No. 22-15827

In the United States Court of Appeals for The Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES, AN OKLAHOMA CORPORATION, ET AL.,
Plaintiff-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Honorable Haywood S. Gilliam, Jr.
(4:20-cv-02798-HSG)

EXCERPTS OF RECORD VOLUME 1 of 10

KIMBERLEE WOOD COLBY
CENTER FOR LAW & RELIGIOUS FREEDOM
8001 Braddock Road, Suite 302
Springfield, VA 22151
(703) 642-1070
rsmith@clsnet.org

CHRISTOPHER J. SCHWEICKERT
SETO WOOD & SCHWEICKERT LLP
2300 Contra Costa Boulevard
Suite 310
Pleasant Hill, CA 94523
(925) 938-6100
cjs@wcjuris.com

DANIEL H. BLOMBERG
Counsel of Record
ERIC S. BAXTER
NICHOLAS R. REAVES
ABIGAIL E. SMITH
JAMES J. KIM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
dblomberg@becketlaw.org

Counsel for Plaintiffs-Appellants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FELLOWSHIP OF CHRISTIAN ATHLETES, et al.,

Plaintiffs,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

Case No. 20-cv-02798-HSG

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 102

The Fellowship of Christian Athletes ("FCA"), the Pioneer High School FCA student chapter ("Pioneer FCA"), and two of its former student members (collectively "Plaintiffs") allege that the San Jose Unified School District ("District") and its officials (collectively "Defendants") discriminated against the FCA's religious viewpoint and unlawfully derecognized its student groups. *See* Dkt. No. 92 ("TAC"). Specifically, Plaintiffs allege that Defendants violated the Equal Access Act ("EAA"), 20 U.S.C. §§ 4071 *et seq.*, the First Amendment (Establishment, Free Exercise, Free Speech, and Freedom of Assembly Clauses), and the Fourteenth Amendment.

Now pending before the Court is Plaintiffs' motion for a preliminary injunction, briefing for which is complete. *See* Dkt. Nos. 102, 111, 115. The Court held a hearing on this motion on May 12, 2022. *See* Dkt. No. 190. In short, Plaintiffs seek an order directing Defendants to recognize student chapters affiliated with the FCA, including Pioneer FCA, as official "Associated Student Body" approved clubs. *See* Dkt. No. 102 at ii. After carefully considering the parties' arguments, the Court **DENIES** Plaintiffs' motion for a preliminary injunction.

I. FACTUAL BACKGROUND

The FCA is an international religious ministry with student groups nationwide and the

mission "to lead every coach and athlete into a growing relationship with Jesus Christ and his Church." TAC ¶¶ 2, 39. As a part of its mission, the FCA has student chapters at colleges, high schools, and middle schools across the country. *Id.* ¶ 40. These student chapters are led by student leaders, who must be approved by the FCA. *See id.* ¶ 117.

Although there are no membership requirements to participate in FCA-affiliated student groups, Plaintiffs represent that the FCA requires student leaders to "agree and live in accordance with [FCA's] core religious beliefs and religious standards as expressed in the Student Leadership Application" and FCA's Statement of Faith. *Id.* ¶¶ 42, 48; *see also* TAC Ex. B (Student Leadership Application) and Ex. C at 6 (Statement of Faith). The student leadership application explains that "Each FCA representatives [*sic*] shall affirm their agreement with FCA's Christian beliefs and shall not subscribe to or promote any religious beliefs inconsistent with these beliefs." TAC Ex. B at 3. It also states that student leaders "shall at all times . . . endeavor to conduct themselves in a manner that affirms biblical standards of conduct in accordance with FCA's Christian beliefs. Such conduct standards include FCA's Youth Protection Policy and Sexual Purity Statement." TAC Ex. B at 3; *see also* TAC ¶ 125 ("FCA student leaders must agree with FCA's Sexual Purity Statement."). FCA's Sexual Purity Statement states:

> God desires His children to lead pure lives of holiness. The Bible teaches that the appropriate place for sexual expression is in the context of a marriage relationship. The biblical description of marriage is one man and one woman in a lifelong commitment.
>
> While upholding God's standard of holiness, FCA strongly affirms God's love and redemptive power in the individual who chooses to follow Him. FCA's desire is to encourage individuals to trust in Jesus and turn away from any impure lifestyle.

TAC Ex. E.[1]

Plaintiffs allege that prior to the Spring of 2019, FCA student chapters existed at District high schools Pioneer, Willow Glen, and Leland as recognized student organizations under the

[1] The version of the Sexual Purity Statement brought to Defendants' attention in Spring 2019 read: "God desires his children to lead pure lives of holiness. The Bible is clear in teaching on sexual sin including sex outside of marriage and homosexual acts. Neither heterosexual acts outside of marriage nor any homosexual act constitute an alternative lifestyle acceptable to God." Dkt. No. 111 at 2-3. Plaintiffs assert that this was a version of the Sexual Purity Statement "previously used by a different FCA region." TAC ¶ 7.

Associated Student Body ("ASB") program. TAC ¶¶ 9, 10; Dkt. No. 102 at 3. Plaintiffs allege that in April 2019, a teacher at Pioneer High School posted the FCA Statement of Faith and a version of the Sexual Purity Statement on his classroom whiteboard with the statement: "I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements. How do you feel?" TAC ¶ 60; Dkt. No. 102 at 5. According to Plaintiffs, in or around May 2019 the District revoked ASB recognition for the FCA student groups at Pioneer, Willow Glen, and Leland high schools. TAC ¶¶ 9, 10, 65. Plaintiffs allege that "[t]he District justified its hostile treatment of FCA under its non-discrimination policy, saying that FCA was wrong to ask its student leaders to agree with religious beliefs the District found objectionable." Dkt. No. 102 at 1.

The District's non-discrimination policies are described in District Board Policies 0410 and 5145.3 (collectively "Board Policies"). At the preliminary injunction hearing, Plaintiffs' counsel confirmed that the Board Policies took effect prior to April 2019 and have remained substantially unchanged since April 2019.

Board Policy 0410, titled "Nondiscrimination in District Programs and Activities," states:

> The Governing Board is committed to equal opportunity for all individuals in district programs and activities. District programs, and activities, and practices shall be free from discrimination based on gender, gender identity and expression, race, color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation or the perception of one or more of such characteristics. The Board shall promote programs which ensure that any discriminatory practices are eliminated in all district activities. Any school employee who observes an incident of discrimination, harassment, intimidation, or bullying or to whom such an incident is reported shall report the incident to the Coordinator or principal, whether or not the victim files a complaint.

Dkt. No. 102-1 at 331 ("Board Policy 0410"). Board Policy 5145.3, titled "Nondiscrimination / Harassment," states:

> All district programs and activities within a school under the jurisdiction of the superintendent of the school district shall be free from discrimination, including harassment, with respect to the actual or perceived ethnic group, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, and physical or mental disability, age or sexual orientation. The Governing Board desires to provide a safe school environment that allows all students equal access to District programs and activities regardless of actual or perceived ethnicity, religion, gender, gender identity, gender expression, color, race, ancestry, nation origin, physical or mental disability, sexual orientation, or any other classification protected by law.

Id. at 335 ("Board Policy 5145.3").

Plaintiffs allege that in the Spring of 2020, the District created an "ASB Affirmation Form" that all ASB clubs must complete. TAC ¶ 145; Dkt. No. 102 at 7. The ASB Affirmation Form cites the Board Policies and reads, in relevant part:

> All ASB recognized student groups are governed by a policy of nondiscrimination. Neither the District, the ASB, nor any ASB recognized students groups shall discriminate against any student or group of students or any other person on any unlawful basis, including on the basis of gender, gender identity and or expression, race, inclusive of traits historically associated with race, including but not limited to, hair texture and protective hairstyles, such as braids, locks, and twists, color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation, or the perception of one or more of such characteristics, or on the basis of association with a person who has or is perceived to have any of those characteristics.

TAC Ex. H. ASB club student leaders are then required to affirm the following statements:

- We shall allow any currently enrolled student at the school to participate in, become a member of, and seek or hold leadership positions in the organization, regardless of his or her status or beliefs.
- We shall not adopt or enforce any membership, attendance, participation, or leadership criteria that excludes any student based on gender, gender identity and or expression, race, inclusive of traits historically associated with race, including but not limited to, hair texture and protective hairstyles, such as braids, locks, and twists, color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation, based on the perception of one or more of such characteristics or based on association with a person who has or is perceived to have any of those characteristics.
- We may adopt non-discriminatory criteria regarding being a member, leader or representative of the organization, or exercising voting privileges, such as regular attendance at group meetings, participation in group events, participation in the group for a minimum period of time, or participation in orientation or training activities. Membership levels (e.g., voting versus non-voting membership) will not be based on any prohibited discriminatory criteria.
- We shall select our leaders (including officers or other representatives) by a democratic method. [AR 6145.5 (Student Organizations and Equal Access)]
- We shall comply with District and school site policies and regulations as well as all applicable laws, whether on or off campus. Failure to comply with applicable standards may result in the revocation or non-renewal of recognition, loss of privileges, student discipline, or other sanctions.

- We shall not restrict eligibility for membership, attendance, participation, or leadership to any student in violation of the District's nondiscrimination policies.
- We shall not engage in any conduct in violation of the District's anti-hazing policies.

Id.

