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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.

NANCY ALBARRAN, in her official and personal capacity, HERB 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-LHK

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS FCA AND FCA PIONEER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: March 3, 2022
Hearing Time: 1:30 p.m.
Courtroom: Courtroom 8 – 4th Floor
Judge: Hon. Lucy H. Koh

Third Amended Complaint Filed: 7/15/21

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 3, 2022, at 1:30 p.m. or as soon thereafter as the matter may be heard in Courtroom 8 of the above-entitled Court, located at 280 South 1st Street, San Jose, California, Defendants Nancy Albarran, Herb Espiritu, Peter Glasser and Stephen McMahon ("Defendants") will and hereby do move as follows:

1. To dismiss all of the claims of Plaintiffs Fellowship of Christian Athletes ("FCA") and Fellowship of Christian Athletes of Pioneer High School ("FCA Pioneer") for lack of jurisdiction because those Plaintiffs lack standing, and because all of their claims for prospective relief are either moot or unripe. (Fed. R. Civ. P. 12(h)(3) (court must dismiss action if it determines at "any time" that it lacks subject-matter jurisdiction));

2. For judgment on the pleadings as to all of FCA and FCA Pioneer's claims for lack of jurisdiction because those Plaintiffs lack standing, and because all of their claims for prospective relief are either moot or unripe. (Fed. R. Civ. P. 12(c));

3. For judgment on the pleadings as to all of FCA's causes of action for failure to state a claim upon which relief may be granted. (Fed. R. Civ. P. 12(c));

4. For judgment on the pleadings as to all of FCA and FCA Pioneer's causes of action for failure to state a claim for declaratory or injunctive relief for alleged bullying, harassment, and/or retaliation. (Fed. R. Civ. P. 12(c));

5. For judgment on the pleadings as to FCA and FCA Pioneer's First Cause of Action for Violation of the Equal Access Act for failure to state a claim upon which relief may be granted. (Fed. R. Civ. P. 12(c));

6. To dismiss all of FCA Pioneer's claims for lack of capacity to sue. (Fed. R. Civ. P. 17(b)); and

7. To vacate all orders issued in this case during time periods that jurisdiction over the claim, party, or request for relief was lacking, including any preliminary injunction order that may be issued by the time this motion is heard.

This motion is brought pursuant to Federal Rules of Civil Procedure 12(h)(3), 12(c), and 17(b). This motion is based upon this Notice, the Memorandum of Points and Authorities below,

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the Declarations and exhibits and the proposed order submitted herewith, the pleadings and documents on file with the Court, and such other and further evidence or argument as the Court may allow.

DATED: November 26, 2021

DANNIS WOLIVER KELLEY

By: */s/Amy R. Levine*
AMY R. LEVINE
Attorneys for Defendants
NANCY ALBARRAN, HERB ESPIRITU, PETER GLASSER and STEPHEN MCMAHON

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS FCA AND FCA PIONEER

I. INTRODUCTION

Plaintiffs Fellowship of Christian Athletes, an Oklahoma corporation ("FCA"), and Fellowship of Christian Athletes of Pioneer High School, an unincorporated association ("FCA Pioneer") seek declaratory and injunctive relief against Defendants in their Third Amended Complaint ("TAC"), but lack standing to do so. They seek two forms of prospective relief: (1) an order and a declaration that the San Jose Unified School District must provide FCA groups at its high schools with official Associated Student Body ("ASB") recognition; and (2) an order prohibiting the District from allowing harassment of or retaliation against FCA group members. However, there are no longer any active student FCA groups at any District high school, and no students have sought official ASB recognition for any such group this school year. Moreover, Plaintiffs have not pled, and there are no facts to support, the need for any prospective relief addressing harassment or retaliation. As there are no active student FCA groups, no harassment of or retaliation against group members can be deemed to be ongoing, thereby negating any basis for any prospective relief. Since there is no live case or controversy for FCA and FCA Pioneer to pursue, and since they would not be the proper parties to pursue relief in any event, both must be dismissed from this action, along with all of their claims for declaratory and injunctive relief

II. LEGAL BACKGROUND

The federal courts have limited jurisdiction, and may only adjudicate live cases – those that present an actual case or controversy, as required by Article III of the Constitution. An essential part of establishing that a case or controversy exists is that the plaintiff must have standing to pursue the lawsuit. If a plaintiff lacks standing to pursue any of its claims, the Court is without jurisdiction to resolve them. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000), citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (standing is a jurisdictional issue deriving from the case or controversy requirement of Article III); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (a plaintiff is required to "demonstrate standing for each claim he seeks to press and for each form of relief

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that is sought"). Court-created prudential rules of standing also dictate that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). It is Plaintiffs' burden to plead and prove that they have standing to proceed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To establish Article III standing, organizations, like individuals, must satisfy three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). An organization can pursue a claim if it has standing in its own right based on its own injury (organizational standing), or by showing that it is entitled to bring a claim on behalf of its members to redress their injuries (associational standing). With respect to organizational standing,

> an organization may establish "injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [injurious behavior] in question." The organization cannot, however, "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." In other words, an organizational plaintiff must show that the defendant's actions run counter to the organization's purpose, that the organization seeks broad relief against the defendant's actions, and that granting relief would allow the organization to redirect resources currently spent combating the specific challenged conduct to other activities that would advance its mission.

Rodriguez v. City of San Jose, 930 F.3d 1123, 1134 (9th Cir. 2019) (internal citation omitted). With respect to associational standing,

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). In addition, a plaintiff must have statutory standing, and show that it is an individual or entity entitled to enforce the particular statute at issue. *Lexmark Intern. Inc. v. Standard Control Components, Inc.*, 572 U.S. 118, 127 (2014). The lack of statutory standing is not jurisdictional, but results in the failure to state a cause of action. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

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Article III's case or controversy provision also requires that a case be ripe for adjudication, and not have become moot. Mootness is a jurisdictional issue, such that "federal courts have no jurisdiction to hear a case that is moot that is, where no actual or live controversy exists." *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999). "Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Id. (internal quotation marks omitted). "If there is no longer a possibility that [a plaintiff] can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999).

The Declaratory Judgment Act provides no way around these requirements. Instead, it explicitly conditions the availability of declaratory relief on the existence of a live dispute. 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought"). Injunctive relief likewise requires a "concrete and particularized" harm to the plaintiff requiring the court's intervention to prevent it. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 986 (9th Cir. 2007). Thus, "[w]here the activities sought to be enjoined already have occurred, and the … courts cannot undo what has already been done, the action is moot, and must be dismissed." *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) (internal citation omitted); *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013).

