as the one category of beliefs that organizations may not utilize in choosing members and leaders, since FCA is apparently the first club at Pioneer to have its ASB status revoked. A "[r]eligion is [itself] [a] viewpoint from which ideas

are conveyed." *Good News Club*, 533 U.S. at 112 n.4. The policy therefore denies only religious groups the ability to preserve their animating beliefs and viewpoints.

In cases from *Lamb's Chapel* through *Good News Club*, the Supreme Court looked beyond a policy's face and a school's characterization to determine whether its application to a religious group is unconstitutionally viewpoint discriminatory. For example, in *Lamb's Chapel*, the school district described its rule as forbidding any group to use facilities "for religious purposes" (which covered all organizations and arguably did not facially single out speech). 508 U.S. at 387, 393. But the Court determined that the policy was being used to exclude a film on child-rearing, an otherwise allowable subject, because of its religious perspective; the policy thus "was unconstitutionally applied in this case." *Id*. at 393–94.

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," not just religious ones, 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.

Nor is the District's rule viewpoint neutral because, as the District argues, "the Policy targets conduct, not religious identity or belief." ECF No. 111, at 30. 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. The Supreme Court held in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that even categories of unprotected activity may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id*. at 383–84. When this case is viewed in the relevant perspective—an expressive group's selection of the leaders and members who express its beliefs and determine its

course—the District's exclusion of FCA is exactly the kind of selective restriction that *R.A.V.* condemns. The District's policy prohibits an expressive group from discriminating based on its animating viewpoint in one case only: where the viewpoint is religious.

C. Discrimination against religion triggers strict scrutiny.

Because the District's policy singles out religious groups in its structure and operation, the District's application of the policy to religious groups must satisfy strict scrutiny. When discrimination against religion coerces groups to choose between their religious nature and a government benefit, it "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Lukumi*, 508 U.S. at 546). When the government singles out religion for discrimination, it does not matter that the consequences of denying the benefit are less than "dramatic," like a "few extra scraped knees" from unsurfaced playgrounds in *Trinity Lutheran*, 137 S. Ct. at 2024–25. A denial based on discrimination against religion is "'odious to our Constitution all the same.'" *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025). As the Supreme Court recently reiterated, strict scrutiny is required under the Free Exercise Clause whenever the government "treat[s] *any* comparable activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

So too with respect to the District's singling out of religious viewpoints under the Free Speech Clause: the viewpoint discrimination itself triggers strict scrutiny. In none of the decisions involving exclusion of religious groups from a limited public forum— from *Widmar* through *Good News Club*— did the Court ask whether the exclusion imposed large burdens on such groups. Whatever the size of the burden, "to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech," the government "must show that its regulation [satisfies strict scrutiny]." *Widmar*, 454 U.S. at 269–70.[2]

[2] In *Christian Legal Soc'y Chapter of the Univ. of California, Hastings College of Law v. Martinez*, the Supreme Court emphasized what it viewed as "other available avenues for the group to exercise its First Amendment rights" only *after* finding that the "access barriers" there were "viewpoint neutral." 561 U.S. 661, 690 (2010). When a policy discriminates against religion, strict scrutiny applies regardless of the burden.

D. 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. To retain its status as an ASB group, FCA must forgo its fundamental right to select its leaders according to its religious beliefs. And if it is deregistered for exercising that right, it suffers multiple harms.

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

Burdens on a religious group's ability to choose and control its leaders cause it 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, 188–89 (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). As with all expressive groups, "[f]orcing a [religious] group to accept certain members [or leaders] may impair the ability of the group to express those views, and only those views, that it intends to express." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). These interests apply to FCA's student leaders, who "represent FCA and its affiliated FCA chapters by leading prayer, worship, and religious teaching." ECF No. 102, at 11.

2. Derecognition of a group seriously burdens it.

The District does not dispute that FCA and other religious groups have significant interests in choosing their leaders. Instead, it claims that forfeiture of its ASB status to retain its "discriminatory leadership requirements is not an impermissible burden on religion but a choice the group can make. ECF No. 111, at 16. That contention is meritless. Deregistration causes religious groups and their student members significant material and non-material harms. FCA documented such harms here. To give only a few examples:

Loss of Club Benefits. By stripping FCA of ASB status, the club loses access to resources, a faculty advisor, and means of communication and funding that are not otherwise available. ECF No. 137, at 12.

