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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELIZABTH 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-EJD

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS AS TO FCA AND FCA PIONEER

Date : June 9, 2022
Time : 9:00 a.m.
Ctrm : 4, 5th Fl.
Judge : Edward J. Davila

Third Amended Complaint Filed: 7/15/21

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I. THE LACK OF AN EXISTING FCA CLUB AT ANY SCHOOL MAKES PLAINTIFFS' CLAIMS MOOT AND UNRIPE.

In their Opening Brief, Defendants asserted: (1) there are no longer any active FCA groups at any District school; and (2) no student applied for ASB recognition for such a group this school year. Without students "who wish to conduct a meeting within [a district's] limited open forum," no claim exists under the Equal Access Act ("EAA"). Without interested students and an application that has been denied, none of Plaintiffs' First or Fourteenth Amendment claims is ripe, and standing is lacking. In their Opposition, Plaintiffs attempt to show there *is* still one active group -- at Pioneer High School – but fail to submit any admissible evidence to support this. They also fail in their attempt to show that the non-existence of a group that currently meets on campus, or that has applied for ASB approval, is either the District's fault, or is unnecessary. On this motion challenging jurisdiction, Plaintiffs have the burden of proof and must submit *admissible evidence* to show their entitlement to proceed, including admissible evidence that the occurrence of future injury that "will be redressed by a favorable decision" is "likely," rather than "merely speculative." *Calif. Communities Against Toxics v. Armorcast Prod. Co., Inc.*, 2015 WL 13915023, *3 (C.D. Cal. 2015); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Since Plaintiffs fail to produce such evidence, they cannot pursue their claims for prospective relief.

A. Plaintiffs Fail to Show Formation of a Pioneer FCA Club This School Year.

While Plaintiffs insist FCA Pioneer still exists (Opposition Brief ("OB") 7:4), their "evidence" turns out to be either an inaccurate description of the documents relied upon, declarations lacking foundation or personal knowledge, or speculative or hearsay statements. Plaintiffs do not show that a club ever *formed* this school year, let alone that there is one that is active.

Plaintiffs cite to the Declaration of Milara Gatcke, Dkt. No. 127-9 ¶¶4, 5, and 7, for the proposition that "Pioneer FCA students have met together twice on campus this semester," (OB 20:19-20), and that therefore the group exists. Ms. Gatcke does not describe two meetings *of the club*, but one meeting of her, two students, and Rigo Lopez at which "Mr. Lopez talked . . . about how M.H. [one of the students] wanted to *start* a club," (Gatcke Decl., ¶4) (emphasis supplied), and a second meeting of Ms. Gatcke, M.H., and Principal Espiritu, at which M.H. told them "that she was excited but nervous to *form* the club [and] Mr. Espiritu told her that he would support her" if she decided to. (Id., ¶5) (Emphasis supplied). Thus, this declaration shows that at the time of these meetings, no club had been formed. Plaintiffs present no evidence that the club formed or held any meetings at some later date. Moreover, the witnesses confirm that after those preliminary meetings, no representative of Pioneer FCA participated in club rush (even though they were permitted to do so). (Gatcke Decl., ¶¶6, 8; Declaration of Herb Espiritu, ¶9).

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Plaintiffs also claim that ¶¶6, 11 and 12 of the Lopez III Decl. (Exhibit A to the Declaration of Daniel Blomberg) show a group exists. (OB 21:3). They do not. They contain hearsay statements that four students told Mr. Lopez in August 2021 that "they wanted to participate in the Pioneer FCA huddle this school year," and another student "expressed excitement" about possible future Pioneer FCA events. They do not show that any Pioneer FCA club actually formed, met, or put on events. Plaintiffs also claim that ¶7 and Exs. A, C, D, and E to the Declaration of Rigo Lopez in opposition to this Motion ("Lopez IV Decl.") prove a group formed. Again, they do not. Paragraph 7 says that Mr. Lopez met with N.M. in November, 2021 at an FCA National event, and he "came away from that meeting and later conversations with the understanding that Pioneer FCA planned to *continue* meeting this academic year." (Emphasis supplied). Not only does this statement lack foundation on various levels, it is obviously not *proof* that FCA Pioneer did meet then or any other time. Exhibit A is a November 24, 2021 email from Mr. Lopez to Ms. Gatcke in which he tells her that he and N.M. "spoke at length a little bit ago and she wants to get some other Christian students together in your office to meet for FCA, pray and be encouraged in their faith." He then suggests two possible dates for this meeting. When Mr. Lopez claims to know "what [N.M.] wants" in this email, he is speculating. Moreover, the email does not refute the undisputed fact that no further student meetings actually occurred this year.[1]

Exhibits C and D are an FCA student leader application form and an evaluation from an FCA training filled out by N.M., whom Mr. Lopez describes as "the current leader of Pioneer FCA." (Lopez IV Decl., ¶¶14, 15). Their existence obviously does not prove a club ever formed at Pioneer, nor is there any foundation for his claim about her leadership, particularly given that Plaintiffs previously identified M.H. as the club's "leader" and N.M. failed to show up to the September 2021 meeting with Principal Espiritu. (Defendants' Opening Brief ("Mtn.") 15:12-16:3; Gatcke Decl., ¶5, Espiritu Decl., ¶7). These FCA leader application forms show only that these students jumped through FCA National's hoops to *apply* for student leadership, not that they are, in fact, student leaders.[2] In fact, FCA and FCA Pioneer have said, under oath, that "No leaders or potential leaders of Pioneer FCA were required to seek or obtain approval from … FCA," and that "*Student leaders at Pioneer FCA are approved by Pioneer FCA's chapter leadership.*" (Reply Declaration of Amy Levine, Ex. X (FCA Pioneer's Responses to First Set of RFAs, No. 1), Ex. Y (FCA Pioneer's Responses to First Set of Interrogatories, No. 1), Ex. Z (FCA's Amended Responses to Second Set of Interrogatories, No. 13)). Plaintiffs submit no proof that these students are