On the other hand, lack of ripeness prevents the court from adjudicating matters before the events leading to the claim have been crystalized and become capable of being adjudicated. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Thus, a case is not ripe when key events underpinning the cause of action have not yet occurred. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all'"). Ripeness also requires the court to consider "'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" Id., at 300-01.

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III. PLAINTIFFS' CLAIMS REGARDING APPROVAL OF AN FCA CLUB AT THE DISTRICT'S HIGH SCHOOLS ARE EITHER MOOT OR NOT RIPE

The gravamen of Plaintiffs' Third Amended Complaint is that at three District high schools -- Willow Glen, Leland, and Pioneer -- the District improperly refused to recognize an FCA group as an official student organization under the umbrella of the ASB, with the benefits that adhere to that status, instead only allowing them to meet on campus without the official recognition. (TAC), ¶¶64, 67-69). Plaintiffs acknowledge that the District derecognized the FCA clubs at certain sites because the clubs' leadership requirements violated the District's non-discrimination policy, but Plaintiffs assert that the non-discrimination policy should not apply to them because their leadership requirements derive from their religious beliefs. Plaintiffs FCA and FCA Pioneer seek an order and declaration requiring the District to provide ASB recognition to FCA clubs on District campuses. (TAC, ¶¶140, 169, 181, 198, 210, 225, 140, 250, 261, 271, 282, 292, 304, and p. 65, a-g). However, since there are no active clubs on any District campus, and no students have sought ASB recognition for an FCA club this year, there is no basis for any such prospective relief.

A. Plaintiffs' Claims Regarding FCA at Willow Glen Are Moot

The Willow Glen FCA group was started in or about 2015, when J.F., a transfer student who graduated in 2018, organized the group. (Declaration of Amy R. Levine ("Levine Decl."), Ex. A (Transcript of Deposition of Rigo Lopez ("Lopez Depo."), 101:25-102:11; 104:16-25); Declaration of Shannon McGee ("McGee Decl."), ¶16). The FCA group that was derecognized in May 2019 for violation of the District's non-discrimination policy. (TAC, ¶65). From the end of the 2018-2019 school year until the present, however, there has been no FCA group at that campus. (Declaration of Thao Pham ("Pham Decl."), at ¶3; Dkt. 102-6, ¶27 (chapter "dissolved" after derecognition in 2019, and there was no chapter as of July, 2021)). FCA Bay Area Metro Director Rigo Lopez testified that there are currently no students he is aware of who are interested in forming an FCA chapter at that site. (Levine Decl., Ex. A (Lopez Depo., 107:24-108:2)). Plaintiffs' interrogatory responses confirm that there is no active group at Willow Glen, and Plaintiffs also admit that no student leadership applications have been received from that site

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since 2018. (Levine Decl., ¶4, 5, Ex. B (affirming that there were no student leaders there in 2019-2020 or 2020-2021); Ex. C (identifying the only Willow Glen leadership applications that exist)). Student groups must apply for recognition annually, and no such groups have applied for recognition for an FCA chapter at Willow Glen in the 2019-2020, 2020-2021, or 2021-2022 school years. (Pham Decl., ¶3). Clearly, without any active student group on campus, no leaders or potential leaders, and no one who has applied for official ASB recognition, there is no live case or controversy with respect to the FCA at Willow Glen High School. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (controversy not ripe until the challenged rule has been applied to plaintiffs' situation by some concrete action).

B. Plaintiffs' Claims Regarding FCA at Leland Are Either Moot or Not Ripe

Plaintiffs also allege that the FCA group was derecognized at Leland High School in May 2019, again, based on the District's non-discrimination policy. (TAC, ¶65). In fact, the group was never officially derecognized at Leland. The Leland group was formed in the 2017-2018 school year by a group of parents and their children. It applied for and was given official ASB approved status. (Levine Decl., Ex. A **(**Lopez Depo., 45:24-46:4; 65:24-67:13); Declaration of Meg Walsh ("Walsh Decl."), ¶3). The group continued to meet the next two years, as an ASB approved "interest group," a form of official recognition at Leland used for groups who did not use an ASB bank account or engage in fundraising. (Walsh Decl., ¶¶2-3). Leland Principal Peter Park met with the Leland FCA faculty advisor Gary Clarke in September, 2019, to discuss FCA's leadership policies and the District's non-discrimination requirements, but FCA's status as an ASB approved interest group was never revoked or otherwise changed at Leland. (Declaration of Gary Clarke ("Clarke Decl."), ¶2; Ex. A; Walsh Decl., ¶4).

Instead, the group simply withered away for lack of interest, and is now defunct. Participation in the Leland FCA had been declining since the chapter was founded, as its founding leaders graduated. (Levine Decl., Ex. A (Lopez Depo. at 87:6-88:23)). By 2019-20, the group had dwindled to two or three participants. (Clarke Decl., ¶3, Ex. A; Levine Decl., Ex. A (Lopez Depo. at 87:6-88:9)). On October 22, 2019, Gary Clarke emailed Rigo Lopez to inform him that "[t]he FCA club at Leland does not appear to be happening," and observed that it "only [had] 2

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people in it." (Clarke Decl., ¶3, Ex. A). Two of the original (and only) group of leaders then graduated at the end of that academic year, and the last of the original leaders graduated in 2020-2021. (Levine Decl., Ex. A **(**Lopez Depo., Id.)). The group did not apply for recognition in the 2020-21 or 2021-22 school years, and Lopez testified there are currently no students he is aware of who are interested in forming an FCA group at that site. (Walsh Decl., ¶5; Levine Decl., Ex. A (Lopez Depo. at 107:24-108:2)). The lack of an active group at Leland is also confirmed in Plaintiffs' written discovery responses. (Levine Decl., ¶6, Ex. D and Ex. B). Thus, there is neither a live controversy at Leland as to whether an FCA group should be recognized, nor any imminent injury to any student or student group that could be adjudicated by this Court. In fact, there is not even a past injury to be adjudicated, since the club's status was never revoked or even changed. Accordingly, there is no basis for any prospective relief as to that site.

C. Plaintiffs' Claims Regarding ASB Recognition at Pioneer High School Are Either Moot or Not Ripe

The FCA group at Pioneer was initially formed in or around the 2015-2016 school year. (Declaration of Michelle Mayhew ("Mayhew Decl."), ¶12). As Plaintiffs allege, FCA existed for several years "without incident" until late April 2019, when the administration learned that it employed exclusionary leadership requirements. (TAC, ¶ 9). On May 2, 2019, the Principal at Pioneer, Herb Espiritu, told Klarke and Sinclair that FCA Pioneer would no longer be an ASB recognized student group, but could continue to meet on campus. (TAC, ¶¶62, 65; (Declaration of Herb Espiritu ("Espiritu Decl."), ¶3)). Espiritu provided Klarke and Sinclair with "Talking Points" regarding the derecognition decision, which cited the District's non-discrimination policies. (Espiritu Decl., ¶3, Ex. A). Klarke and Sinclair applied for official recognition of FCA Pioneer for the 2019-2020 school year, but the application was denied, for the same reasons. (Espiritu Decl., ¶4).