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 classroom board asserting that FCA's views were an injury "to the rights of others in my community." ECF No. 102, at 5; *see also id.* at 13 n.1 (collecting derogatory comments from staff and other students against FCA and its members). Echoing school officials, students led loud protests right outside Pioneer FCA's meeting, carrying signs disparaging the beliefs of FCA as "HATRED." ECF No. 102, at 15. Pioneer granted recognition to a Satanic Temple Club chapter formed to "openly mock" FCA's beliefs. *Id*.

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. *See* ECF No. 137, at 12. Lack of ASB approval discourages students from becoming student FCA representatives and club leaders. *See id.* Alone among student group presidents, the incoming president of Pioneer FCA had to meet with District leadership before the group could attend club rush. *See id.* at 13. Student protests, negative coverage in the student newspaper, and negative comments on social media also intimidate FCA members and other religious students. *See id*. at 12. The District-sanctioned message to students interested in FCA is clear: stay away and keep your religious views to yourself.

Such harms are common when student religious groups try to choose committed leaders in an atmosphere of hostility to that right. For example, at the Ohio State University Moritz College of Law, after a student complained that the Christian Legal Society chapter was requiring that leaders and voting members hold its Christian beliefs, the chapter's student president faced a hostile education environment in which he was "often the subject of name-calling, gossip, and rumor-mongering," was "verbally admonished" by classmates for his religious beliefs, and was "warned by upperclassmen not to take courses by certain professors who were not likely to give [him] fair evaluations."[3] While these harms are all too common, the harms here are especially severe.

[3] *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114th Cong. 39–58 (June 2, 2015), Supp. Hrg. Rec. 62–64 (Letter from Michael Berry to Chairman Trent Franks (June 5, 2015)), *available at* http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf.

Here, the District tries to declare victory by mootness because its harassment and campaign of intimidation have scared students away from Pioneer FCA. Putting aside the factual problems with the District's argument, it would *encourage* schools to be even more openly hostile toward religious groups, in the hope that the groups could be stamped out of existence before the courts could vindicate First Amendment rights. The severe burdens placed by the District on Pioneer FCA do not moot this case; they confirm that strict scrutiny of the District's discriminatory actions is required.

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

The District's discrimination against religious groups is not limited to denying them the right, enjoyed by all other groups, to expect commitments of belief from their leaders. The District has also discriminated against religion by exempting or registering many other student groups that restrict leadership or membership based on otherwise prohibited grounds, while refusing to provide the same protection to religious groups. For that reason, the District's policy is neither neutral toward religion nor generally applicable, and it violates the Free Exercise Clause.

A. Selective exemptions violate the Free Exercise Clause.

Under Supreme Court precedent, laws that burden religious exercise are subject to strict scrutiny unless they are both neutral and generally applicable. *Smith*, 494 U.S. at 878–82. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. And a "law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (cleaned up). In other words, a law may "appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (citing both *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365–67 (3d Cir. 1999)). "An exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and

generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id*. (citation omitted).

Thus, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.*

In *Fraternal Order of Police*, for example, the police department forbade officers to wear beards but gave an exception for officers with a medical reason for wearing beards. 170 F.3d at 360–61. The Third Circuit, in an opinion by then-Judge Alito, held that the department discriminated against religion when it refused an analogous exception to Muslim officers who wore beards as a command of their faith. The court agreed that the department had "unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons." *Id*. at 365.

B. The District has devalued religion, violating neutrality and general applicability.

In the same way, 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 therefore violated neutrality and general applicability: "it has unconstitutionally devalued [FCA's] religious reasons for [setting criteria] by judging them to be of lesser import than [other organizations'] reasons." *Id*.; *cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–67 (2020) (finding public health orders discriminatory when they restricted houses of worship more than comparable businesses).

1. Athletics.

Most significantly, the District provides an unwritten categorical exception allowing student athletics teams to discriminate based on sex in their leadership and membership because they fall "under a different umbrella within our school system," though they too have ASB accounts. ECF No. 102, at 17. This exception creates a gaping hole in the "All Comers Policy." By allowing—even

encouraging—this athletic exemption but refusing a religious exemption, the District violates neutrality and general applicability by devaluing religious groups' interests.

The District says that its athletics exemption is "about achieving the aim of full and fair opportunities for all" in the "context of sports" by a "different means": discrimination based on sex. ECF No. 111, at 18. This defense merely highlights that the District's policy devalues religion and reflects an impermissible "value judgment" favoring other interests. *Fraternal Order of Police*, 170 F.3d at 366.