[1] Presumably, had the potential meeting referred to actually occurred, Plaintiffs would have said so. This Court must therefore conclude that there have been ***no*** meetings "of Pioneer FCA" this school year.
[2] The leadership application states: "Please fill out this form if you are *interested in being considered* as an FCA Leader at your school this coming year." (Lopez Decl. IV, Ex. C).

now or ever were leaders of an existent club at Pioneer. Thus, even if they had standing at some other time, they do not have it now and must be dismissed from this case.

B. Without an Application for ASB Approval, None of Plaintiffs' Claims is Ripe.

Despite Plaintiffs' claims that students may once have been interested in forming a club, none of them actually did form one this year, and none took the simple step of submitting an ASB application by September 10, 2021 deadline, or ever. (Gatcke Decl., ¶4; Declaration of Michelle Mayhew, ¶17). There is no foundation for Mr. Lopez's assertion that M.H. started to fill out an application and stopped, or for his speculation that M.H. was "not able" to complete the application because "it requires affirmation that Pioneer FCA will not ask its leaders to agree with its faith." (Lopez III Decl., ¶8). Moreover, the application does not this – it requires only that students explicitly agree to abide by the District's non-discrimination policy, which Plaintiffs deny they violate, and which the Court has already found lawfully applies to them. (Dkt. No. 49, at 21:15–22:11, 22:24-24:17; 30:1-12); Levine Decl. Ex. E (FCA Responses to Second Set of RFAs, Nos. 8-13); Levine Reply Decl., Ex. X (FCA Pioneer Responses to First Set of RFAs. Nos. 3-8)).

Plaintiffs argue "[t]here is no requirement for a plaintiff to submit herself to a discriminatory application process in order to challenge that process." (OB 21:13-14). It is unclear how the District's non-discrimination policy is itself discriminatory towards FCA. In all but one of the cases Plaintiffs cite, the policies governing the application process involved explicit barriers to certain specified groups' abilities to obtain a government benefit, which is not the case here: see, e.g., *Northeastern Fla. Ch. of Ass'd Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 660 (1993) (affirmative action set-asides for minorities and women in government contracts); *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (limitation on school board membership to freeholders); *Trinity Luth. Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2018 (2017) (blanket rule that applicants for state grants to rebuild playgrounds could not be owned by a church), or are cases brought under statutes with their own unique case law on standing: e.g., *Namisnak v. Uber Techs, Inc.*, 971 F.3d 1088, 1092 (9th Cir. 2020) (ADA). These cases are inapposite because the District's non-discrimination policy applies to all clubs seeking ASB approval.[3]

It is also unclear how the District's requirement that ASB-approved clubs abide by its non-discrimination policy excuses the failure even to seek approval here. Schools all across the country have anti-discrimination policies that are identical or nearly identical to the District's, and FCA has clubs at hundreds of them. (Third Amended Complaint ("TAC"), ¶¶ 3-4). Further, these policies existed when

[3] The only other case cited by Plaintiffs relating to applications, *Koala v. Khosla*, 931 F.3d 887, 893 (9th Cir. 2019) is inapposite because it involved "an ongoing violation" of a newspaper's First Amendment rights. Here, there cannot be any "ongoing violation" of FCA Pioneer's rights because FCA Pioneer no longer exists.

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FCA groups applied for recognition from the District previously; the District's decision explicitly to include it in the application itself does not change the fact that it has always applied to ASB-approved clubs. Moreover, it is not necessary to have ASB approval for a club to exist on campus. (Declaration of Shannon McGee, Ex. B). FCA Pioneer did it successfully during 2019-20. Moreover, during that school year, and the year after, FCA Pioneer had no compunction about applying for ASB approval, even after being told that the non-discrimination policy applied to it. Ultimately, then, even if one student did refrain from applying for ASB approval this year for reasons of conscience, this does not negate the undisputed evidence that no active club actually exists on any campus and that there are no students ready, willing and able to lead such a group but for the lack of ASB approval. Since students are apparently unwilling or unable to form a group under *any* circumstances, ASB approval is therefore irrelevant.[4]

II. PLAINTIFFS' EVIDENCE OF THE VIABILITY OF THEIR HARASSMENT, BULLYING AND RETALIATION CLAIMS DOES NOT PASS MUSTER.

Plaintiffs 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." (TAC, Prayer). To obtain such relief, Plaintiffs must submit non-speculative evidence of ongoing conduct that requires court intervention to stop it, but Plaintiffs have failed to produce any evidence that harassment is ongoing or likely to recur. These claims are therefore moot.