According to Plaintiffs, after losing ASB recognition, Pioneer FCA became a "student interest group," meaning it meets on campus but does not receive the benefits of ASB recognition such as access to ASB bank accounts or being listed in the yearbook. Dkt. No. 102 at 6. Plaintiffs assert that the Leland and Willow Glen FCA chapters, on the other hand, "dissolved completely" after losing ASB recognition. *Id.* at 7.[2]

Plaintiffs allege that Pioneer FCA's application for ASB recognition during the 2019-2020 school year was denied. TAC ¶ 70. During the 2020-2021 school year, Plaintiffs explain, clubs did not meet in person due to the Covid-19 pandemic and all groups were granted conditional approval, including Pioneer FCA. Dkt. No. 102 at 7. Plaintiffs allege that "Pioneer FCA's leaders and members are eager to regain ASB recognition but face insurmountable barriers to receiving it *without* an injunction." Dkt. No. 115 at 15 (emphasis in original). Plaintiffs represent that school officials have said FCA chapters "with the 'same leadership requirements' as at the time of derecognition are ineligible for recognition." Dkt. No. 102 at 11. Additionally, Plaintiffs argue that they cannot apply for ASB recognition without abdicating their rights because the application involves signing the ASB Affirmation Form. *See* Dkt. No. 115 at 15. At the preliminary injunction hearing, Plaintiffs' counsel represented that Pioneer FCA continues to meet and that the group recently met on campus, albeit without the benefit of ASB recognition.

II. LEGAL STANDARD

A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking preliminary

[2] There is no allegation that the Leland and Willow Glen FCA Chapters could not have similarly met as a student interest group. Defendants contend that the Leland and Willow Glen FCA Chapters were permitted to meet as student interest groups, but that the groups became defunct after student leaders graduated. Dkt. No. 111 at 3-4.

injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, an injunction may issue where "the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor," provided that the plaintiff can also demonstrate the other two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard, Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important *Winter* factor is likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

There are two types of injunctions. "A mandatory injunction orders a responsible party to take action, while a prohibitory injunction prohibits a party from taking action and preserves the status quo pending a final resolution on the merits." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir.2014) (internal quotations and citations omitted). Mandatory preliminary relief "goes well beyond simply maintaining the status quo" and is "particularly disfavored." *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979). "When a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (internal quotations and citations omitted).

III. ANALYSIS

Plaintiffs seek an injunction requiring Defendants to recognize student chapters affiliated with the FCA, including Pioneer FCA, as official ASB clubs. Plaintiffs allege that the District de-recognized the FCA clubs at District high schools Pioneer, Willow Glen, and Leland in May 2019. TAC ¶ 65. Plaintiffs brought this case in April 2020, *see* Dkt. No. 1, at which time no FCA groups had ASB club status at any District school. Thus, the status quo is that the District has no ASB-recognized FCA clubs, and Plaintiffs are asking to change this current state by requiring the District to extend ASB recognition to FCA groups. Because Plaintiffs ask the Court to order

Defendants to take action, they must meet the "heightened standard" required for issuance of a mandatory preliminary injunction and show that the "facts and law clearly favor" Plaintiffs. *See Katie A., ex rel. Ludlin v. Los Angeles Cty*, 481 F.3d 1150, 1156 (9th Cir. 2007) (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d at 1320).

A. Likelihood of Success

Plaintiffs allege that the District's non-discrimination policy, and its enforcement as to them, violate their rights under the Constitution and the EAA. The District's non-discrimination policy (the "Policy") is set out in Board Policies 0410 and 5145.3 and the ASB Affirmation Form. It prohibits discrimination based on any "classification protected by law" including "discrimination based on . . . religion . . . [or] sexual orientation." Board Policy 0410; *see also* Board Policy 5145.3 ("All district programs and activities . . . shall be free from discrimination . . . with respect to the actual or perceived ethnic group, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, and physical or mental disability, age or sexual orientation."). As explained in the ASB Affirmation Form, ASB clubs must "allow any currently enrolled student at the school to participate in, become a member of, and seek or hold leadership positions in the organization, regardless of his or her status or beliefs," but the clubs can adopt "non-discriminatory" membership or leadership criteria so long as the clubs do not exclude "any student based on gender, gender identity . . ., race, . . . national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, [or] sexual orientation . . . ." TAC Ex. H.

In their motion for preliminary injunction, Plaintiffs raise arguments attacking both the validity of the Policy as written and the District's practices in enforcing the Policy. Judge Koh, to whom this case was originally assigned, already dismissed with prejudice Plaintiffs' facial invalidity claims.[3] As she noted, the District's Policy, on its face, is permissible under Ninth Circuit precedent, namely *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), and *Truth v. Kent School Dist.*, 542 F.3d 634 (9th Cir. 2008), which ratified similar school policies

[3] On January 21, 2022, the case was reassigned to the undersigned. *See* Dkt. No. 152.

prohibiting discrimination on the basis of enumerated classifications. Even if Plaintiffs' claims had not been dismissed with prejudice, this Court agrees that the Policy as written is constitutional and does not violate the EAA.

Regarding the District's enforcement of the Policy, Plaintiffs fail to show that the facts and law clearly favor their argument that the Policy has not been generally applied. Contrary to Plaintiffs' assertions, District officials are not formally empowered to allow clubs to discriminate on the basis of religion, sexual orientation, or other protected basis. And Plaintiffs fail to show that District officials have actually given any clubs permission to discriminate in violation of the Policy.

i. Plaintiffs Fail to Show That the Law and Facts Clearly Favor Their Argument That the Policy, as Written, Is Unconstitutional

a. Plaintiffs Have Not Clearly Shown That the Policy Violates Their Rights to Free Speech and Freedom of Expressive Association

"When a [school] excludes a student organization from official recognition for refusing to comply with the school's nondiscrimination policy, both freedom of speech and freedom of expressive association challenges are properly analyzed under the limited-public-forum doctrine." *Alpha Delta*, 648 F.3d at 797 (citing *Christian Legal Society v. Martinez*, 561 U.S. 661, 679-683 (2010)). The state may reserve limited public forums for certain groups and "[a]pplication of the less restrictive limited-public-forum analysis better accounts for the fact that" schools, through their student club programs, are "dangling the carrot of subsidy, not wielding the stick of prohibition." *Christian Legal Society*, 561 U.S. at 683. "In a limited public forum, the government may impose restrictions that are 'reasonable in light of the purpose served by the forum,' so long as the government does not discriminate against speech on the basis of its viewpoint." *Alpha Delta*, 648 F.3d at 797 (citation omitted). "[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Christian Legal Society*, 561 U.S. at 695 (citation omitted).

Plaintiffs' arguments that the Policy violates their First Amendment rights to free speech

and freedom of expressive association must be assessed under the limited-public-forum doctrine.[4] First, the District's Policy, which forbids exclusion of students based on a protected characteristic, is reasonable in light of the ASB program's purpose to engender a "positive feeling going to campus" and a feeling of connectedness among students by uniting them around common interests. *See* Dkt. No. 102-2 (Mayhew Depo. Tr.) at 35:20-36:4.[5] In her deposition, the Activities Director at Pioneer High School described the ASB program as an opportunity for clubs "to really engage students and to have the students feel connected to school." *Id.* at 35:20-22. The District could reasonably determine that students cannot engage in the school community if they are prohibited from joining clubs or holding leadership positions because of their race, gender, religion, national origin, or other protected characteristic.

The second prong of the inquiry is whether the Policy is "neutral as to content and viewpoint." *See Alpha Delta*, 648 F.3d at 802. The Ninth Circuit found a similar non-discrimination policy content and viewpoint neutral in *Alpha Delta*. In that case, a state university denied a Christian fraternity and sorority school recognition because the groups violated the school's non-discrimination policy, which prohibited restricting membership or eligibility to hold officer positions "on the basis of race, sex, color, age, religion, national origin, marital status,

---

[4] Plaintiffs argue that under *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000), forcing Pioneer FCA "to accept as leaders students who reject FCA's religious beliefs would force FCA 'to propound a point of view contrary to its beliefs,' . . . which burdens its expression and triggers strict scrutiny." Dkt. No. 102 at 23. The Supreme Court rejected this argument in *Christian Legal Society*. 561 U.S. at 682. As the Court explained, where a student group is "seeking what is effectively a state subsidy, [it] faces only indirect pressure to modify its membership policy; [the student group] may exclude any person for any reason if it forgoes the benefits of official recognition." *Id.* The Supreme Court therefore analyzed the student group's expressive association arguments under the limited-public-forum doctrine, and did not rely on expressive association cases like *Boy Scouts of America*, in which groups were compelled to include unwanted members. *Id.*

[5] In determining reasonableness, the Supreme Court in *Christian Legal Society* and the Ninth Circuit in *Alpha Delta* found it important to note that although the student groups there had been denied official recognition, they still had "alternative avenues of communication besides the forum from which they [had] been excluded." *Alpha Delta*, 463 F.3d at 799; *see also Christian Legal Society v. Martinez*, 561 U.S. 661, 691 (2010) ("But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers."). Just like those student groups, Pioneer FCA is still allowed to meet on campus as a student interest group and can advertise through "non-university electronic resources." *See Alpha Delta*, 463 F.3d at 799; Dkt. No. 111 at 3.

sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law." *Id.* at 796. The Court found the school's policy to be neutral because it served a purpose other than targeting speech on the basis of its content. *Id.* at 801. Instead, it served "to remove access barriers imposed against groups that have historically been excluded." *Id.* As the Court further explained, "antidiscrimination laws intended to ensure equal access to the benefits of society serve goals 'unrelated to the suppression of expression' and are neutral as to both content and viewpoint." *Id.*

Here too, the Policy is "neutral as to content and viewpoint" because it serves a purpose unrelated to the suppression of expression. *See Alpha Delta*, 648 F.3d at 802. The Board Policies existed prior to the 2019 dispute, and Plaintiffs point to no evidence that those Board Policies were implemented for the *purpose* of suppressing Plaintiffs' viewpoint. *See id.* at 801.[6] And as the Ninth Circuit noted, policies meant "to ensure that the school's resources are open to all interested students without regard to special protected classifications" are similar to the antidiscrimination laws intended to ensure equal access that the Supreme Court has concluded are viewpoint and content neutral. *Id.* (internal quotation omitted) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984)). The fact that the Policy allows clubs to set "non-discriminatory criteria" but not criteria based on religion, sexual orientation, or other protected classifications does not mean the Policy aims at the suppression of speech. *Roberts v. U.S. Jaycees*, 468 U.S. at 623-24 (holding that a state law prohibiting discrimination on the basis of race, color, creed, religion, disability, national origin, or sex "does not aim at the suppression of speech [and] does not distinguish between prohibited and permitted activity on the basis of viewpoint").