After Klarke and Sinclair graduated in June 2020, two other students, L.W. and B.W., applied for ASB recognition for the 2020-2021 school year. Plaintiffs allege that the application was denied (TAC, ¶71), but in fact, all student groups were provided provisional recognition that year, and the group met virtually during the COVID shut-down. FCA Pioneer was treated no

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differently than any other student group. (Mayhew Decl., ¶13). L.W. and B.W. are identified as the "Student Representatives" on whose behalf FCA seeks to pursue these claims (see TAC, ¶28), but those students graduated in 2021. (Mayhew Decl., ¶16).

For the 2021-2022 school year, the District has revised its student organization application process, and instituted new application forms, standardized group constitutions, and a requirement that all groups explicitly agree to abide by the District's non-discrimination policies in their membership and leadership practices as a condition of official ASB recognition. (McGee Decl., ¶10 and the Exhibits thereto). The deadline at all high schools for students to submit applications for club recognition was September 10, 2021. (Id.; Mayhew Decl., ¶17). However, no applications were received by that deadline from any FCA group at any District high school, including at Pioneer. (McGee Decl., ¶10; Mayhew Decl., ¶17).

On or about September 8, 2021, Milara Gatcke, an academic counselor at Pioneer, was approached by two students, M.H. and N.M., about advising FCA Pioneer for the current school year. (Declaration of Milara Gatcke ("Gatcke Decl."), ¶¶2-3)). She told them she would be willing, but wanted to check with Principal Espiritu. (Id., ¶3) On or about September 15, 2021, Ms. Gatcke, M.H., and N.M. met with Rigo Lopez in Ms. Gatcke's office. This was the first time Ms. Gatcke had met Mr. Lopez in person. At that meeting, Mr. Lopez introduced M.H. and N.M, and told N.M. that M.H. wanted to get a FCA Pioneer club started. (Gatcke Decl., ¶4). Mr. Lopez then came onto the Pioneer campus two more times during the current school year: once on September 22, 2021 to drop off supplies for club rush, and once on September 28, 2021 to pick up those supplies. (Gatcke Decl., ¶7).

After the September 10, 2021 deadline had come and gone, Ms. Gatcke contacted Principal Espiritu to inquire about being an advisor for FCA Pioneer, and about the group's participating in club rush. (Espiritu Decl., ¶6). Ms. Gatcke told Espiritu that she had been approached by Rigo Lopez about being the club's advisor. She also told Espiritu that there was a student interested in leading the group, M.H., but that because she was a freshman, she was nervous about taking on that role. (Id.). Espiritu advised Gatcke that the student could participate in club rush, but that student clubs must be student initiated, and that M.H. should reach out to

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him for support. (Id.). Espiritu, Gatcke, and M.H. then met on or around September 21, 2021, and Espiritu provided the student with guidance about next steps and told her that she had his support. (Espiritu Decl., ¶7; Gatcke Decl., ¶5)).

However, even after that meeting, no student submitted any application for official recognition on behalf of FCA Pioneer. M.H. did ask Ms. Mayhew if the FCA group could have a table at club rush, and Ms. Mayhew made sure one was set up for her, but nonetheless, no students participated in club rush for the group. (Espiritu Decl., ¶9; Mayhew Decl., ¶17; Gatcke Decl., ¶6). When Espiritu later checked in with M.H. and asked her why she had not participated in club rush after all, M.H. indicated that she was not going to be leading the group. Espiritu observed that M.H. appeared to be happy with that decision, and did not press her. (Espiritu Decl., ¶8). Even though M.H. was permitted to hold meetings, the group is not meeting on campus. (Gatcke Decl., ¶¶3, 8; Espiritu Decl. ¶9).

Clearly, a prerequisite for Plaintiffs to obtain an order requiring that FCA Pioneer be officially recognized as a club is that a group of students have joined together to form a club, have sought recognition, and been denied. The Equal Access Act ("EAA") protects the rights of "students who wish to conduct a meeting within [a district's] limited open forum." 20 U.S.C. §4071(a). Without any such students, no cause of action exists under that statute. Further, without interested students and an application that has been denied, none of the Plaintiffs' First or Fourteenth Amendment claims is ripe. *Lujan*, 497 U.S. at 891; *Reno v. Cath. Soc. Serv. Inc.*, 509 U.S. 43, 58, and n.19 (1993) (challenge to regulation not ripe as to applicants who failed to timely file applications). See also *Harris v. Itzhaki*, 183 F.3d 1043, 1050 (9th Cir. 1999) (requests for prospective relief moot in housing discrimination case where plaintiff voluntarily left apartment and moved 3000 miles away).

The fact that there used to be a student group is not sufficient. A claim must remain live throughout all stages of the proceedings. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). Federal courts may not issue advisory opinions based on hypothetical facts. *Thomas v Anchorage Equal Rights Com'n*, 220 F. 3d 1134, 1138 (9th Cir. 2000). Here, not only is there no cognizable injury that is "actual or imminent," there is no causation because Plaintiffs' injuries

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are self-inflicted. *Lujan,* 504 U.S. at 560. Redressability is also lacking, as there is nothing for the Court to order even if Plaintiffs prevail. The Court cannot order a student group into existence, or order the Defendants to provide recognition to a non-existent group. *Merkey v. Bd. of Regents of the State of Fla.*, 493 F.2d 790, 791 (5th Cir. 1970) is on point. In *Merkey,* the court dismissed a challenge by a student and a student organization to a university's refusal to afford the group official status, stating: "No present FSU student is shown by the record to seek recognition for YSA as an official student organization. In these circumstances … the appeal is moot."

Similarly for ripeness, the Court must consider not only whether the timing is right, but also the fitness of the issues for judicial decision and whether the parties will suffer any hardship if the matter is not adjudicated now. Here, no students are meeting as FCA Pioneer, and none have sought recognition. Thus, resolution of the dispute will have no "'direct effect on the day-to-day business'" of any Pioneer students, and so Plaintiffs suffer no hardship if this dispute is allowed to ripen. *Texas*, at 301 (citation omitted). For this reason as well, the Court should refrain from adjudicating this dispute.