The Court previously dismissed FCA's prospective relief claims for lack of standing, with leave to amend, requiring that it identify in its complaint at least one specific student member with standing on whose behalf it was proceeding. (Dkt. No. 49, at 18:19-19:13). Plaintiffs' new Complaint identified two "Student Representatives" whom they claim were harassed at Pioneer (TAC, ¶28), who have since graduated. FCA and FCA Pioneer therefore needed either to identify at least one current student with a harassment claim that is not moot, or have their claims for prospective relief based on alleged harassment, bullying, and retaliation dismissed for failure to plead facts sufficient to state a cause of action and for lack of jurisdiction.

Plaintiffs do not dispute that no "harassment" or "bullying" occurred at any school other than Pioneer, or that no such conduct occurred after February 2020. They assert their harassment and

[4] Plaintiffs further attack Defendants' arguments on ripeness by citing a case that does not mention ripeness (*Rosebrock v. Mathis*, 745 F.3d 963, 791 (9th Cir. 2014) (OB 22:17), and by mischaracterizing Mr. Espiritu's testimony. When Mr. Espiritu testified that an FCA Pioneer application would likely be denied in the future, this was before the District's new process and new approval guidelines had been put into effect; they point to no rejection of any applicants under these procedures. These facts also undercut Plaintiffs' criticism of Defendants' citation of *Reno v. Catholic Social Services* (OB 22 n.5). Moreover, Mr. Espiritu's testimony assumed there would actually be an FCA Pioneer group that would apply.

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retaliation claims are not moot because: (1) there has been new harassment this fall; and (2) even if there had not been, the District cannot guarantee it will not start up again in the future. Like their claims that FCA Pioneer still exists, Plaintiffs' claims of ongoing harassment are heavy on the rhetoric and light on the evidence.[5]

Plaintiffs point to three supposed instances of ongoing harassment. The first is that Principal Espiritu "required [M.H.] to meet with him in person as a condition precedent to participation" in club rush. (OB 24:28-25:7). The only authority cited is Paragraphs 15-16 of the Lopez III Decl., which describe interactions between Mr. Espiritu and Ms. Gatcke about which Mr. Lopez lacks personal knowledge, and presents his speculations about Ms. Gatcke's motivations, M.H.'s emotions and thoughts and the reasons for them, and the thoughts of "the students." Mr. Lopez's ruminations are rebutted by the declarations of Ms. Gatcke and Mr. Espiritu, both of whom have personal knowledge, and both of whom describe a meeting at which Mr. Espiritu offered his support to M.H. – a far cry from harassment or intimidation.

The second example of ongoing harassment is that Defendants sought to depose N.M. – who is the person Mr. Lopez describes as "the current leader of Pioneer FCA." (Lopez IV Decl., ¶14). Plaintiffs cite no case law to support their claim that it can be considered "harassment" under the EAA, or the U.S. Constitution, or any other law, to seek to depose someone who has personal knowledge of the current status of Pioneer FCA, a named Plaintiff.

[5] The problems with Plaintiffs' evidence are myriad. All their declarations fail to state that they are based on personal knowledge, and even if the declarations had recited that they were based on personal knowledge, they still fail to lay a foundation to show that personal knowledge of the "facts" stated in them exists. Fed. R. Evid. 602; see *U.S. v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999); *Ani-Deng v. Jeffboat, LLC*, 777 F.3d 452, 454-55 (7th Cir. 2015). The Lopez III and Lopez IV declarations are little more than a series of statements lacking a foundation, interspersed with inadmissible hearsay and pure speculation. The Klarke II and Williams II declarations also contain multiple speculative assertions that lack foundation or recite hearsay. All these declarations violate N.D. Local Rule 7-5(b) and Fed. R. Civ. P. 56(c)(4), (e), and the Local Rule authorizes this Court to strike all Plaintiffs' declarations, in whole or in part. Moreover, Plaintiffs cite throughout their OB to prior declarations of Ken Williams, Elizabeth Sinclair, Reed Smith, Charlotte Klarke, and L.W., and to *two* prior declarations of Rigo Lopez (in addition to the two they do submit in opposition to the Motion), without submitting those declarations with their Opposition Brief, in violation of Fed. R. Civ. P. 6(c)(2) and Local Rule 7-2(d) and 7-5. This tactic requires Defendants and the Court to scour past filings, and raise and re-raise objections to an ever-growing stockpile of materials Plaintiffs may cite to, all within the parameters of their reply brief. Finally, Plaintiffs attach *entire* deposition transcripts and all their exhibits for Ken Williams, Peter Glasser, Herb Espiritu and the District's 30(b)(6) deponent (totaling almost *five hundred* pages), mostly to raise arguments completely irrelevant to this Motion. This practice violates N.D. Civil Local Rule 7-5(a), which requires that declarations be supported by "*appropriate* references to the record," including "[*e*]*xtracts* from depositions." (Emphasis supplied). Violating this rule also creates unfair burdens for Defendants, who must review and potentially object to hundreds of pages of irrelevant material in order to satisfy their own obligations under the rules. Defendants object to the relevance of all those transcripts here, object to the contents of the transcripts based on hearsay, speculation, opinion, and lack of foundation, and stand by their objections as to form as raised in the depositions.