The District's Policy is reasonable in light of the ASB program's purposes and is viewpoint and content neutral. Therefore, Plaintiffs are unlikely to prevail on their claims that the Policy, as written, violates their Free Speech and Expressive Association rights.

b. Plaintiffs Have Not Clearly Shown That the Policy Violates Their Right to Free Exercise of Religion

[6] The District's non-discrimination policy, in the form of Board Policies 0410 and 5145.3, existed well before April 2019, even if the ASB Affirmation Form, which cites the pre-existing policies, was not written until later.

As the Supreme Court has explained, the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). In other words, while the government may not impose special disabilities on the basis of religious views or religious status, "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct." *Alpha Delta*, 648 F.3d at 804 (quoting *Christian Legal Society*, 561 U.S. at 697 n.27).

Plaintiffs have not shown that the Policy, as written, clearly violates their right to free exercise of their religion. The District's Policy applies to all ASB student clubs. It does not "impose special disabilities" on Plaintiffs or other religious groups, but instead affects those groups in ways incidental to the general application of the Policy. *See Alpha Delta*, 648 F.3d at 804.[7]

Plaintiffs urge that because the Policy allows for groups to exclude students based on "secular criteria," like club attendance and competitive skill, under *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Policy triggers strict scrutiny. This argument is unpersuasive. The Policy does not treat comparable secular activity more favorably than religious exercise. In *Alpha Delta*, the Ninth Circuit examined a very similar non-discrimination policy that also barred discrimination on a number of grounds, including religion, and found that the policy did not target religious belief and did not impose special disabilities on religious groups. *Alpha Delta*, 638 F.3d at 804-05; *see also Christian Legal Society*, 561 U.S. at 693 (approving of a policy that allowed groups to "condition eligibility for membership and leadership on attendance, the payment of dues, or other

[7] Plaintiffs argue that the Policy is not one of general application because it is tantamount to a "heckler's veto." A statute cannot "allow or disallow speech depending on the reaction of the audience." *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department*, 533 F.3d 780, 787 (9th Cir. 2008). However, the District's Policy does not prohibit discrimination only if someone complains: it flatly prohibits discrimination based on any of the listed characteristics. The District also now requires *all* ASB clubs to affirm their commitment to the District's non-discrimination policy. *See* Dkt. No. 111 at 17. Plaintiffs have not shown that the facts and law clearly favor their argument that Defendants allow or disallow speech based on the reaction of the audience. *See also infra* Section III.A.iv.

neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise").

Plantiffs also rely on a Second Circuit case, *Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839 (2d Cir. 1996), to argue that student leaders of religious student groups are critical to the expression of the group's religious message, and therefore groups should be allowed to consider religious views in setting criteria for those who lead the group's ministry. However, Plaintiffs' reliance on *Hsu* is unpersuasive, as the Second Circuit case was decided before *Christian Legal Society*, a Supreme Court case, and *Alpha Delta*, a Ninth Circuit case, both of which upheld school non-discrimination policies that applied to student club members and leaders.[8]

Because the Policy is generally applicable, Plaintiffs are unlikely to prevail on their claims that the Policy violates their Free Exercise rights.

c. Plaintiffs Have Not Clearly Shown That the Policy Violates Their Rights Under the Equal Protection Clause

The Fourteenth Amendment requires that "all persons similarly situated should be treated alike." *Alpha Delta*, 648 F.3d at 804 (citation omitted). "A showing that a group 'was singled out for unequal treatment on the basis of religion' may support a valid equal protection argument." *Id.*

Plaintiffs have failed to show that the Policy, as written, violates the Equal Protection Clause. The fact that the Policy prohibits discrimination on certain grounds, one of which is religion, does not mean that Plaintiffs have been treated differently because of their religious status. *See id.* at 804-05. Like the policy at issue in *Alpha Delta*, where the Ninth Circuit found that the written policy did not violate the Equal Protection Clause, the Policy here is one of general application, and while it incidentally burdens Plaintiffs, it does not single them out for unequal treatment on the basis of religion. *See id.*

ii. Plaintiffs Fail to Show That the Law and Facts Clearly Favor Their Argument That the Policy, as Written, Violates the EAA

[8] Plaintiffs also argue that "[i]nserting District officials into religious leadership decisions violates FCA's right to internal religious autonomy." Dkt. No. 102 at 24. However, the Supreme Court case Plaintiffs cite concerned the autonomy of "religious institutions." *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020). Nothing in the record suggests that the Christian athlete student-led group at Pioneer High School organized within the school's ASB program is a religious institution akin to a private Catholic school.

"Under the Equal Access Act, a public secondary school with a 'limited open forum' is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the 'religious, political, philosophical, or other content of the speech at such meetings.'" *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226, 235 (1990) (citations omitted). "A 'limited open forum' exists whenever a public secondary school 'grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.'" *See id.* (citations omitted). A school violates the EAA when it (1) denies equal access, denies fair opportunity, or discriminates (2) based on the "content of the speech" at a group's meetings. *Truth v. Kent School Dist.*, 542 F.3d 634, 645 (9th Cir. 2008). The Ninth Circuit has noted that the EAA "clearly allows exclusions that are not 'content'-based." *Id.* at 646. A "restriction on expressive activity is content-netural if it is . . . based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *Id.* at 645-46 (citation omitted).[9]

Here, Defendants do not contest that the EAA applies to District high schools, but argue that the Policy is content-neutral. Given the Policy's similarity to the policy at issue in *Truth*, the Court agrees with Defendants. In *Truth*, a high school declined to recognize a Bible study group because the group's requirement that members be Christian violated the school's non-discrimination policy, which required that equal opportunity and treatment be provided to all students "without regard to race, creed, color, national origin, sex, marital status, previous arrest, . . . incarceration, or . . . disabilities." *Id.* at 639. The Ninth Circuit held that the high school's non-discrimination policy was content-neutral, and thus did not violate the EAA, because the policy did not "preclude or discriminate against religious speech," but rather proscribed discriminatory conduct. *Id.* at 645-46.

[9] Plaintiffs argue that content neutrality for purposes of the EAA cannot be measured using First Amendment precedent, but they ignore that the Ninth Circuit in *Truth* relied on First Amendment cases to guide its analysis because "[c]ontent neutrality for purposes of the Equal Access Act is identical to content neutrality for First Amendment claims." *Alpha Delta*, 648 F.3d at 802 n.5. As the Ninth Circuit explained, both lines of cases inform content and viewpoint neutrality analysis "because the Equal Access Act, like the First Amendment, forbids 'denial of equal access, or fair opportunity, or discrimination' based on the content (or viewpoint) of a group's speech." *See id.*

Although *Truth* dealt with membership restrictions and this case concerns alleged leadership restrictions, the District's Policy is content-neutral because it does not preclude religious speech but rather prohibits acts of discrimination. *See* TAC Ex. H ("Neither the District, the ASB, nor any ASB recognized student groups shall discriminate . . ."). The Policy also has a "non-pretextual" purpose divorced from the content of the message attempted to be conveyed: "The Governing Board desires to provide a safe school environment that allows all students equal access to District programs and activities regardless of actual or perceived ethnicity, religion, gender, gender identity, gender expression, color, race, ancestry, nation origin, physical or mental disability, sexual orientation, or any other classification protected by law." Board Policy 5145.3.

Given the clear Ninth Circuit precedent, Plaintiffs are unlikely to prevail on their claim that the Policy, as written, violates the EAA.

iii. Plaintiffs Fail to Show That the Law and Facts Clearly Favor Their Argument That the Policy Allows For Discretionary Exceptions

Plaintiffs also argue that the Policy impermissibly gives the District the power to grant exemptions. Where policies have a "formal mechanism for granting exceptions," it "renders [the] policy not generally applicable, regardless [of] whether any exceptions have been given." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1879 (2021). For example, in *Fulton*, a city's contract with foster care agencies did not allow the agencies to reject foster parents based on their sexual orientation "unless an exception is granted by the Commissioner." *Id.* at 1878. The Supreme Court found that the non-discrimination requirement in the contract was not generally applicable because it included "a formal system of entirely discretionary exceptions." *Id.* at 1878. This formal mechanism for granting exceptions invited "the government to decide which reasons for not complying with the policy [were] worthy of solicitude," and therefore the policy was not neutral and generally applicable. *See id.* at 1879.