What's more, the right of religious organizations to select their leaders is at least as fundamental as any interest in recreational events. When the Supreme Court unanimously affirmed that First Amendment right in *Hosanna-Tabor*, the Court traced its roots in both England (back to Magna Carta) and in colonial and founding-era America, concluding "against this background" that both clauses of the First Amendment prevent the government from "interfering with the freedom of religious groups to select their own [ministers and leaders]." 565 U.S. at 183-84; *see also Our Lady*, 140 S. Ct. at 2061 (reiterating that *Hosanna-Tabor* "'looked to the 'background' against which 'the First Amendment was adopted'").

In short, single-sex athletic teams undercut the District's asserted non-discrimination interests as much as or more than student religious groups do. *Cf. Tandon*, 141 S. Ct. at 1296 ("Comparability is concerned with the risks various activities pose" to "the asserted government interest."). Because the government may not "treat *any* comparable secular activity more favorably than religious exercise" without satisfying strict scrutiny, *id.*, the District must take the simple and reasonable step of allowing religious groups an exception to choose leaders who adhere to their religion. *Cf. Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("[N]o precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide."); *Cottonwood Christian Ctr. v. Cypress Redevelopment*

Agency, 218 F. Supp. 2d 1203, 1228–29 (C.D. Cal. 2002) (rejecting argument that revenue generation is a compelling interest justifying discrimination against religious organizations).[4]

2. Other groups and activities.

Beyond athletics, the District's asserted policy is not applied to other comparable activities either. As noted above, the District allows the Latino Male Mentoring Group to discriminate based on age, sex, and ethnicity. It allows the Male Summit Conference and various school contests to discriminate based on sex. In employment, the District discriminates based on race. *See* ECF No. 102, at 10. Other District programs and policies discriminate based on pregnancy or parental status. *See id*.

The District protests that all these types of discrimination are "appropriate[]" and "reasonable," and that some occur "outside the context of ASB-recognized clubs." ECF No. 111, at 18, 20. But once again, that only underscores the inherent value judgment that the District is making *against* religious exercise. "[T]he asserted government interest that justifies the" District's policy is a blanket one: non-discrimination. *Tandon*, 141 S. Ct. at 1296. So, if the District believes that some other values overcome its non-discrimination interest (either within or without its ASB program), the First Amendment requires it to give religious exercise the same consideration.

CONCLUSION

The District's discrimination against FCA for its religious exercise is as egregious as anything encountered by *amici* in their decades of serving thousands of school campuses nationwide. The Court should deny Defendants' motion to dismiss or for judgment on the pleadings, and grant the preliminary injunction sought by Plaintiffs.

[4] To be clear, the problem is not single-sex sports teams. The problem is undervaluing religious rationales for selection relative to other rationales.

Dated: January 13, 2022

Respectfully submitted,

By: */s/ Christopher Mills*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH SINCLAIR, CHARLOTTE KLARKE, FELLOWSHIP OF CHRISTIAN ATHLETES, an Oklahoma corporation, and FELLOWSHIP OF CHRISTIAN ATHLETES OF PIONEER HIGH SCHOOL, an unincorporated association,

Plaintiffs,

v.

SAN JOSÉ UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, in its official capacity, NANCY ALBARRÁN, in her official and personal capacity, HERBERT ESPIRITU, in his official and personal capacity, PETER GLASSER, in his official and personal capacity, and STEPHEN MCMAHON, in his official and personal capacity,

Defendants.

CASE No. 5:20-cv-2798

JUDGE: _____

[PROPOSED] ORDER GRANTING LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CAMPUS CRUSADE FOR CHRIST, INC., INTERVARSITY CHRISTIAN FELLOWSHIP/USA, YOUNG LIFE, CHI ALPHA CAMPUS MINISTRIES, AND RATIO CHRISTI IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Before the Court is the Motion of for Leave to File Brief *Amicus Curiae* of Campus Crusade for Christ, Inc., Intervarsity Christian Fellowship/USA, Young Life, Chi Alpha Campus Ministries, and Ratio Christi in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss. After considering the Motion, any responses or replies, the relevant law and rules of civil procedure, and the arguments of counsel, the Court **GRANTS** the Motion. The previously submitted *amicus* brief is considered **FILED**.

It is so ordered, this _____ day of _____, 2022.

_____
Presiding Judge