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The third example of alleged "ongoing harassment" is not of a current student at all, but of Ms. Gatcke. Plaintiffs' claim she was harassed is based on ¶¶8-13 of the Lopez IV Decl., where he states (without showing a basis in personal knowledge) his "understanding that in mid-October, [Ms. Gatcke] was approached by Defendants' lawyers about her role with Pioneer FCA," and speculates about Ms. Gatcke's state of mind and alleged actions thereafter (¶¶8-10). It also contains rank speculation that Ms. Gatcke is "facing pressure from the District regarding her support for Pioneer FCA," and about "how students feel" as a result of District actions he has speculated about.[6] Certainly any alleged "harassment" of Ms. Gatcke could not form the basis for Plaintiffs' claim of ongoing *student* harassment.

Plaintiffs alternatively argue that harassment of Pioneer FCA is reasonably likely to recur (OB 22:22-23:25), quoting this Court's July 13, 2021 Order Granting Plaintiffs' Motion to File Third Amended Complaint, which applied the "extreme liberality" standard for amending a pleading. That Order did not foreclose any challenges to Plaintiffs' harassment allegations, and in fact contemplated a future challenge. (Dkt. No. 90, at 12:15-13:21).

Plaintiffs raise other irrelevant facts in a desperate attempt to show ongoing conduct. They claim the District's conduct with respect to a complaint made by FCA's lawyers in April 2020 is "evidence" of "the likelihood of resumed harassment and retaliation." (OB 23:25-24:12). It is not. While the District did miss a 60-day deadline to complete its investigation (during the chaos of COVID and while response deadlines were extended as a result), Plaintiffs did not appeal and the students then alleging harassment – Klarke and Sinclair - graduated and filed this lawsuit. Cal. Code Regs. tit. 5, §§ 4631(a), 4632; Sen. Bill 117 (March 17, 2020) (extending timelines "by the length of time a school is closed due to coronavirus"). No further "harassment" has occurred since, and if there had been any harassment, current students could file a new complaint. The fact that none have done so is strong evidence that no "ongoing harassment" is taking place.[7]

[6] Defendant's attorneys' communications with Ms. Gatcke are privileged (*Upjohn Co. v. U.S.*, 449 U.S. 383, 394-95 (1981)) and Defendants object to Plaintiffs' use of such evidence here. Plaintiffs' counsel had no right to communicate with Ms. Gatcke regarding this litigation, directly or indirectly. *In re Shell Oil Refinery*, 143 F.R.D. 105, 108 (E.D. La. 1992), amended on reconsideration in part, 1992 WL 275426 (E.D.La. 1992), and amended, 144 F.R.D. 73 (E.D. La. 1992) (plaintiffs could be prohibited from using documents their lawyers obtained from a Shell employee outside the discovery process as this constituted unauthorized contact with an opposing party without its attorney's consent in violation of rules of professional conduct; the "'district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it'").

[7] Plaintiffs present no admissible evidence that what happened with the previous investigation was anything more than an unfortunate administrative oversight. There is no evidence that the District intended not to perform the investigation or misrepresented anything to anyone. (See, e.g., Levine Reply Decl., Ex. AA (Deposition of Jennifer Thomas at 288:21-289:21; 295:9-20; 309:13-311:5, 315:14- 317:5)).

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III. PLAINTIFFS LACK ASSOCIATIONAL STANDING

The Court previously found 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. No. 49, at 19:2-13, citing *Ass'd Gen. Contractors of Am., San Diego Ch., Inc. v. Calif. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2003) (emphasis in original)). Here, Plaintiffs must submit "individual affidavits" from "members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Although such individualized proof is necessary, Plaintiffs submit no such evidence.

Apparently conceding the lack of "members" with standing, Plaintiffs now claim that members are unnecessary. In all the cases Plaintiffs cite, however, the organization asserting associational standing either: (1) had actual members who made the decisions of the organization; or (2) could show that it was "subject to the influence of those it seeks to represent." *La Asociacion de Trabajadores v. City of Lake Forest*, 2008 WL 11411732 (C.D. Cal. Aug. 18, 2008), *aff'd*, 624 F.3d 1083, fits into the first category: the court there found that the organization seeking associational standing *did* have "actual members," (id. at *4), and that "decisions of the [organization] are made by its members through their oral vote or consensus." (Id.) *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977) and *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003) fit into the second category. In *Hunt*, "subject to the influence" meant that the constituents alone elected the leadership of the organization, were the only ones who could serve in that leadership, and provided all financing for the organization. (Id. at 344-45). Similarly, in *Mink*, "subject to the influence" meant the organization's governing board was composed of mental health service recipients and their family members (or individuals knowledgeable about the clients served by the system), and a majority of the directors were people with disabilities. Its advisory council also was 60% comprised of individuals who had received mental health services and their family members, and was chaired by such individuals. While its constituents were not the *only* ones permitted to choose or serve as leadership, they did had a large degree of influence over these choices, and thus over the organization. Id. at 1111-12. In light of these facts, the *Mink* court concluded the organization "provides the means by which [the individual constituents] express their collective views and protect their collective interests." Id. at 1112. [8]

[8] While *America Unites for Kids v. Rousseau*, 985 F.2d 1075 (9th Cir. 2021) might seem to have carved out an exception to the rule that "the organization be subject to the influence of those it seeks to represent," which both *Hunt* and *Mink* "treated … as an important 'indicia of membership,'" it apparently only made that exception because it *assumed*, based on its survey of federal appellate decisions, that whenever "a non-member organization showed that it served a 'specialized segment' of the community that is the 'primary beneficiary' of its activities," it always "established that those non-members exercised control over the operation of the