Plaintiffs rely on *Fulton* to argue that the District's Policy impermissibly allows District officials to decide whether and how student clubs can discriminate. Given the text of the Board Policies and the ASB Affirmation Form, Plaintiffs are unlikely to succeed on this argument. The Board Policies prohibit discrimination with respect to a student's "actual or perceived ethnic

group, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, and physical or mental disability, age or sexual orientation." Board Policy 5145.3; *see also* Board Policy 0410. Neither Board Policy reserves for the District the power to allow exceptions. The ASB Affirmation Form says that no ASB group "shall discriminate against any student or group of students or any other person on any unlawful basis" and repeats the list of protected classifications. TAC Ex. H. According to the ASB Affirmation Form, student groups "may adopt non-discriminatory criteria," but in no way does the Form suggest that a District official may allow groups to discriminate based on a protected characteristic. *See id.* Unlike the policy in *Fulton*, which allowed officials to grant exceptions to allow discrimination based on sexual orientation, the Policy here does not say that the District can grant exceptions allowing an ASB club to discriminate based on religion, sexual orientation, or any of the other protected characteristics.

Plaintiffs argue that allowing student groups to adopt "non-discriminatory criteria" gives District officials an impermissible degree of discretion. A plain reading of the Board Policies and the ASB Affirmation Form, however, shows that discriminatory criteria are enumerated in the list of protected characteristics, so non-discriminatory criteria must be criteria not based on those characteristics. Requiring District officials to enforce a mandate not to allow discrimination based on race, gender, religion, sexual orientation, or other unlawful basis is not unfettered discretion.

For these reasons, Plaintiffs have failed to clearly show that the Policy creates a formal mechanism for granting exceptions as discussed in *Fulton*.

iv. Plaintiffs Fail to Show That the Law and Facts Clearly Favor Their Argument That the Policy Has Been Selectively Enforced in Violation of the Constitution and EAA

In both *Alpha Delta* and *Truth*, the Ninth Circuit remanded on the factual question of whether the defendants in practice allowed certain groups to operate in violation of the non-discrimination policies. *Alpha Delta*, 648 F.3d at 803-804; *Truth*, 542 F.3d at 648. The Ninth Circuit reasoned that enforcing the non-discrimination policy against some groups but not others raises a question as to whether the religious group was refused an exemption because of its religious viewpoint. *Alpha Delta*, 648 F.3d at 804; *Truth* 542 F.3d at 648 ("If indeed the District

has a policy of enforcing the non-discrimination policy only against religious groups, this policy would of course violate the [EAA].”). Further fact development was necessary because “it [was] possible that [the other] groups were approved inadvertently because of administrative oversight, or that [the other] groups have, despite the language in their applications, agreed to abide by the nondiscrimination policy.” *Alpha Delta*, 648 F.3d at 804.

Here, Plaintiffs similarly argue that Defendants have, in practice, selectively enforced the Policy, allowing some clubs to discriminate while strictly enforcing the Policy as to others.[10] Importantly, the question here is whether Defendants have granted some groups *exemptions* to the Policy, or, in other words, whether Defendants have allowed other student groups to act in violation of the Policy. The District’s interactions with a number of the student groups Plaintiffs cite as proof of unequal treatment did not involve any “exemptions” to the Policy, as those groups’ membership and leadership criteria do not use impermissible “discriminatory criteria” as defined by the Policy. For example, Plaintiffs object that the National Honor Society requires members to have a minimum GPA and can disqualify applicants who are “unworthy citizen[s].” Dkt. No. 115 at 8. However, neither of those criteria are disallowed under the Board Policies or precluded by the ASB Affirmation Form. On the other hand, requiring leaders to swear that their religious beliefs are the same as those described in the FCA’s Statement of Faith and further requiring them to comply with the Sexual Purity Statement that says sex can only occur between a married man and woman does violate the Policy’s prohibition on “leadership criteria that excludes any student based on . . . religion . . . [or] sexual orientation.” *See* TAC Ex. H.

That said, Plaintiffs also allege that the District “has approved numerous student group

[10] The Court limits its analysis to student groups seeking ASB recognition, as those are the groups similarly situated to Plaintiffs. Plaintiffs argue that the school has improperly restricted their speech and religious exercise rights within the limited public forum and limited open forum created by the school. District programs, such as school sports teams, are not “student groups” that are a part of the limited public forum or that trigger the EAA. *See* 20 USC § 4071(c) (“A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related *student groups* to meet on school premises during noninstructional time.”) (emphasis added); *see also* Cal. Code Regs. tit. 5, § 4910 (California state regulation regarding nondiscrimination in schools that distinguishes between clubs, defined as a “group of students which meets on school property and which is student initiated, student operated and not sponsored by the educational institution,” and extracurricular activities, defined as “an activity that is sponsored” by the district).

applications that discriminate on one or more of the criteria listed in its non-discrimination policy." Dkt. No. 102 at 4. As examples, Plaintiffs allege that the Girls Who Code club, the Big Sister/Little Sister club, the Girls Circle club, and the Simone club "have been allowed to select members and leaders based on sex." *Id.* at 4, 17. But the evidence regarding these examples does not support Plaintiffs' argument. In her deposition, the Activities Director for Pioneer High School said that Girls Who Code could limit their membership to students who identify as female, but an email from a Girls Who Code organization manager to the Associate Superintendent of the District says that "GWC strives to close the gender gap; however all interested students may participate." *See* Dkt. No. 102-2 (Mayhew Depo. Tr.) at 35:20-36:4; Dkt. No. 102-5 (Blomberg Decl.) Ex. GG. Moreover, Defendants say that male students do participate in and lead Girls Who Code. *See* Dkt. No. 111 at 14; Dkt. No. 111-1 (Mayhew Decl.) ¶ 25; Dkt. No. 111-4 (Glasser Depo. Tr.) at 182:8-183:2. In his deposition, Principal Espiritu said that if a male student wanted to join the Big Sister/Little Sister club, the group would need "to be inclusive and consider it." Dkt. No. 102-1 (Expiritu Depo. Tr.) at 135:6-9. The District also represents that neither the Girls Circle nor the "Simone Club" were approved as ASB clubs. The Girls Circle is a school counseling group run by school staff, and the District says it has no record of a Simone Club ever applying for ASB recognition. Dkt. No. 111 at 14, 20 n.11; Dkt. No. 111-1 (Mayhew Decl.) ¶¶ 26, 31. These examples do not show that the District has, in the past, knowingly allowed ASB clubs to violate the Policy.

And even if Plaintiffs were able to show clear past selective enforcement, the District represents that it has implemented new procedures to ensure Policy compliance. *See id.* at 17. As Plaintiffs' supplement to the record shows, ASB clubs are now adopting constitutions based on a San Jose Unified School District template. *See* Dkt. No. 177-3.[11] The new club constitutions

[11] The Court **GRANTS** Plaintiffs' Administrative Motion for Leave to Supplement the Preliminary Injunction Record, filed as docket number 177. Defendants agree that these materials were not available when the preliminary injunction motion was originally filed and briefed. Dkt. No. 178 at 2. The Court finds that these materials are relevant and properly considered as part of the motion for preliminary injunction record. *Herb Reed Enterprises, LLC v. Florida Entertainment Management*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013) (explaining that "the rules of evidence do not apply strictly to preliminary injunction proceedings" and that it is "within the discretion of the district court to accept . . . hearsay for purposes of deciding whether to issue the

include verbiage similar to the ASB Affirmation Form, including:

> "The club shall not discriminate against any student or group of students or any other person on any unlawful basis, including on the basis of gender, gender identity and/or expression, race, ... color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation, or the perception of one or more of such characteristics . . . ."

Id. at 17. The form language also states that "[t]he club shall not adopt or enforce any membership, attendance, participation, or leadership criteria that excludes any student on any of the foregoing grounds." *See id.*

The 2021-2022 school year applications Plaintiffs offer as proof of selective enforcement also fail to demonstrate that the District enforces the Policy as to some student groups but not others. The club constitution for Senior Women, which includes the above-described non-discrimination provisions, says that its members are "students who are seniors who identify as female," but it also says that "[a]ny currently enrolled student in the School shall be eligible for membership." Dkt. No. 177-3 at 67. While there is arguably some tension in these statements, on the current record there is not clear proof that the District allows the club to violate the Policy. Similarly, while a spreadsheet produced by Defendants and submitted by Plaintiffs says the proposed South Asian Heritage club "will prioritize south asian acceptance," it also says the group will have "[n]o cap on members" and it is "fine with non south asians joining." Dkt. No. 177-3 at 13. None of the statements that Plaintiffs highlight are clear evidence that any club discriminates in violation of the Policy. As the Ninth Circuit noted in *Alpha Delta*, evidence that groups were "approved inadvertently because of administrative oversight" or "have, despite the language in their applications, agreed to abide by the nondiscrimination policy," does not necessarily establish that a school refused to grant an exception because of a group's religious viewpoint. *See Alpha Delta*, 648 F.3d at 803-04.

And across the board, the District requires all ASB clubs to confirm their commitment to

---

preliminary injunction") (citation omitted). The Court also **OVERRULES** Defendants' evidentiary objections, docket number 112, to exhibits included in Plaintiff's Motion for Preliminary Injunction, docket number 102, because the materials are relevant and properly considered as part of the motion for preliminary injunction record. *See id.* Plaintiffs' Motion to Strike, docket number 114, is **TERMINATED AS MOOT**.

the non-discrimination policy. There is no indication in the record that any club other than Pioneer FCA has refused to sign the ASB Affirmation Form. *See* Dkt. No. 115 at 15. This is another way that Plaintiffs fail to show that like entities are being treated differently.