As to Plaintiffs' assertions that they cannot in good conscience apply for ASB recognition because applying would require them to agree to the District's non-discrimination policies, that objection is without merit. This Court has already found that the District was entitled to apply its non-discrimination policy to the FCA groups, under the authority of *Alpha Delta Chi-Delta Chapter v. Reed,* 648 F.3d 790 (9th Cir. 2011) and *Truth v. Kent Sch. Dist.,* 542 F.3d 634 (9th Cir. 2008). (Dkt. 49, at 21:15–22:11, 22:24-24:17). In its ruling on Defendants' motion to dismiss the First Amended Complaint, the Court determined that the District's policy was reasonable and viewpoint neutral, and dismissed Plaintiffs' facial challenges to the application of the non-discrimination rules towards them. (Dkt. 49, at 30:1-12). Defendants are thus entitled to require that students seeking official recognition of an FCA group fill out an application form and agree to abide by the non-discrimination policy. It is not illegal for the District to do so, and that requirement cannot be enjoined. Moreover, Plaintiffs deny that they discriminate against any student in membership or leadership, and so there appears no reason why they could not, in good

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conscience, fill out the application form. (Levine Decl., ¶7, Ex. E).[1]

In its previous ruling, the Court also directed the parties to focus on whether Defendants have exempted certain student groups from the non-discrimination policies but declined to grant Plaintiffs an exemption because of their religious viewpoint. (Dkt. 49, at 30:1-12). Plaintiffs have pursued this "selective enforcement" theory, including in their pending motion for a preliminary injunction. But, even still, Plaintiffs cannot pursue that theory without actually applying to the District for the recognition they seek. To prevail on any such claim, Plaintiffs must show they were treated differently from other similarly-situated student groups because of their religious viewpoint. *Rosenbaum v City & Cty. of San Francisco*, 484 F.3d 1142, 1152-53 (9th Cir. 2007). If they are not recognized because they alone refused to agree to a reasonable and neutral non-discrimination policy, or because they failed even to apply for recognition, then no selective enforcement occurred. *Alpha Delta*, 648 F.3d at 803-04; *Truth*, 542 F.3d at 648 and n.2.

Finally, Plaintiffs' theory presupposes that even if they *were* to apply, their application would be denied. They have no proof of this. If a current student had applied, and filled out the required paperwork, their group may very well have been granted official recognition. The District's current student club recognition guidelines so provide, and it would be up to the students to reconcile the requirement of a democratic selection process for leaders with their religious beliefs. (McGee Decl., ¶13). Plaintiffs cannot obtain an order requiring Defendants to provide official club recognition based only on conjecture about what might happen in the future, especially in light of these changed circumstances. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019) ("Where the challenged conduct 'has been sufficiently altered so as to present a substantially different controversy …[,] there is no basis for concluding that the challenged conduct [is] being repeated'").

[1]Every school district in California must have a policy in place that prohibits discrimination in its programs and activities on the basis of sexual orientation, including in student club membership. Cal. Educ. Code § 220; Cal. Code Regs., tit. 5, § 4926. See also, 20 U.S.C. §1681(a); *Bostock v. Clayton Cty*, 590 U.S. ___, 140 S. Ct. 1731 (2020) (sex discrimination includes discrimination based on sexual orientation or gender identity). However, no FCA group in the District (or elsewhere, to Defendants' knowledge) has refused to apply for official recognition because it cannot "in good conscience" agree with its non-discrimination policies.

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IV. PLAINTIFFS' CLAIMS REGARDING HARASSMENT, BULLYING AND RETALIATION ARE MOOT, AND ARE NOT BROUGHT BY A PLAINTIFF WITH STANDING

Plaintiffs also seek to enjoin Defendants "from allowing students and faculty to harass students in the Student FCA Chapters because of their religious beliefs and/or the FCA students' exercise of their federal statutory or constitutional right to meet to express those religious beliefs." (Dkt. 92, Prayer for Relief). However, those claims are moot. To obtain such injunctive relief, Plaintiffs must assert non-speculative facts showing that the conduct is ongoing and that court intervention is required to stop it. *Serv. Women's Action Network v. Mattis*, 352 F. Supp. 3d 977, 986 (N.D. Cal. 2018), citing *Bates v. United Parcel Serv. Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (a plaintiff must establish a "real and immediate threat of repeated injury" and that "the claimed threat of injury must be likely to be redressed by the prospective injunctive relief"); *Williams v. Alioto*, 549 F.2d 136, 142 (9th Cir. 1977) (court lacks jurisdiction "[w]hen events have permanently destroyed any possibility of repetition" or "when the chance of repetition is remote and speculative").

Plaintiffs make a variety of conclusory allegations about widespread and ongoing harassment and bullying directed at FCA students generally, but admit that no such acts occurred at any other school site besides Pioneer. (Levine Decl., Ex. B). As to Pioneer, the TAC pleads facts showing that any purported harassment or bullying ended, at the latest, in February 2020, almost two years ago. (TAC, ¶¶17-19, 80-90). Thereafter, District schools were shut down for over a year due to COVID, from March 2020 to April 2021 (Espiritu Decl., ¶4), and it is undisputed that no harassment or bullying of any kind occurred during that time period. (Levine Decl., Ex. A **(**Lopez Depo., 147:16-22; 151:18-152:5)). In fact, none of the Plaintiffs testified about any harassment or bullying occurred after February 2020, or that it is ongoing. (Levine Decl., Ex. A (Lopez Depo. at id.); Ex. F (Klarke Depo., 164:21-169:3; 179:13-180:12; 183:16-185:6; 186:14-189:19; 205:24-206:8; 211:25-214:10; 278:18-281:9); Ex. G (Sinclair Depo., 95:4-21; 96:23-100:19;100:21-108:17; 117:22-25; 150:6-155:5; 167:16-178:22)**).** Thus, Plaintiffs' conclusory allegations of ongoing harassment have no factual basis in the TAC, and amendment

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of that Complaint would be futile because Plaintiffs cannot show either ongoing conduct or that Court intervention is required for it to stop.

Moreover, even if there were any non-speculative evidence of any current adverse treatment of students at Pioneer, it certainly would not meet any definition of harassment. To state a claim for discrimination under 42 U.S.C. section 1983, Plaintiffs must show "that the defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional." *Flores v. Morgan Hill Unif. Sch. Dist.*, 324 F.3d 1130, 1134–35 (9th Cir. 2003). It is unclear what needs to be shown to establish religion-based discriminatory harassment in this context, but presumably it at least requires some showing that harassment actually occurred and that Defendants were aware of it and did nothing. *Brennon B. v. W. Contra Costa Unif. Sch. Dist.*, 2019 WL 4738283, *1 (N.D. Cal. 2019) (complaint sufficiently alleged §1983 claim for student–on–student harassment when it alleged, *inter alia*, numerous reports by the parent of inappropriate sexual touching by other students while unsupervised, and no follow-up by the school). Plaintiffs have no facts to show any ongoing conduct at all, and certainly none that has been reported to the District. As to their retaliation claim, they likewise have no evidence of any ongoing conduct that "would chill a person of ordinary firmness from continuing to engage in … protected activity." *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006). Without any such facts, Plaintiffs utterly fail to state a claim for injunctive relief based on harassment, bullying, or retaliation as to any current student.