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Here, the two people described as "student representatives of FCA" do not control FCA in any way, and have no say in its decision-making process. Plaintiffs admit that students cannot even *nominate* someone to FCA's Board on their own (OB, 14:3-5), let alone choose its leadership. (Levine Reply Decl. Ex. BB (Williams Depo. pp. 17:13-19:3 (how board members are chosen)); Levine Decl., Ex. W (Form 990 showing no governance decisions are made by anyone other than FCA's governing body). Indeed, Plaintiffs' evidence shows that FCA is not "subject to the influence of those it seeks to represent," but vice versa: "students [who become "Student Representatives] must affirm and agree to conduct themselves in accordance with *FCA*'s statement of faith" (OB, 12:23-24), and "are responsible for presenting *FCA*'s religious message at their school, and for correctly and faithfully conveying *FCA*'s religious beliefs." (Id. at 12:25-27). "FCA works to support these student representatives to ensure they can advance *FCA*'s mission on their campuses" (OB, 12:27-28) (Emphases supplied). Similarly, neither the fact that some of the members of "FCA's Executive Team . . . were FCA students representatives or participants in FCA activities while students," nor the fact that the "FCA views participation in its student ministry as a 'significant' factor in evaluating prospective . . . staff" (OB, 13:26-28) means that FCA is "subject to the influence" of its *current* student representatives – *i.e.*, that it is analogous to a membership organization, as the cases require.

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

A. FCA's Mission Has Not Been Thwarted

Plaintiffs claim the District made it more difficult for FCA to accomplish its mission of spreading the Gospel by erecting barriers to ASB approval, stigmatizing FCA and discouraging students from becoming FCA leaders, and harassing current students interested in associating with FCA. (OB 5:19-22). None of this is true, and even if it were, it would not give FCA standing to pursue the prospective relief it seeks.[9]

As an initial matter, Plaintiffs cite the wrong standard. Organizational standing is not achieved when a plaintiff's mission becomes "more difficult" (OB 8:10-14); instead, Plaintiffs must show "concrete

organization." Id. at 1097. Given the overwhelming evidence in this case that the "Student Representatives" do *not* exercise control over FCA, the reasoning and the holding of *Rousseau* do not apply.

[9] Plaintiffs also argue ASB approval gives clubs access to resources, a faculty advisor, and means of communication and funding that are not available to non-ASB approved groups. (OB 6:4-6). Plaintiffs mislead the Court; even without ASB approval, FCA student groups were allowed to meet on campus, use bulletin boards and the PA system to advertise their events, participate in club rush and other schoolwide events, and have faculty support. (Mtn., 23:16-19 and n.4) While FCA groups did not have ASB financial account after derecognition, none had such accounts *before* derecognition either. (Mtn., 12:20-26, 13:14-18; Levine Reply Dec. Ex. FF (Klarke Depo. p. 137:8-22 (Pioneer never used an ASB account)).

and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitut[ing] far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Here, FCA's mission to "spread the Gospel" through student "huddles" was not frustrated by Defendants' actions, because FCA had no independent right to form a club on SJUSD campuses to promote its religious message to students. That right is held only by the students themselves. 20 U.S.C. §§4071(a), (c)(1), (c)(5); *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972) (the courts have never "suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purpose"); *Ceniceros v. Bd. of Trustees of the San Diego Unif. Sch. Dist.*, 106 F.3d 878, 884 (9th Cir. 1997) (dissent) ("In order to obviate possible church-state entanglement, Congress and the Supreme Court have both recognized that student religious clubs must meet certain conditions which do not necessarily pertain to secular groups," including the EAA limitation regarding non-school persons); *Sease v. Sch. Dist. of Philadelphia*, 811 F. Supp. 183, 190 n.4 (E.D. Pa. 1993). Since FCA is not constitutionally entitled to use the schools to communicate with students, it is not like The Presbyterian Church, and its mission frustration cannot be measured by a decrease in souls reached.

1. Plaintiffs Do Not Show Defendants Caused Participation to Decline.

Further, in *The Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518 (9th Cir. 1989), local churches were surveilled by the INS, which caused an actual decrease in participation in worship services and other religious activities and the cancellation of a Bible study class. Plaintiffs admit that they have no metrics to measure mission success. (Levine Reply Decl., Ex. BB (Williams Depo., 26:8-22)). Even if FCA had a right to proselytize on District campuses, it has not actually proven that the District's actions *caused* a decline in participation in any FCA activities or *caused* FCA to change its programming in any way. Students were permitted to meet on campus after derecognition, either as FCA groups or other Christian groups or both, and the students did so, at least at Pioneer and Leland, as explained in the Opening Brief.[10] With no decline in participation caused by Defendants, FCA has no injury-in-fact that is "concrete and particularized" and "actual and imminent" or any causal connection between the injury and Defendants' conduct as required for Article III standing. *Lujan, supra*, 504 U.S. at 560.

In attempt to rebut this point, Plaintiffs rely on the Lopez III Decl., which states that "[t]he loss of

[10] Documents recently produced by Plaintiffs show that on-campus events continued at Leland after the September, 2019 conversation between Principal Park and faculty advisor Clarke where Park told Clarke that FCA Leland needed to be more inclusive in its leadership. Off-campus FCA-sponsored events also continued to be advertised on FCA Leland's Instagram feed as late as May 2020. (Levine Reply Decl., Ex. CC (FCA019727-28, 019729-37); see also, Levine Reply Decl., Ex.DD (FCA019409, 019428-29, 019444) (additional documents showing FCA Pioneer continued to meet and put on events after derecognition)).