In summary, Plaintiffs have failed to meet their burden to show that the facts and law clearly favor their position that the District in practice selectively enforces the Policy.

B. Irreparable Injury

The Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also CTIA – The Wireless Association v. City of Berkeley, California*, 928 F.3d 832, 851 (9th Cir. 2019) ("[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury . . . by demonstrating the existence of a colorable First Amendment claim." (citation omitted)). Building on this logic, other courts have similarly found that violations of the Equal Access Act inflict irreparable injury because the Act protects "expressive liberties." *Colin ex rel. Colin v. Orange Unified School Dist.*, 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000); *see also Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839, 872 (2d. Cir. 1996).

Plaintiffs argue that the Policy, as written, and the District's uneven enforcement of the Policy violates their rights, thereby causing them injury. FCA chapters within the District can meet and hold events on campus, which Pioneer FCA has done. *See* Dkt. No. 111 at 3. However, they do not have ASB recognition, which carries with it various benefits such as being listed in the yearbook, and, if the District is found to have violated the Constitution and the EAA, the denial of ASB recognition can amount to an injury. *See Board of Educ. of the Westside Comm. Schools v. Mergens, et al.*, 496 U.S. 226, 246-47 (1990) (holding that refusing to recognize a Christian club denied the club "equal access" under the Equal Access Act and noting that "[o]fficial recognition allows student clubs to be a part of the student activities program and carries with it access" to various publication systems); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). If, as Plaintiffs assert, the Policy as written violates their rights or they are being singled out because of the religious content of their speech, that would constitute an injury based on the deprivation of their "expressive

liberties" as protected by the Constitution and the EAA.

C. Balance of Equities and Public Interest

When the government is a party to a case, the balance of equities and the public interest factors merge. *Drake Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, both sides assert important interests. Plaintiffs argue that because they have raised First Amendment questions, the balance of hardships and public interest are in their favor. *See American Beverage Ass'n v. City and Cty of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) ("The fact that the plaintiffs have raised serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the plaintiffs'] favor." (citation and internal quotation marks omitted)).

Defendants, on the other hand, argue that the balance of equities and public interest does not weigh in Plaintiffs' favor because "[e]xempting Pioneer FCA from the Policy would unfairly shift the burden and stigma of discrimination to other students." Dkt. No. 111 at 24. As the Supreme Court explained in *Christian Legal Society*:

> "Exclusion, after all, has two sides. [The school], caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership."

561 U.S. at 694. In adopting its non-discrimination policy, the District had to weigh the interests of students who seek to exclude, the interests of students who face exclusion in the absence of a non-discrimination policy, and the educational costs and benefits of striking a particular balance between them.

The balance between these competing, and weighty, interests does not tip so sharply in Plaintiffs' favor so as to justify a mandatory preliminary injunction.

IV. CONCLUSION

The Court **DENIES** Plaintiffs' motion for a preliminary injunction. Because the Court **OVERRULES** Dkt. No. 112, Defendants' evidentiary objections, it **TERMINATES AS MOOT** Dkt. No. 114, Plaintiffs' motion to strike. The Court also **DENIES** Dkt. No. 119, Defendants' administrative motion to file supplemental declarations and evidence in support of its opposition

to Plaintiffs' motion for a preliminary injunction; Dkt. No. 125, Plaintiffs' motion for leave to supplement the preliminary injunction record; and Dkt. No. 192, Plaintiffs' administrative motion for leave to supplement the preliminary injunction record. The Court **GRANTS** Dkt. No. 177, Plaintiffs' administrative motion for leave to supplement the preliminary injunction record.

IT IS SO ORDERED.

Dated: 6/1/2022

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JESSICA ROE, et al.,

Plaintiffs,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD, et al.,

Defendants.

Case No. 20-CV-02798-LHK

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 25

The Fellowship of Christian Athletes ("FCA") and two of its pseudonymous former student members (collectively, "Plaintiffs") allege that the San Jose Unified School District and its officials (collectively, "Defendants") discriminated against FCA's religious viewpoint and unlawfully derecognized FCA's student groups. Plaintiffs specifically claim that Defendants violated the Equal Access Act, 20 U.S.C. §§ 4071 *et seq*., and various overlapping rights under the First Amendment and Fourteenth Amendment. Before the Court is Defendants' motion to dismiss Plaintiffs' first amended complaint. ECF No. 25. Having considered the parties' submissions; the relevant law; and the record in this case, the Court GRANTS IN PART and DENIES IN PART

Defendants' motion to dismiss.[1]

I. BACKGROUND

A. Factual Background

Plaintiffs are FCA—an international religious ministry with student groups nationwide—and two pseudonymous high school students who were members of FCA but have since graduated. First Am. Compl. ("FAC") ¶ 2, ECF No. 14. One pseudonymous former student, "Jane Doe," brings suit through her pseudonymous father, "John Doe." FAC ¶ 21. The other pseudonymous former student is "Jessica Roe." FAC ¶ 22. FCA adheres to a set of religious beliefs, which are found primarily in FCA's Statement of Faith and Sexual Purity Statement. *Id.* ¶ 95. "FCA's student leaders must affirm their agreement with these core religious beliefs and try to live consistent with those beliefs." *Id.* ¶ 3. However, FCA alleges that it "invite[s] all students to attend[,] participate in its meetings[,]" and be non-leadership members even if these students disagree with FCA's religious beliefs. *Id.* ¶¶ 2–3.

Defendants are the San Jose Unified School District Board of Education ("the District"); Superintendent Nancy Albarrán; Principal Herb Espiritu of Pioneer High School ("Pioneer"); and Peter Glasser, a teacher at Pioneer. FAC at 1. The District is sued only in its official capacity. FAC at 2. All Defendants other than the District ("individual Defendants") are sued in both their official and personal capacities. *Id.*

Below, the Court recounts Plaintiffs' allegations. Specifically, Plaintiffs allege that (1) the District derecognized FCA student groups; and (2) used the District's nondiscrimination policies as pretext for viewpoint discrimination. The Court then summarizes developments that occurred after the incidents alleged in the FAC. Notably, the COVID-19 pandemic has temporarily closed the District's schools, and Plaintiffs Doe and Roe have graduated high school.

[1] Defendants' motion to dismiss contains a notice of motion paginated separately from the supporting points and authorities. ECF No. 51. Civil Local Rule 7-2(b) provides that the notice of motion and points and authorities must be contained in one document with the same pagination.

1. The derecognition of FCA's student clubs given FCA's Sexual Purity Statement and the District's nondiscrimination policies

Plaintiffs allege that "[t]he District has revoked recognition of the Student FCA Chapters because of their religious beliefs and speech." FAC at 3. Specifically, Plaintiffs allege that on April 23, 2019, Glasser "posted a copy of FCA's Statement of Faith and Sexual Purity Statement in his classroom with the caption, 'I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements. How do you feel?'" FAC ¶ 5.

The Sexual Purity Statement requires FCA student leaders to affirm that they will not "be[] involved in a lifestyle that does not conform to the FCA's Sexual Purity Statement." ECF No. 25-3 (2018–19 FCA Student Leader Application).[2] The Sexual Purity Statement describes "impure lifestyle[s]" as including "sex outside of marriage and homosexual acts." *Id.* at 1. The Sexual Purity Statement specifically provides:

> God desires His children to lead pure lives of holiness. The Bible is clear in teaching on sexual sin including sex outside of marriage and homosexual acts. *Neither heterosexual sex outside of marriage nor any homosexual act* constitute an alternative lifestyle acceptable to God.
>
> While upholding God's standard of holiness, FCA strongly affirms God's love and redemptive power in the individual who chooses to follow Him. FCA's desire is to encourage individuals to trust in Jesus and turn away from any impure lifestyle.
>
> 1. Will you conform to the FCA's Sexual Purity Policy? ____ Yes ____ No
>
> 2. Have you, or will you at this time commit to living a drug, alcohol and tobacco-free life? ____ Yes ____ No

[2] The Court considers FCA's Sexual Purity Statement as incorporated by reference. Courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Here, the FAC repeatedly references the Sexual Purity Statement. *E.g.*, FAC ¶¶ 5, 50, 95, 98, 100. Defendants have attached the Sexual Purity Statement by filing a version of FCA's student leadership application that includes the Sexual Purity Statement. ECF No. 25-2 at 9. Although Plaintiffs object that the attached application was not used in the District during the relevant time, Plaintiffs "do not dispute the contents of the 'Sexual Purity Statement,' or that it bars individuals who engage in homosexual conduct." Reply at 9 n.4; *see* Opp'n at 25 (limited objection). Thus, the Court incorporates by reference the Sexual Purity Statement.

> As an officer, I will be accountable to the other officers, Huddle Coach(es) and FCA staff. I understand that *if I am found being involved in a lifestyle that does not conform to the FCA's Sexual Purity Statement*, or break my commitment to living a drug-, alcohol- and tobacco-free life, that *it means that I will need to step down from my leadership position* with the Fellowship of Christian Athletes. This does not mean that I am a bad person and that the FCA does not love me and want me involved; this is in order to protect the integrity of the ministry and to protect the ones to which we are ministering.

Id. (emphasis added). In sum, under the Sexual Purity Statement, FCA student leaders must "step down from [their] leadership position" if they engage in extramarital sex or "homosexual acts." Glasser displayed the Sexual Purity Statement in his classroom for a week. FAC ¶ 6.