Since FCA and FCA Pioneer seek to enjoin harassment on behalf of "FCA students," they seem to acknowledge that they, as entities, cannot themselves be harassed. In the January 28, 2021 ruling on Defendants' motion to dismiss, the Court dismissed FCA's prospective relief claims for lack of standing, with leave to amend, and required that it identify in its complaint at least one specific student member with standing on whose behalf it was proceeding. (Dkt. 49, at 18:19-19:13). In Plaintiffs' Second and Third Amended Complaints, they identified students B.W. and L.W. as "Student Representatives," and claim that these students were harassed at Pioneer, too. (See, e.g., TAC, ¶28). However, B.W. and L.W. graduated in June 2021, and so

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themselves have no standing to enjoin any future harassment at Pioneer. (Mayhew Decl., ¶16). Since FCA and FCA Pioneer's harassment, bullying, and retaliation claims are only derivative, and since those organizations have not identified any students whose harassment claims are not now moot, FCA and FCA Pioneer lack standing to pursue such injunctive relief claims.[2] The Court should now dismiss Plaintiff FCA and FCA Pioneer's claims for prospective relief based on alleged harassment, bullying, and retaliation for failure to plead facts sufficient to state a cause of action and for lack of jurisdiction.

V. FCA LACKS STANDING TO SEEK PROSPECTIVE RELIEF FOR ITSELF OR ANY DISTRICT STUDENTS

FCA, the Oklahoma corporation, also asks the Court to order and declare that Defendants are required to provide recognition to FCA groups on District campuses, and to enjoin harassment of FCA students. Since FCA has neither organizational nor associational standing, and has no statutory standing under the Equal Access Act, this Court must also dismiss it as a party.

A. FCA's Mission Is Not Thwarted

An organization suing on its own behalf can establish an injury-in-fact when it shows that it suffered "both a diversion of its resources and a frustration of its mission," and that it needs prospective relief to prevent this from recurring. (Dkt. 49, at 18:4-6, citing *La Asociacion de Trabajadores*, 624 F.3d at 1088). An organization's diversion of resources must be significant enough to have "'perceptibly impaired' [its] ability to carry out [its] mission[ ]." *Valle del Sol*

[2] As explained above, FCA Pioneer does not currently meet, has no members, and has not applied for ASB recognition. Since there are no members who would themselves have standing to sue, FCA Pioneer has no derivative right to pursue this suit on their behalf. *Hunt*, 432 U.S. at 343. The Court therefore has no jurisdiction over FCA Pioneer's claims. Moreover, FCA Pioneer is alleged to be an "unincorporated association." (TAC Caption). Unincorporated associations can bring lawsuits in federal court, but only do so when they are, in fact, associations of two or more natural persons. Fed. R. Civ. P. 17(b)(3); Cal. Corp. Code § 18035(a); Cal. Code Civ. Proc. § 369.5(a). Otherwise, plaintiffs must pursue claims under their real names. Fed. R. Civ. P. 17(a). Here, should the Court find that there is no group of students at Pioneer who are associating for purposes of forming FCA Pioneer, it lacks both standing to sue **and** capacity to sue, and must be dismissed as a party to this action on lack of capacity grounds as well. Plaintiffs' counsel purports to represent such an entity, but has objected to discovery that would require Plaintiffs to identify FCA Pioneer's members or to produce its members for deposition. (Levine Decl., ¶¶23, 24). Moreover, in response to discovery directed to FCA Pioneer, responses have come back unverified, and instead signed by Rigo Lopez, an employee of FCA. (Id., ¶25).

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Inc. v. Whiting, 732 F.3d 1006, 1018 (9th Cir. 2013) (citation omitted). The Court previously dismissed FCA's claims for lack of standing, finding it had failed to allege that Defendants' conduct frustrated its mission. (Dkt. 49, at 17:24-19:13). Since FCA still cannot show how its mission is being frustrated by Defendants' actions, it continues to lack organizational standing.

FCA describes itself as "an international religious ministry with recognized student groups" on university and high school campuses. (TAC, ¶2). Its mission is, "[t]o lead every coach and athlete into a growing relationship with Jesus Christ and His church." (TAC, ¶39). FCA alleges that, "[s]tudent FCA chapters meet regularly to advance the religious mission of FCA to reach others for Christ." (TAC, ¶54). Although Plaintiffs broadly allege that Defendants have frustrated FCA's "mission of reaching athletes and other students and promoting FCA's religious beliefs, speech, and values" (TAC, ¶110), FCA's assertions are unsupported.[3]

FCA has not explained how the failure of students in the District to receive official recognition runs counter to its mission to lead coaches and athletes into a growing relationship with Christ. FCA's claim is that students at District high schools have been unable to obtain official recognition for their organizations through ASB. However, FCA is an Oklahoma corporation; it is not a student at any District campus, nor is it a student organization or club. State law defines a "club" as being "a group of students which meets on school property and which is student initiated, student operated and not sponsored by the educational institution." Cal. Code of Regs., tit. 5, § 4910(d). District regulations allow student organizations to be formed by current students, and, consistent with the EAA, it precludes student organizations from being run by "non-school persons." 20 U.S.C. § 4071(c)(5). (Espiritu Decl., ¶¶5-6; McGee Decl., ¶¶10-11, and Exs. C, E)). Any injury that FCA might have suffered cannot have been caused by Defendants' actions, because FCA had no right to form a student organization in the District in the first place, and no right to use the public schools as a pulpit to spread its brand of religion to

[3] FCA does not establish and use any metrics to measure mission success (Levine Decl., Ex. L (Williams Depo, 26:8-22)), but it does provide an annual ministry report to stakeholders. For the school year 2018-19, when the Pioneer events occurred, FCA touted its outstanding mission achievements, including record revenues, record programing outreach, and record numbers of student and adult huddles, (Id., Ex. L (Williams Depo, 114:8-123:9), ¶26, Ex. T).

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students. *McCollum v. Bd. of Educ*., 333 U.S. 203, 211-12 (1948) (the government cannot "utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals"). School districts are not open public fora for religious organizations to spread their message to target populations; the District has created only a limited public forum for *students* to form student groups and engage in student speech. *Christian Legal Soc. Chptr. of the Univ. of Calif., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 682–83 (2010). FCA as an organization is still able to "[t]o lead every coach and athlete into a growing relationship with Jesus Christ and His church" no matter what happens in the SJUSD. FCA has no independent right to exist at SJUSD, and nothing SJUSD has done or now does frustrates its stated mission.