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ASB-approved student FCA huddles at both Willow Glen and Leland High Schools was a direct result of the District's discrimination and hostility to the student FCA huddles' religious beliefs and speech." (OB at 7:6-10).) This is not a fact, but merely argument improperly included in that declaration.

With respect to Willow Glen, the FCA group did not meet after the 2018-19 school year, but the reasons are unclear. Plaintiffs claim students at Willow Glen expressly disaffiliated with FCA and continued under a different name "because" of a "restriction [against] being an FCA club," citing to a hearsay statement within a redacted hearsay email from a former student leader there. (Lopez Decl. IV, Ex. F). The cited email actually says nothing about why "the FCA Huddle at Willow Glen" did anything. Instead, it says that *this particular student* did not want to continue participating in FCA Willow Glen because: "God told [her] over the summer his plan for Willow Glen is to part from FCA and reboot ourselves and start this next chapter." She then goes on to say that "I won't be involved but if other leaders who were in FCA last year want to run an FCA that's great and I'll keep them in my prayers." Apparently, the remaining leaders did *not* want to continue to run an FCA, but there is no evidence before the Court as to why not.

2. Plaintiffs Do Not Show Defendants Caused a Lack of Leaders.

Plaintiffs also offer no admissible evidence that the student groups' efforts to recruit or retain leaders this year was impeded either by lack of ASB recognition or by "stigma." Until this school year, FCA Pioneer was able to recruit and retain new leaders. (Levine Reply Decl., Ex. EE (FCA019402, 19414, 19436-437, 19442-43)). The leaders in 2018-19 were Plaintiffs Klarke, Sinclair, E.L., and E.V. In 2019-20, they were Klarke, Sinclair, and E.V., with L.W. and B.W. added in the spring. In 2020-21, after those individuals graduated, they were L.W. and B.W., who agreed to serve without hesitation. (Mtn. 14:25-26; Levine Reply Decl. Ex. FF (Klarke Depo., 51:25-52:16, 53:20-54:19, 169:25-170.5, 208:19-209:25); Levine Decl., Ex. E (FCA Responses to Defendant's Second Set of Requests for Admissions, Nos. 14-17)). At Leland, the leaders continued to be drawn from the founding group of students, as they had been for all prior years, although interested had waned over time. (Mtn. 13:23-14:3; Levine Decl., Ex. A (Lopez Depo, 87:6-88:23). At Willow Glen, one student leader (out of the 12-20 leaders at that site) decided to part ways with FCA after it was determined to engage in discriminatory leadership practices, but the evidence does not show this was because of "stigma," but because God told her to form another Christian group instead. . Mr. Lopez does not describe any effort to recruit leaders at Leland or Willow Glen, ever. His declarations address only communications with students from Pioneer. (Lopez IV Decl., ¶¶ 7, 9: Lopez III Decl., ¶7). However, his conclusory statement that it has been difficult to recruit leaders is ultimately irrelevant since he is not a student or a student leader, and the groups are to be student-led and

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the leaders democratically selected. (McGee Decl., ¶13, Ex. B). Indeed, as discussed above, Plaintiffs previously affirmed that student leaders are selected by the students, not by FCA.).

Plaintiffs falsely claim that "[c]urrent student FCA representatives in the District still face made-for-FCA hurdles and fear further harassment from Defendants…" (OB 7:14-15). However, none of the "facts" they rely on come from statements of current students – they are all based on hearsay assertions by Mr. Lopez, which lack foundation and are contradicted by the evidence in the record, as discussed above. Plaintiffs' speculation that students are too fearful to form an FCA group this year is nothing more than a bogeyman of Plaintiffs' own creation. Certainly M.H., an incoming freshman (and the person Plaintiffs previously identified as the FCA Pioneer leader) would have no easy way of knowing anything about this case, including that Principal Espiritu was a defendant, or that he "openly expressed to the school community" his "disapproval of FCA's religious beliefs," as Plaintiffs claim, unless she was told those things by Plaintiffs. (OB 7:17-21). Plaintiff Klarke says she discussed the prospective meeting with Mr. Espiritu with M.H., and that after their discussions, "M.H. had some concerns, but was obviously still very excited to lead Pioneer FCA". (Dkt. No. 137-5, ¶32).[11] Moreover, even if there were proper evidence before the Court that this student was "afraid" or suffered "overwhelming anxiety," it is impossible to attribute this to Defendants. Plaintiffs cannot manufacture standing from fears they impart to a new class of potential student leaders, based on events from two or more years ago. If a current student's fears after having a supportive conversation with Principal Espiritu were indeed overwhelming (contrary to all admissible evidence), such an irrational reaction cannot lay the groundwork for standing. In other First Amendment cases, putative plaintiffs asserting their speech was chilled must show an objectively reasonable "credible threat of prosecution" to establish injury-in-fact. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). A mere "subjective chill" is insufficient. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). See also, *Minor I Doe v. Sch. Bd. for Santa Rosa Cty., Fla.*, 264 F.R.D. 670, 680 (N.D. Fla. 2010); *The Presbyterian Church*, 870 F.2d at 528-29 (for injunctive relief, plaintiff must show credible threat of future injury). Here, it is not *objectively reasonable* that current students wished to form a club, but were deterred based on current harassment by Defendants.