On May 2, 2019, Principal Espiritu informed the student leaders of Pioneer's FCA club that the high school would no longer recognize the club. FAC ¶ 7. To explain his decision, Espiritu met with two FCA student leaders, praised their "patien[ce] and understanding throughout this process," and memorialized their conversation in an email to the students. ECF No. 25-1 (May 2, 2019 email). Espiritu cited the District's nondiscrimination policies as the basis for derecognizing the club. Espiritu summarized the policies as barring discrimination based on "sexual orientation," among other characteristics. Espiritu wrote:

> San José Unified requires all of its programs and activities to be free from discrimination based on gender, gender identity and expression, race, color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation or the perception of one or more of such characteristics.

ECF No. 25-1. According to Plaintiffs, the specific nondiscrimination policies at issue are District Policy BP 0410 and District Policy 5145.3. FAC ¶ 114. These policies also list "sexual orientation" as a protected characteristic. Policy BP 0410 provides:

> The Governing Board is committed to equal opportunity for all individuals in district programs and activities. District programs, and activities, and practices *shall be free from discrimination based on* gender, gender identity and expression, race, color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, *sexual orientation* or the perception of one or more of such characteristics. The Board

> shall promote programs which ensure that any discriminatory practices are eliminated in all district activities.
>
> Any school employee who observes an incident of discrimination, harassment, intimidation, or bullying or to whom such an incident is reported shall report the incident to the Coordinator or principal, whether or not the victim files a complaint.

FAC ¶ 116 (emphasis added). Policy 5145.3 similarly provides:

> All district programs and activities within a school under the jurisdiction of the superintendent of the school district *shall be free from discrimination*, including harassment, with respect to the actual or perceived ethnic group, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, and physical or mental disability, age or *sexual orientation*.
>
> The Governing Board desires to provide a safe school environment that allows all students *equal access to District programs and activities regardless of* actual or perceived ethnicity, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, physical or mental disability, *sexual orientation*, or any other classification protected by law.

Id. ¶ 117 (emphasis added).

"Soon after[]" the FCA leaders' meeting with Espiritu, "District officials informed FCA student leaders at Leland [High School] and Willow Glen [High School] that schools in the District would no longer recognize the Student FCA Chapters." *Id.* ¶ 8. FCA's derecognition denied FCA student clubs certain benefits. These benefits included access to faculty advisors and Associated Student Body ("ASB") funds. *Id.* ¶ 55.

2. Nondiscrimination policies were allegedly pretext for discrimination, as evidenced by the District's recognition of other clubs and alleged harassment of FCA

Though the District cited its nondiscrimination policies in derecognizing FCA, Plaintiffs allege that the policies were "pretextual." FAC ¶ 91. Specifically, the District allegedly exempts student groups from its nondiscrimination policies "on an individualized basis." *Id.* Plaintiffs allege that "[t]he District recognizes, supports, and even sponsors student groups and activities that deny membership or leadership opportunities on the basis of students' belonging to enumerated classes. For example, the District and Pioneer sponsor and support numerous single-sex athletic teams." *Id.* Similarly, Plaintiffs allege that "the District has approved applications for

numerous noncurriculum-related student groups that have expressed gender, religious, or racial membership or leadership requirements in their applications." *Id.* ¶ 92. As examples, Plaintiffs cite the Big Sister/Little Sister club and the Black Student Union. *Id.*

Plaintiffs further allege that "[t]he District has approved of and facilitated attempts to harass and intimidate FCA students." FAC at 16. Specifically, Plaintiffs allege that students and two teachers at Pioneer have protested FCA and called FCA a discriminatory group.

As to alleged harassment from students, Plaintiffs claim that after the District derecognized FCA, some students still opposed "FCA continuing to meet at Pioneer even as an unrecognized student group." FAC ¶ 64. These students formed the Satanic Temple Club at Pioneer, which the District then recognized. *Id.* ¶ 64.

On September 16, 2019, "students associated with the Satanic Temple Club passed out flyers announcing the intent to gather directly outside of the meeting space for the Pioneer Student FCA Chapter's meeting in order to denounce the FCA students' religious beliefs." *Id.* ¶ 65. On October 23, 2019, "[t]he protesting students yelled at the FCA students as they were entering their meeting and held signs disparaging their religious beliefs." *Id.* ¶ 67. Defendants allegedly did not regulate the protest. *Id.* ¶¶ 65–67.

In addition, Plaintiffs complain that on November 6, 2019, student reporters from the school newspaper entered the Pioneer FCA meeting "in a manner calculated to harass" FCA students. *Id.* ¶ 68. During the 30-minute meeting, Plaintiffs allege that the student reporters took hundreds of close-up photos of FCA students as they spoke. When FCA students complained to Espiritu, Espiritu allegedly responded that FCA students "would have no presence in the yearbook . . . if they did not allow the [student reporters] to take pictures at the FCA students' meetings." *Id.*

As for alleged harassment from teachers, Plaintiffs name Glasser (the teacher who posted FCA's Sexual Purity Statement in his classroom) and an unnamed faculty member. FAC ¶ 73. Plaintiffs allege that Glasser not only disparaged FCA in his classroom, but also tried to dissuade a visiting athlete from speaking to Pioneer's FCA Chapter. FAC ¶ 74. The unnamed faculty member, for his or her part, "encouraged and participated in demonstrations" against FCA. *Id.* ¶ 75.

3. The District stops in-person instruction given the pandemic, and Plaintiffs Doe and Roe graduate Pioneer High School in June 2020.

In March 2020, the District stopped in-person instruction given the COVID-19 pandemic. McGee Decl. ¶ 8, ECF No. 42. Despite the pause in in-person instruction, "some student groups have continued to function during distance learning in a remote fashion." *Id.* ¶ 10. For instance, some students at Willow Glen and Pioneer high schools have organized "an online 'club rush' where student groups could be listed." *Id.* Moreover, some student groups have requested ASB funds, although that funding is currently frozen. *Id.*

The District "is making plans for an eventual reopening, but it cannot know with any certainty if and when it will reopen for this 2020–2021 school year." *Id.* ¶ 8.

In June 2020, Plaintiffs Jane Doe and Jessica Roe graduated Pioneer High School. McMahon Decl. ¶ 2, ECF No. 25-2.

B. Procedural History

On April 22, 2020, Plaintiffs filed suit. ECF No. 1. On May 19, 2020, Plaintiffs filed the operative First Amended Complaint ("FAC"). ECF No. 14. The FAC pleads 12 related claims alleging violations of Plaintiffs' rights to free speech, free expressive association, free exercise, and equal protection. Specifically, Plaintiffs claim that Defendants (1) violated the Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*; (2) committed viewpoint discrimination; (3) violated Plaintiffs' right of expressive association; (4) violated Plaintiffs' right to free exercise of religion and generally available benefits; (5) targeted Plaintiffs' religious beliefs; (6) violated FCA's internal autonomy; (7) committed denominational discrimination; (8) demonstrated hostility toward religion; (9) denied Plaintiffs equal protection of the laws under the Fourteenth Amendment; (10) compelled Plaintiffs' speech; (11) imposed unconstitutional conditions on benefits; and (12) retaliated against Plaintiffs' exercise of constitutional rights. FAC ¶¶ 122–238 (listing 12 claims).

All 12 claims are brought under 42 U.S.C. § 1983's private right of action. *Id.* All claims pray for injunctive relief, declaratory relief, and damages. *Id.* ¶¶ 131–32, 140–41, 153–54, 161–62, 173–74, 186–87, 194–95, 203–04, 210–11, 219–20, 227–28, 237–38; *id.* at 50 (prayer for relief).

On August 10, 2020, Defendants filed the instant motion to dismiss. ECF No. 25 ("Mot."). On September 8, 2020, Plaintiffs filed their opposition to the motion to dismiss. ECF No. 30 ("Opp'n"). On September 22, 2020, Defendants filed their reply supporting the motion to dismiss. ECF No. 31 ("Reply").

Three related administrative motions followed. First, on December 2, 2020, Defendants moved for leave to file supplemental evidence supporting their motion to dismiss. ECF No. 42. Plaintiffs filed their opposition to this motion on December 7, 2020. ECF No. 45.

Second, on December 2, 2020, Plaintiffs also moved to file supplemental evidence supporting their opposition to the motion to dismiss. ECF No. 43. Defendants have not filed a response to this motion by Plaintiffs.[3]

Lastly, on December 11, 2020, Plaintiffs moved for leave to use pseudonyms for Plaintiffs "Doe" and "Roe." ECF No. 46; *see also* ECF No. 3 (previous *ex parte* motion for same). On December 15, 2020, Defendants filed their opposition to pseudonyms and asked the Court to dismiss the FAC for failing to comply with Federal Rule of Civil Procedure 10(a). ECF No. 47.

II. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(1)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) tests whether the court has subject matter jurisdiction. Although lack of "statutory standing" requires dismissal for failure to state a claim under Rule 12(b)(6), lack of Article III standing requires dismissal for want

[3] The two motions for leave to file supplemental evidence ask the Court to take judicial notice of public documents pertaining to the District's school closures and student groups. ECF Nos. 42, 45. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Matters of public record" are proper subjects of judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Thus, the Court GRANTS the two motions for leave to file supplemental evidence, ECF Nos. 42 and 43. However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *Id.*

of subject matter jurisdiction under Rule 12(b)(1). *See Nw. Requirements Utilities v. F.E.R.C.*, 798 F.3d 796, 808 (9th Cir. 2015) ("Unlike Article III standing, however, 'statutory standing' does not implicate our subject-matter jurisdiction." (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014))); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). A Rule 12(b)(1) jurisdictional attack may be factual or facial. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

"[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id*. In resolving such an attack, unlike with a motion to dismiss under Rule 12(b)(6), a court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* Moreover, the court "need not presume the truthfulness of the plaintiff's allegations." *Id.* Once the defendant has moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of establishing the court's jurisdiction. *See Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

"In a facial attack," on the other hand, "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. The court "resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

B. Motion to Dismiss Under Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The United States Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The Court, however, need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Additionally, mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

C. Leave to Amend

If a court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id*. at 1130 (internal quotation marks omitted).

Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008). At the same time, a court is justified in denying leave to amend when a plaintiff "repeated[ly] fail[s] to cure deficiencies by amendments previously allowed." *See Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010). Indeed, a "district court's discretion to deny leave to amend is

particularly broad where plaintiff has previously amended the complaint." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (quotation marks omitted).

D. Standard for Allowing Party to Proceed Under Pseudonym

"The normal presumption in litigation is that parties must use their real names." *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010). However, Ninth Circuit precedent "allow[s] parties to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'" *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067–68 (9th Cir. 2000) (quoting *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981)). Courts balance "the need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party." *Id.* at 1068 (citations omitted). Courts applying this balancing test have recognized three situations allowing a plaintiff to proceed anonymously: (1) when identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to preserve privacy in a matter of sensitive and highly personal nature; and (3) when the anonymous party is compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution. *Id.* (internal quotation marks and citations omitted).

III. DISCUSSION

Plaintiffs are the Fellowship of Christian Athletes ("FCA") and two pseudonymous high school students ("Doe" and "Roe") who were members of FCA but have since graduated. Plaintiffs' First Amended Complaint ("FAC") pleads 12 related claims alleging violations of Plaintiffs' rights to free speech, free expressive association, free exercise, and equal protection under the Equal Access Act ("EAA"), 20 U.S.C. §§ 4071–74, and the First and Fourteenth Amendments. *See* FAC at 31–49. All 12 claims are brought under 42 U.S.C. § 1983's private right of action. All 12 claims pray for injunctive relief, declaratory relief, and damages.

Defendants are the San Jose Unified School District Board of Education ("the District"); Superintendent Nancy Albarrán; Principal Herb Espiritu of Pioneer High School ("Pioneer"); and

Peter Glasser, a teacher at Pioneer. FAC at 1. The District is sued only in its official capacity. FAC at 2. All Defendants other than the District ("individual Defendants") are sued in both their official and personal capacities. *Id.*

Defendants move to dismiss the FAC on six grounds. First, Defendants argue that the FAC violates Federal Rule of Civil Procedure 10(a) by failing to disclose the identities of Plaintiffs Doe and Roe. Second, Defendants argue that the Court lacks jurisdiction over Plaintiffs' claims for prospective relief. Third, Defendants argue that in their official capacities, they are not "persons" subject to suit under 42 U.S.C. § 1983. Fourth, Defendants argue that under the Eleventh Amendment, Defendants are immune from suit in their official capacities. Fifth, Defendants argue that Plaintiffs fail to adequately allege that Defendants broke the law—and that regardless, the individual Defendants are entitled to qualified immunity. Lastly, Defendants argue that the Coverdell Teacher Protection Act, 20 U.S.C. § 7941 *et seq.*, shields the individual Defendants from damages.

The Court addresses each argument for dismissal in turn. Ultimately, the Court dismisses certain claims with leave to amend and certain claims with prejudice. Specifically, the Court (1) dismisses with leave to amend the FAC for violating Federal Rule of Civil Procedure 10(a) by failing to disclose the identities of Doe and Roe; (2) dismisses with prejudice all of Doe and Roe's claims for prospective relief for lack of jurisdiction; (3) dismisses with leave to amend all of FCA's claims for prospective relief for lack of jurisdiction; and (4) dismisses with prejudice all of Plaintiffs' monetary claims against Defendants in Defendants' official capacities. The Court need not address Defendants' fourth argument (Eleventh Amendment immunity) because none of the official-capacity claims withstand Defendants' first three arguments. Lastly, under binding Ninth Circuit precedent, Defendants' nondiscrimination policies are facially valid. However, Plaintiffs adequately allege as-applied monetary claims against individual Defendants in their personal capacities.

A. The FAC violates Federal Rule of Civil Procedure 10(a) by failing to disclose the identities of pseudonymous Plaintiffs.

Defendants argue that the FAC should be dismissed because Plaintiffs Doe and Roe cannot proceed pseudonymously. ECF No. 47 at 6. Plaintiffs respond that pseudonyms are warranted because Doe and Roe "have a reasonable fear of both social stigma and physical harm." ECF No. 46 at 3. The Court agrees with Defendants.

As a general matter, "[a] district court has discretion in deciding whether to permit a party to proceed anonymously." *Advanced Textile*, 214 F.3d at 1067, 1068. The Court must balance the party's need for anonymity with the prejudice to the opposing party and the public's interest in knowing the party's identity. *Id.* at 1068. "In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

Here, Plaintiffs fail to provide "compelling reasons" for proceeding pseudonymously. *Id.* Specifically, Plaintiffs fail to show that this is an "'unusual case' when nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'" *Does I thru XXIII*, 214 F.3d at 1067–68 (quoting *Doe*, 655 F.2d at 922 n.1). Plaintiffs instead cite alleged harassment at their high school that ended when Doe and Roe graduated in June 2020, if not sooner. *See* ECF No. 46 at 3 (citing Roe Decl. ¶¶ 6–7 & Exhs. A & B, ECF No. 46-2; Doe Decl. ¶¶ 6–7 & Exhs. A & B, ECF No. 46-3).

Moreover, the exhibits that purportedly describe "just one of many incidents of personal attacks" instead describe a peaceful protest. Exhs. A & B (same in both declarations). The exhibits comprise a December 9, 2019 article in Pioneer's student newspaper. The article states that on December 4, 2019, "over twenty protesters gathered outside the [building] during the Wednesday FCA meeting, holding pro-LGBTQ signs." Exh. B. Principal Espirtu banned the protestors from "go[ing] in to protest," but allowed them to "go in and observe the meeting." *Id.* The article then mentions a protest organizer and an FCA member. The organizer states that protestors were "quiet

and peaceful . . . They simply stood still and held signs promoting love and acceptance." *Id.* Then, the FCA member reportedly states that "ultimately . . . the protests *will not affect* the group's meetings." *Id.* (emphasis added). Thus, the 13-month-old incident Plaintiffs cite fails to show that "nondisclosure of [Doe and Roe's] identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'" *Does I thru XXIII*, 214 F.3d at 1067–68 (quoting *Doe*, 655 F.2d at 922 n.1).

Nor do Plaintiffs plausibly allege future harassment. Plaintiffs' allegations are instead vague and conclusory. Doe and Roe assert, for example, that "[they] fear that if [their] identit[ies] became public, [they] would experience ostracism, harassment and threats from people in [their] community." Roe Decl. ¶ 4; Doe Decl. ¶¶ 4 (same). Yet Doe and Roe do not aver any actual threat or any specific people who would pose a threat. At most, Doe and Roe show that many in their community disagree with their beliefs. Community disagreement and any resulting "embarrassment or economic harm is not enough" to support a pseudonymous lawsuit. *Doe v. Rostker*, 89 F.R.D. 158, 161-62 (N.D. Cal. 1981); *see also Doe v. NFL Enterprises*, LLC, No. 17-CV-004960-WHA, 2017 WL 697420, at *2 (N.D. Cal. Feb. 22, 2017) (collecting cases denying plaintiffs leave to proceed pseudonymously).

Doe and Roe have thus "cite[d] no actual threat of any harm against [them] *specifically*." *NFL Enterprises*, 2017 WL 697420, at *2 (emphasis in original). Rather, like the pseudonymous plaintiff in *NFL Enterprises*, Doe and Roe resort to citing harassment faced by others in far-flung circumstances. For instance, Doe and Roe cite reports from 2008 that "the mayor of Fresno and a prominent pastor received threats to their safety due to their support of Proposition 8." ECF No. 46 at 4 (citing Smith Decl. ¶ 4 & Exh. A, ECF No. 46-1). These reports are unavailing. If Plaintiffs could proceed pseudonymously based on threats made over 12 years ago to different people in a different location in different circumstances unrelated to this case, the "public's common law right of access to judicial proceedings" would be a dead letter. *Does I thru XXIII*, 214 F.3d at 1068.

In addition, to the extent Doe and Roe risk embarrassment, Plaintiffs' own actions are increasing that risk by boosting the profile of the instant case. Plaintiffs' counsel has advertised the

instant case on their website for months. Levine Decl. ¶ 11, ECF No. 47-1 (citing Christian Legal Society, *Fellowship of Christian Athletes and San Jose Unified School District*, https://www.christianlegalsociety.org/fcasjusd). Plaintiffs' counsel has also published on their website a January 14, 2020 letter from Plaintiffs' counsel to Superintendent Albarrán about the instant case. *Id.* These consistent efforts to generate publicity undermine Plaintiffs' assertion that Doe and Roe need anonymity. Indeed, despite this publicity and the pendency of this case since April 22, 2020, Plaintiffs have not filed declarations alleging ongoing harm that would support a pseudonymous lawsuit. *Id.* In sum, the Court finds that Doe and Roe's fears of harm are indefinite and unreasonable.