To the extent FCA relies on the activities of student groups at District campuses to support its own standing, the facts do not bear out the allegation that FCA's mission was frustrated by Defendants' conduct. As this Court previously observed, and as Plaintiffs themselves acknowledge, FCA Pioneer continued to regularly meet on Pioneer's campus as a student group following its derecognition at the end of the 2018-2019 school year and during the 2019-2020 school year prior to the closure of District schools due to the COVID-19 pandemic. (Dkt. 49, at 18:4-18; TAC, ¶¶75-85, 87). During the 2019-2020 school year, FCA Pioneer had as many meetings as in prior years, held as many events as in prior years, and reported that it had approximately the same number of attendees at those events as in prior years. (Levine Decl., Ex. G (Sinclair Depo., 56:15-57:21)).[4] Despite school closures in the 2020-2021 school year, Pioneer FCA continued to regularly meet virtually. (Mayhew Decl., ¶13; Levine Decl., Ex. A (Lopez Depo., 146:9-13)).

According to the TAC, FCA's mission is advanced by student chapters meeting (TAC, ¶58), and that occurred, either on campus before the COVID closure, or virtually during it. Although that is not occurring during the 2021-22 school year, that is because there are no students interested in meeting, not because of Defendants' conduct. Indeed, FCA Pioneer

[4] After derecognition, FCA Pioneer was still permitted to meet on campus, hold events in the auditorium, post fliers around campus, use the PA system and the group's Instagram account to announce meetings and events, and participate in club rush. (Levine Decl., Ex. F (Klarke Depo., 137:23-141:6); Ex. G (Sinclair Depo., 118:21-122:19, 114:5-16); and Ex. H (Espiritu Depo., 86:6-87:21, 88:4-11; 89:9-19; 129:18-130:21)).

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continued to function and meet for two years after derecognition, and students were given every opportunity to meet on campus this year as an FCA group, but have not chosen to do so. (Espiritu Decl., ¶¶4, 5-11; Levine Decl., Ex. I (McMahon Depo., 39:14-19, 41:6-24, 166:24-167:20); Gatcke Decl., ¶8).[5] FCA's mission as an organization does not depend on whether its affiliated groups meet as official organizations or in some other form, so long as the groups are still able to meet and attempt to reach others for Christ. FCA thus cannot show any injury-in-fact that is "concrete and particularized" and "actual and imminent," or any causal link between Defendants' conduct and any alleged injury. It therefore cannot establish standing. *Lujan*, 504 U.S. at 560.

B. FCA's Resources Are Not Being Diverted

Even if Plaintiffs could show that Defendants somehow frustrated FCA's mission, Plaintiffs cannot show that Defendants have caused, and continue to cause, a diversion of FCA's resources. To meet this prong, FCA must show it would have suffered some other injury if it had not diverted resources to counteract the problem they allege Defendants created. *La Asociacion de Trabajadores*, 624 F.3d at 1088. An abstract moral concern about Defendants' conduct is not enough. *Project Sentinel v. Evergreen Ridge Apts.*, 40 F. Supp. 2d 1136, 1138 (N.D.Cal. 1999) (setback to organization's interest in gaining compliance with fair housing laws insufficient to establish standing); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39-40 (1976) (organizations dedicated to promoting access to health services lacked standing to challenge tax treatment of hospitals).

In order to demonstrate "a diversion-of-resources injury… sufficient to establish organizational standing," FCA must demonstrate that, "*independent of the litigation*, the challenged policy 'frustrates the organization's goals and requires the organization to expend resources … they otherwise would spend in other ways.'" *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (internal citations omitted, emphasis added). The organization cannot, however, "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at

[5] The roster FCA Pioneer submitted to the District from the 2020-21 school year shows eight (8) members, six (6) of whom were seniors that year, and have now graduated. (Mayhew Decl., ¶18 and Ex. C).

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all." *La Asociacion de Trabajadores*, 624 F.3d at 1088. "Plaintiff cannot manufacture standing by first claiming a general interest in lawful conduct and then alleging that the costs incurred in identifying and litigating instances of unlawful conduct constitute injury in fact." *Project Sentinel*, 40 F. Supp. 2d at 1139.

Aside from this litigation, FCA cannot demonstrate that it diverted any resources as a result of the events alleged in the TAC. FCA claims its Bay Area Metro Director Rigo Lopez spent more of his time providing support to students at Pioneer during the 2019-20 school year because of the protests. (TAC ¶¶113-116). However, this cannot be considered a "diversion of resources" because FCA had no right to have its employees regularly attending meetings and events on campus anyway. 20 U.S.C. § 4071(c)(5); *McCollum*, 333 U.S. at 212 (public schools cannot let outsiders engage in religious teaching or promote voluntary religious classes taught by private teachers); *Nartowicz v Clayton Cty. Sch. Dist*., 736 F.2d 646, 649-50 (11th Cir. 1984) (forbidding school to allow churches to announce church-sponsored activities over school PA system). And, as a factual matter, there is insufficient proof that Lopez did spend, or more importantly, continues to spend, his time diverted towards FCA Pioneer.

Lopez testified that he spent approximately the same amount of time at Pioneer during the 2018-2019 school year as in the prior year. (Levine Decl., Ex. A (Lopez Depo**.,** 156:15-22). He testified that his time at each school site for which he was responsible varied each year, and was unable to quantify the amount of time or attention he spent at or for any site during any school year. (Id., 10:8-16, 11:12-19, 75:8-21, 154:14-155:21, 156:15-22). While his text messages indicate he was attempting to keep a "low profile" at Pioneer in the 2019-2020 school year, he asserted that he made that site a priority because of the protests. (Id., Ex. A (Lopez Depo., 76:10-77:13; 152:13-156:22; Ex., P (FCA000535)). Moreover, even if he *did* spend more time on the Pioneer campus because of the protests, this does not explain how FCA's resources were diverted to handle the Pioneer group's derecognition – an issue for which it separately seeks injunctive relief.

Mr. Lopez testified that during the 2020-2021 school year, his time with Pioneer was about the same as at any other school site, and that he has spent less time than in previous years

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because all the meetings were virtual. (Levine Decl., Ex. A (Lopez Depo., 154:18-155:1, 155:13-22)). There is no evidence that Mr. Lopez continues to spend any extra time at Pioneer during this 2021-22 school year.