B. FCA's Resources Were Not Diverted.

In addition to lack of mission frustration, FCA also cannot show its resources were and are being

[11] This portion of Ms. Klarke's declaration (Dkt. No. 137-5) is, of course, either speculation or inadmissible hearsay. Defendants also object to other portions of that declaration as irrelevant (¶¶6-22), speculative, conclusory, opinion, lacking foundation, and/or based on hearsay (¶¶ 16, 18, 20 (see Ex. E), 21-22, 26, 28, 30-32), and inconsistent with deposition testimony (or inconsistent with the evidence) (¶¶13, 18, 25). (Levine Reply Decl., Ex. FF (Klarke Depo., 12:10-20, 271:8-273:3).

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diverted because of Defendants' conduct. Mr. Lopez claims he lost time he would have spent on other job duties when he "consoled students, built morale. . . ensured student safety, and performed other tasks unrelated to litigation." (OB 10:6-8). As Defendants previously explained, Plaintiffs cannot separate out the tasks they performed from the litigation when the litigation was contemplated from the beginning. The evidence shows Mr. Lopez spent a significant amount of time coordinating with legal counsel while supposedly having his resources diverted from non-litigation related activities. (Levine Reply Decl., Ex. GG (FCA000421-424, 452-455, 501-505 -Text messages regarding Lopez coordinating with legal counsel)).

Moreover, the tasks Mr. Lopez describes are consistent with those he previously performed as part of his regular job duties. He has always spent time working with students, providing moral support, and prayed with students. (Levine Reply Decl., Ex. HH (Rigo Lopez Job Description, FCA018434-18436); Ex. BB (Williams Depo. 101:14-102:23)). He testified his role, on all the campuses, at all relevant times, was as "an advocate, spiritual adviser, coach for them, mentor." (Levine Decl. Ex. A, at 78:6-22, and 194:17-19; Klarke Decl. ¶¶ 3-5). To the extent he spent time "educating students about their rights" (OB 10:7), there is no proof this represented a change from "business as usual" either. "Organizations divert resources when they 'alter[] their resource allocation to combat the challenged practices,' but not when they go about their ''business as usual.''" *Friends of the Earth v. Sanderson Farms, Inc.*, __ F.3d __, 2021 WL 1205023, *2 (9th Cir. 2021). As Defendants have shown, FCA has always educated students about the law. For instance, its "Huddle Playbook" includes information about the legal rights of religious students on campuses. (TAC, Exs. C and D (see pp. 34-38 of both exhibits)). Plaintiffs contend that "staff time spent addressing illegal conduct can establish diversion of resources," and that in response to the events at Pioneer, Mr. Lopez "communicated with District officials to explain FCA's stances." (OB 9:16-17; 10:1-2). However, Mr. Lopez, by his own admission, was always "an advocate" with school administrators. For instance, not long before the events in this case arose, Mr. Lopez sent Mr. Espiritu an article on a dispute between FCA and another local school district regarding student rights on campus to "let him know that we've had other situations around this, misunderstandings." (Levine Decl., Ex. A, at 139:21-140:6, and Ex. L.) While Plaintiffs assert these "diversions" occurred well before the litigation was filed (OB 10:4-6), the fact is that litigation was contemplated from the very beginning, and Lopez spent significant time coordinating with legal counsel.

Ken Williams has been FCA's Senior Executive Advisor since March 2020, and prior to that, its Executive Vice President and Chief Administrative Officer. (Williams Decl., ¶1). His job duties include "insuring legal compliance" and "enterprise risk management," and he has no responsibilities for FCA's

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program outreach or working with students. (Dkt. No. 137-7, ¶1; Dkt. No. 64-3, ¶10; Levine Reply Decl., Ex. BB (Williams Depo., 13:11-14:1 and 15:5-22). His duties do include acting as the organization's gatekeeper on the use of legal counsel. (Levine Reply Decl., Ex. BB (Williams Depo., 15:5-22)). Thus, to the extent Plaintiffs claim he was diverted from his duties by Defendants' actions (only by reference to a declaration he submitted to the Court almost a year ago), there is no basis for finding that providing guidance on or monitoring legal disputes is outside the realm of his normal job duties. (See also Levine Decl., Ex. M, identifying Williams as the contact person to address questions re FCA's positions on controversial topics).

There is also no credible evidence that Mr. Lopez was taken away from other duties. His first conclusory declaration on the topic states that his time was diverted from "other aspects of FCA's core ministry," and his current conclusory declaration says he spent 40 hours of diverted time (presumably over a two and a half year time period, and presumably addressing both derecognition and "harassment"). But, both declarations contradict his sworn deposition testimony, wherein he stated that that time he spends working with a particular school varies, that there was nothing he became unable to do for FCA as a result of Defendants' actions, and that he could not quantify his time spent outside the litigation. (Lopez Decl., ¶10 (Dkt. No. 64-2); (Levine Decl., Ex. A, at 10:8-16, 11:12-19, 75:8-21, 76:10-77:13,152:13-156:22, 219:17-221:3). The Court is free to consider that his declarations contradict his deposition testimony in this factual challenge to standing. *Friends of the Earth*, 2021 WL 1205023, *4.