Moreover, there was nothing that Mr. Lopez was supposed to do for FCA that he was unable to do as a result of Defendants' actions. (Levine Decl., Ex. A (Lopez Depo., 152:20-153:8)). Instead, to the extent any of his time or FCA's resources were diverted, they were diverted in pursuit of this litigation, which cannot be used to establish standing. Mr. Lopez testified that the additional time he spent on Pioneer was significantly due to the litigation, and indeed, FCA contacted a lawyer to begin working on this case within a day after the issue arose, on or about April 24, 2019. (Levine Decl., Ex. A (Lopez Depo., 136:-21-137:25, 138:19-141:3); Ex. J; Ex. K; TAC, ¶¶9, 56). Because lawyers were brought in as soon as events were unfolding, it would be impossible to distinguish time spent addressing the problem from time spent on litigation activities, as the time periods completely overlap. The money FCA spent on legal fees before the litigation started is not "independent of the litigation," and cannot constitute the diversion of resources. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 611 (5th Cir. 2017) ("It is fundamental that no plaintiff may claim as injury the expense of preparing for litigation, for then the injury-in-fact requirement would pose no barrier"). The small sum FCA paid its regular outside counsel to send a demand letter ($10,298.75) came from FCA's general administrative expenses, not from its program budget, and registered barely a blip in its overall expenditures of $145,654,939.00. (Levine Decl., Ex. L (Williams Depo., 62:11-64:23); Ex. M).

Further, FCA cannot argue that the advocacy efforts it undertook in this case diverted it from its mission, because advocacy on behalf of students to enforce their rights to meet as FCA clubs is part of their mission. The FCA website includes a "Student Rights" page, where FCA posts the "FCA Public School Handbook," and contact information for the Legal Intake Division of FCA's partner, the Alliance Defending Freedom. (Levine Decl., Ex. L (Williams Depo., 141:2-145:25); Ex. N; Ex. O). The site says: "Partnering with Alliance Defending Freedom, ADF has developed a support network for those students, parents and teachers facing legal challenges on their campuses. FCA has the legal right to meet on high school and college

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campuses across the country where other student-led groups meet as well. Students have religious rights to FCA meetings on many campuses around the country. Please review the free handbook below and contact the ADF if needed." (Levine Decl., Ex. N). FCA is routinely engaged in legal advocacy for students to form student organizations on campus. (Levine Decl., Ex. A (Lopez Depo., 139:21-141:3); Ex. L (Williams Depo., 59:2-6; 60:5-17); Ex. Q; Ex. K).

FCA's argument that its resources were diverted is also undermined by the fact that FCA used this case to further its mission in various ways, including by publicizing the facts at fundraising events. FCA had Plaintiffs Klarke and Sinclair present their story to FCA supporters at least twice, including at a gala fundraising dinner. (Levine Decl., Ex. P (FCA000458, 514, 519, 521, 527-529); Ex. F (Klarke Depo., 97:16-98:5); Ex. G (Sinclair Depo., 59:4-61:25); Ex. L (Williams Depo., 73:1-25); Ex. R; Ex. S). Klarke and Sinclair's presentation was recorded, and made into a promotional video. (Levine Decl., Ex. R; Ex. S). FCA's exploitation of the events to raise money, enroll new supporters or donors, and mobilize its base, shows not only that its resources were not diverted, but also that advocacy of the type alleged to be a frustration of mission here is actually a core component of FCA's mission.[6]

Because FCA has demonstrated neither frustration of its purpose nor diversion of its resources, it is unable to demonstrate an injury-in-fact or causation and therefore lacks standing to pursue prospective relief on its own behalf.

C. FCA Has No Members and Lacks Standing to Sue on Behalf of District Students

The Court previously found that FCA lacked associational standing because it had not pled "'specific allegations establishing that at least one *identified* member … would suffer harm'" – *i.e.*, that at least one FCA member would himself or herself have standing. (Dkt. 49, at 19:2-13, citing *Associated General Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2003) (emphasis in original)). See also *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (organization must submit "individual affidavits" from

[6] FCA documents show that its revenue, number of staff, and "huddles" around the world all grew during the years at issue. (Levine Decl., Ex.T; Ex. U; Ex. V; Ex. W).

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"members who have suffered the requisite harm"). Despite extensive amendments to the complaint, Plaintiffs still cannot demonstrate associational standing.

First, FCA does not have any "members" in the sense required to establish associational standing. "Associational standing is reserved for organizations that 'express the[ ] collective views and protect the[ ] collective interests of their members." *Fleck and Assocs., Inc. v. Phoenix, City of, an Arizona Mun. Corp.*, 471 F.3d 1100, 1105-06 (9th Cir. 2006). FCA does not have members, nor does it have chapters. (Levine Decl., Ex. A (Lopez Depo., 33:13-19); Ex. F (Klarke Depo., 21:25-23:7); Ex. L (Williams Depo., 35:21-36:4; 42:17-43:22; 47:9-20)). FCA allows student groups (called "huddles") to affiliate with it, but only if the student leaders subscribe to its Statement of Faith. However those student leaders are not members of the FCA organization, nor does FCA even have a list of who those student leaders are. (Levine Decl., Ex. A (Lopez Depo., 19:19-23:15); Ex. L (Williams Depo., 47:9-20; 139:24-140:1)). Further, FCA asserts that the student organizations are not run by FCA, but by students, who act independently of FCA. (Levine Decl., Ex. A (Lopez Depo., 23:13-25:22)).[7] Students at Pioneer High School do not control or influence FCA, and do not fund it directly or indirectly; instead, FCA seeks to speak through student leaders, to advance its own agenda. Thus, students involved with FCA do not demonstrate any traditional indicia of membership in the organization, and FCA cannot be said to represent their interests. *Hunt*, 432 U.S. at 344-45 (associational standing found here because apple growers and dealers, although not traditional "members" of the Commission, "alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them"); *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1111–12, 1113 (9th Cir. 2003) (traditional

[7] Indeed, it is unclear whether the FCA "huddles" themselves even have members, as opposed to "leaders." The groups do not allow their members to vote for their leaders, and do not (without the assistance of counsel) have a definition of who their members are. (Levine Decl., Ex. G (Sinclair Depo., 21:19-23:8); Ex. A (Lopez Depo., 20:23-25:22, 33:13-25)). At Leland High School, for example, there were no FCA members, only leaders, so that the group withered away as each of the leaders graduated from high school. (Clarke Decl., ¶3, Ex. A); (Levine Decl., Ex. A (Lopez Depo., 86:22-88:23)). The TAC alleges that "all Student FCA Chapters had no requirements for membership beyond that a student be enrolled in the respective school." (TAC, ¶42). FCA cannot explain how all students in the school are members, with or without their knowledge or consent, and with or without their agreement in FCA's purposes or activities.

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indicia of membership include the existence of specific statutory provisions that ensure that members "possess the means to influence the priorities and activities" of the organization),

Second, the "Student Representatives" FCA identifies in its TAC – L.W. and B.W. – do not have standing because both have graduated from Pioneer, mooting their claims. (TAC, ¶28). Moreover, they presided over FCA Pioneer during a year in which that group had been granted provisional official status, along with all other student organizations who applied for approval. (Mayhew Decl., ¶13). The organization received the same benefits as any other student organization, including being allowed to participate in a virtual club rush, having yearbook pictures taken, and holding virtual meetings on a platform provided by a faculty advisor. (Mayhew Decl., ¶13; Levine Decl., Ex. A (Lopez Depo., 146:9-147:22); Dkt. 54, ¶68). Since L.W. and B.W. have no claim for prospective relief given that they were afforded all rights of any other student seeking official approval for their group, neither does FCA.

Third, even if FCA could now point to a different student on whose behalf this suit is brought, it would be of no avail. Plaintiffs are required to have and maintain standing at all points during their lawsuit. Thus, coming up with a new "member" would not cure jurisdictional defects that existed in the past. *LA Alliance for Human Rights v. County of Los Angeles*, 14 F.4th 947, 959 n.9 (9th Cir. 2021). If FCA lacked standing when it filed its original Complaint (or at any other point(s) in the proceedings), any actions the Court took during those time periods (like for instance, issuing a preliminary injunction) were void. Id.; *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988) ("[W]e must examine the … original complaint to determine whether … the district court had jurisdiction. If [not], then the court's various orders, including that granting leave to amend the complaint, were nullities"); *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (when a case becomes moot, the established practice is to reverse or vacate the judgment below and remand with a direction to dismiss).

Fourth, even if FCA *had* and *has* members at any of the District's schools, and even if those members had standing, FCA would still lack standing to bring claims on those students' behalf because both FCA's claims and its requested relief require the participation of the individual members in the lawsuit. "Regardless of what relief [is sought], as applied

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constitutional challenges are inherently ill suited to association-level litigation." *City of S. Lake Tahoe Retirees Ass'n v. City of S. Lake Tahoe*, 2017 WL 2779013, at *3 (E.D. Cal. 2017) and cases cited therein. When claims "require an 'ad hoc factual inquiry' for each member represented by the association, the organization does not have associational standing." *Ass'n of Christian Sch. Int'l v. Stearns*, 678 F. Supp. 2d 980, 986 (C.D. Cal. 2008), *aff'd*, 362 Fed. Appx. 640 (9th Cir. 2010). Here, determination of whether the individual "Student Representatives" were harassed, intimidated, or deterred from attending FCA events or forming or maintaining FCA groups, would require precisely the type of individualized ad hoc inquiry that prevents associational standing. (TAC, ¶85).

Finally, associational standing is lacking for FCA, to the extent FCA Pioneer remains a plaintiff in the case. If the FCA students are members of FCA Pioneer, FCA Pioneer (if it otherwise had standing), could represent their interests. There would be no need for FCA to also be in the case so long as FCA Pioneer was a party. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 290 (2014) (association could not pursue suit on behalf of individual plaintiffs who were already parties, as this "does not fulfill the Supreme Court's guidance to focus on 'administrative convenience and efficiency' in determining prudential standing").

VI. FCA CANNOT DEMONSTRATE INJURY UNDER THE CAUSES OF ACTION PLED

These standing defects permeate all of FCA's claims, and prevent it from showing injury, causation, or redressability, or from stating a claim under the causes of action pled. For instance, FCA does not meet the statutory criteria of the EAA, which protects the rights of "students who wish to conduct a meeting within [a district's] limited open forum." (TAC, ¶¶157-159; 20 U.S.C. §4071(a)). "The EAA's plain language and legislative history demonstrate that Congress provided a remedy to a distinct class of plaintiffs" – "students and student groups who were denied access to a school's limited open forum." *American Humanist Ass'n, Inc. v. Douglas Cty. Sch. Dist. Re-1*, 158 F. Supp. 3d 1123, 1135 (D.Colo. 2016). Since "the statute only applies to students enrolled in federally-funded public secondary schools," the court noted that the parent would only have an actionable claim if his son was "involved in a student group that was denied a

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fair opportunity to participate in DCHS's limited open forum." Id. at 1136. FCA is not a student, or a group of students who wish to form an organization on a secondary school campus, and thus fails to show that its interests fall within the protections of the EAA.

Under the equal protection claim (the TAC's Ninth Cause of Action), the FCA, not being a student organization, cannot claim that it is similarly situated to any student organization on campus, and therefore cannot show discrimination. (TAC, ¶¶263-264). The same is true for any claim under which Plaintiffs have asserted discrimination based on selective enforcement. In the TAC's Tenth Cause of Action for "compelled speech," FCA makes no allegation that its speech is compelled, only that the Defendants "have conditioned recognition and its accompanying benefits on the Student FCA Chapters' abjuration of their religious beliefs or their affirmation of beliefs that the District officials insist they affirm." (TAC, ¶275). Similarly, the Eleventh Cause of Action pleads that Defendants unconstitutionally conditioned club recognition and its benefits on Plaintiffs' "foregoing" their constitutional rights to speech and association. (TAC, ¶286). And in the Twelfth Cause of Action, for Retaliation, FCA alleges that recognition was denied, and students were shamed and harassed, such as to "chill persons of ordinary firmness from continuing to engage in protected activity." (TAC, ¶¶296-297). There are no allegations, however, that these events actually befell FCA, or that FCA has been deterred from engaging in any protected activity, or even what its protected activity was. Thus, it is clear that FCA lacks standing as an organization to pursue any of its claims, and that it cannot state a cause of action.

VII. CONCLUSION

For all of the foregoing reasons, this Court should: (1) dismiss with prejudice all of the claims of Plaintiffs FCA and FCA Pioneer for lack of jurisdiction, because those Plaintiffs lack standing to bring such claims, and because all of their claims for prospective relief are either moot or unripe; (2) grant Defendants judgment on the pleadings as to all of FCA and FCA Pioneer's claims on the grounds that those Plaintiffs: (a) lack standing to bring such claims, and all of their claims for prospective relief are either moot or unripe and (b) fail to state a claim upon which relief may be granted; and/or (3) dismiss FCA Pioneer as a party because it lacks capacity to sue. In addition, this Court should vacate any and all previous order(s) adjudicating Plaintiffs' claims

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for prospective relief that it entered during such period(s) of time as it was without jurisdiction over the claim, party, or request for relief.

DATED: November 26, 2021

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