1. Plaintiffs' Standing Cases Do Not Apply.

Plaintiffs cite many standing cases involving advocacy or support groups that work with specific populations, such as legal aid organizations assisting asylum applicants (*East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018)), or advocacy groups assisting refugees at administrative proceedings (*El Rescate Legal Servs., Inc. v. Exec. Off. of Imm. Rev.*, 959 F.2d 742 (9th Cir. 1991). (See OB 3-4; 8-9). In these cases, the advocacy groups actually had to change the direction of their services, had their services tangibly impaired, or lost funding because of real or threatened harm from defendant's conduct. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) ("FHCs investigated Roommate's alleged violations and, in response, started new education and outreach campaigns targeted at discriminatory roommate advertising [which were] not associated with litigation"); *Marin Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (organization "'suffered 'economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices'" and provided itemized receipts for "design, printing, and dissemination of literature aimed at redressing the impact Combs' discrimination had on the

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Marin housing market"); *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (organization's staff regularly buses members who are unauthorized aliens, and reasonably fears its staff will be subject to investigation or prosecution); *Comite de Jornoleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943-44 (9th Cir. 2011) (organization with mission "to strengthen and expand the work of local day laborer organizing groups" could challenge ordinance that "discouraged both employees and employers from participating in hiring transactions" because, among other things, members spent time going to the police station to assist day laborers who had been arrested).[12]

None of the concrete, palpable, quantifiable injuries involved in these cases is analogous to those claimed by FCA, which at most complains of students being deterred from associating with it or incurring legal fees. This is a far cry from *East Bay Sanctuary, supra*, at 766-67, in which organizations assisting asylum applicants established organizational standing with declarations showing: 1) they used money that would have gone to immigrant legal services for education and outreach initiatives regarding the challenged rule; 2) they converted part of their asylum practice into a removal defense program, requiring use of funds otherwise earmarked for immigrant legal services to be spent on "developing new training materials," "significant training of existing staff," and "conducting detailed screenings" at the intake stage; 3) they needed to submit a greater number of applications for family-unit clients, thus diverting resources away from other types of clients; and 4) they suffered a loss of substantial funding, since "a large portion of their [government] funding . . . is tied to the number of asylum applications they pursue."

The sole standing case FCA cites that involves a school district and a national organization is the District Court's decision in *Gay-Straight All. Network v. Visalia Unif. Sch. Dist.*, 262 F. Supp. 2d 1088, 1101 (E.D. Cal. 2001). There, GSA Network, whose purpose was ending intolerance towards gay and lesbian students, sued on behalf of itself and its members to end rampant harassment and discrimination against such students. Id., 1098, 1104-06. On a 12(b)(6) motion, the court found that GSA Network had adequately pled organizational and associational standing. Id., 1100-06. However, *GSA Network* is distinguishable in a number of ways. First, GSA Network alleged it had members, which included current district students and parents, while FCA is not a membership organization and has no active student organization on any District campus. Second, although it was alleged that some students wished to form a GSA Network- affiliated club on campus, the suit was about stopping widespread and ongoing harassment; the organization was not bringing claims for violation of the EAA, or the students' right to form a club. Moreover, GSA Network is not a religious organization, so its mission is not in conflict with

[12] Compare also, *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (involving violation of FHAA, a statute containing express language allowing an organization to operate as a "tester," which supports standing).

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the Establishment Clause, as is FCA's mission here. In addition, GSA Network's grievance could allegedly be redressed by the relief it sought, because the discrimination and harassment were ongoing and an immediate threat to students. Here, there is no ongoing harassment to address. Finally, the case was decided on the face of the complaint, whereas here we have the benefit of facts that severely undercut FCA's allegations in support of standing. Id., 1093, 1103.

2. There is No Evidence of Current Frustration of Mission or Diversion of Resources

Ultimately, there is no evidence that FCA *continues* to spend any time addressing Defendants' actions, other than as related to this litigation. Mr. Lopez may have recently spent time meeting with putative student leaders at Pioneer, but this is within his normal job duties. (Levine Reply Decl., Ex. HH (Lopez Depo., 10:8-11:19)). Plaintiffs try to use events from the spring and fall of 2019 to show there is a live controversy to be adjudicated. But, FCA cannot seek prospective relief for injuries that may have occurred years ago. It needs a current interference with its mission and drain on its resources that is concrete and redressable by this Court. (*E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 664 (9th Cir. 2021).) There is no admissible evidence that an FCA club is being thwarted by Defendants at Pioneer, and no evidence at all of students at Leland or Willow Glen who wish to form a club but are precluded from doing so, or that Mr. Lopez has attempted to organize such students and failed. Nor is there evidence of any ongoing "stigma" at any of those sites. Thus, FCA has not met the standard for organizational standing and must be dismissed as a party from this case.

V. CONCLUSION.

Plaintiffs propose a number of rulings the Court could make to redress their alleged injuries, but none of them is actually available to them because there are no active student groups at any District campus, no current students who have submitted declarations showing that they are ready, willing and able to lead an FCA group, no students who have applied for ASB status and been rejected, no students who are suffering ongoing harassment, and no current mission frustration or diversion of resources by FCA or FCA Pioneer. The Court cannot order hypothetical relief, but needs an actual and imminent harm and a live controversy to address. Since Plaintiffs have not and cannot show this through admissible evidence, Defendants' motion should be granted and FCA and FCA Pioneer should be dismissed from the case.

DATED: January 14, 2022

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By: */s/ Amy R. Levine*
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