The Court further finds that pseudonymity has prejudiced and would continue to prejudice Defendants. Specifically, Doe and Roe's pseudonymity impedes Defendants' ability to defend themselves in this lawsuit. As Defendants aver, "Plaintiffs have still not revealed their identities to Defendants, causing Defendants to have to guess in their motion to dismiss as to Plaintiffs' identities." ECF No. 47 at 4 (citing Levine Decl. ¶ 3). This required guesswork may require the parties and the Court to expend time and resources on disputes that are not present in the instant case. For instance, without knowing Doe and Roe's identities, Defendants did not know for certain whether Doe and Roe had graduated high school and thereby mooted their claims for prospective relief. *See* Section B, *infra*. Thus, Defendants' motion to dismiss argument that Doe and Roe had graduated from high school could only be supported "[u]pon information and belief," not actual knowledge. McMahon Decl. ¶ 2. Only Plaintiffs' failure to dispute this fact in Plaintiffs' opposition to the motion to dismiss has confirmed that Doe and Roe have in fact graduated.

Plaintiffs' anonymity also prejudices Defendants' response to Plaintiffs' monetary claims. Without knowing who Doe and Roe are, Defendants cannot duly assess the magnitude of Plaintiffs' alleged damages. This lack of information not only hampers Defendants' litigation of the merits, but also attempts at mediation and settlement. ECF No. 47 at 5.

Accordingly, the Court DENIES Plaintiffs' motion to proceed pseudonymously and dismisses the FAC as defective under Federal Rule of Civil Procedure 10(a). *See* Fed. R. Civ. P.

10(a) ("The title of the complaint must name all the parties . . . ."); *Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d at 1042, 1046 (affirming similar dismissal under Rule 10(a) with prejudice). However, the Court grants Plaintiffs leave to amend because allowing amendment would not unduly prejudice the opposing party, cause undue delay, or be futile. *See Leadsinger*, 512 F.3d at 532.

Below, the Court identifies several deficiencies in the FAC that must be cured by amendment and deficiencies for which amendment would be futile.

B. The Court lacks jurisdiction to adjudicate Plaintiffs' claims for prospective relief.

Plaintiffs seek prospective declaratory and injunctive relief ("prospective relief") in addition to damages. Defendants argue that the Court lacks jurisdiction to grant prospective relief. Defendants make two arguments against jurisdiction. First, that the graduation of Plaintiffs Doe and Roe moots their claims for prospective relief. Mot. at 2. Second, the pause in in-person instruction caused by the COVID-19 pandemic moots all Plaintiffs' claims for prospective relief. *Id.*

The Court agrees with Defendants' first argument. The Court need not reach Defendants' second argument, however, because the FAC has another jurisdictional defect: it fails to plead FCA's organizational standing. Thus, Doe and Roe's claims for prospective relief are moot, and the remaining Plaintiff, FCA, has failed to adequately allege standing for prospective relief. Thus, the Court lacks jurisdiction to adjudicate all Plaintiffs' claims for prospective relief. Below, the Court addresses the two jurisdictional defects in turn.

1. Plaintiffs Doe and Roe's claims for prospective relief are moot.

Given that the FAC fails to disclose the identities of Plaintiffs Doe and Roe, Defendants' motion to dismiss avers "[u]pon information and belief" that Doe and Roe have graduated. McMahon Decl. ¶ 2. Plaintiffs' opposition does not dispute that Doe and Roe have graduated. *See* Opp'n at 3–7 (discussing standing and ripeness). Defendants thus argue that Doe and Roe's claims for prospective relief are moot. Mot. at 2. Similarly, Plaintiffs do not argue otherwise.

Accordingly, the Court agrees with Defendants that Doe and Roe's claims for prospective

relief are moot. "It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000); *accord, e.g.*, *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc) ("A student's graduation moots claims for declaratory and injunctive relief, but it does not moot claims for monetary damages."). Here, because Plaintiffs Doe and Roe graduated in June 2020, they cannot seek the declaratory or injunctive relief detailed in the FAC. *See* FAC at 50 (prayer for relief); McMahon Decl. ¶ 2 (District official averring that Doe and Roe graduated).

Thus, the Court dismisses Doe and Roe's claims for prospective relief. Moreover, the Court does so with prejudice. A district court may exercise "its 'particularly broad' discretion [to] deny[] leave to amend" where amendment "(1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 845 (9th Cir. 2020) (quoting *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006)). Here, amendment would be futile because "[i]t is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy." *Cole*, 228 F.3d at 1098.

2. The FAC has fails to plead FCA's organizational standing for prospective relief.

Given that Doe and Roe's claims for prospective relief are moot, the remaining claims for prospective relief are FCA's. As mentioned above, Defendants argue that all Plaintiffs' claims for prospective relief (including FCA's) are moot. Defendants argue that the District's pause in in-person instruction caused by the COVID-19 pandemic moots all claims for prospective relief. *See* Mot. at 2–6. Plaintiffs respond that a temporary pause in in-person instruction fails to moot FCA's claims. *See* Opp'n at 4–7.

The Court need not address these arguments because FCA's claims for prospective relief fail for a separate jurisdictional reason: Plaintiffs fail to plead that FCA has organizational standing to bring claims for prospective relief. The Court has an "independent obligation" to note this jurisdictional defect *sua sponte*. *E.g.*, *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th

Cir. 2004). Specifically, FCA fails to plead standing on either of two available grounds. *See generally Int'l Longshore & Warehouse Union v. Nelson*, 599 F. App'x 701 (9th Cir. 2015) (summarizing caselaw).

First, an organization may have standing to sue on its own behalf. "An organization suing on its own behalf can establish an injury when it suffered 'both a diversion of its resources and a frustration of its mission.'" *Id.* at 701 (quoting *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)). Here, FCA fails to allege that Defendants' conduct either (1) caused FCA to divert resources; or (2) frustrated FCA's mission. For instance, FCA alleges that its "chapters meet regularly to advance the religious mission of FCA." Yet Plaintiffs concede that, before the pandemic closed the District's schools, FCA chapters still met regularly on Pioneer's campus as a student group even after derecognition. *See, e.g.*, FAC ¶¶ 64–77 (describing meetings after derecognition of group). FCA fails to allege that despite these regular meetings, Defendants' conduct frustrated FCA's mission. Nor does FCA allege that, despite these meetings, it needs prospective relief to prevent "both a diversion of its resources and a frustration of its mission." *La Asociacion*, 624 F.3d at 1088. Thus, without allegations specific to FCA's resources and mission, the Court cannot conclude that FCA has standing to seek prospective relief on its own behalf. *See, e.g.*, *id.* (affirming that organization lacked standing because it failed to assert "factual allegations regarding organizational standing in its complaint").

Second, an organization can sue on behalf of its members. "[A]n association has standing to bring suit on behalf of its members when: [1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 702 (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). To satisfy these elements, it is not enough to make "general allegations in [the] complaint asserting that [plaintiff's] members would suffer harm." *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1195 (9th Cir. 2013); *accord, e.g.*, *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 244 (D.C. Cir.

2015) ("[A] statistical probability of injury to an unnamed member is insufficient to confer standing on the organizations."). Rather, to seek prospective relief on behalf of its members, FCA must plead "specific allegations establishing that at least one *identified member* . . . would suffer harm." *Associated Gen. Contractors*, 713 F.3d at 1194 (emphasis in original) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)).

Here, the only "identified member[s]" of FCA are pseudonymous Plaintiffs Doe and Roe. As the Court explained in the previous Section, Doe and Roe lack standing to seek prospective relief because they have already graduated. Thus, they are not members who "would suffer harm" and lend FCA standing to seek prospective relief on behalf of its members. *Associated Gen. Contractors*, 713 F.3d at 1194 (quoting *Summers*, 555 U.S. at 498).

Accordingly, the Court dismisses FCA's claims for prospective relief. However, because Plaintiffs could allege additional allegations that support FCA's organizational standing, the Court grants leave to amend as to FCA's claims for prospective relief. *See Leadsinger*, 512 F.3d at 532.

C. In their official capacities, the Defendants are not "person[s]" subject to suit under 42 U.S.C. § 1983.

Plaintiffs' remaining claims are for monetary relief against Defendants. This section addresses the monetary claims against Defendants in Defendants' official capacities. The following two sections address the monetary claims against the individual Defendants in their personal capacities.

Defendants argue that all the official-capacity claims must be dismissed. Specifically, Defendants argue that (1) the District is not a "person" subject to suit under 42 U.S.C. § 1983; and (2) the Eleventh Amendment bars suit against the individual Defendants in their official capacities. Mot. at 19–20. Plaintiffs respond that (1) they technically did not sue the District, but the District's governing body; and (2) Congress has abrogated Eleventh Amendment immunity for Plaintiffs' Equal Access Act claim. Opp'n at 7–8.

The Court agrees with Defendants that all the official-capacity claims must be dismissed. Plaintiffs may not sue the District under 42 U.S.C. § 1983. The Ninth Circuit has "held that a

California school district and county office of education are arms of the state." *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007) (citing *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992), and *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996)). An entity that is an "arm-of-the-state" is "not a 'person' for purposes of 42 U.S.C. § 1983." *Id*. Thus, under settled Ninth Circuit precedent, California school districts such as the District are not "persons" subject to suit under § 1983.

Plaintiffs respond that technically, they named the San Jose Unified School District Board of Education as a Defendant, not the District itself. Opp'n at 8. Yet Plaintiffs draw a distinction without a difference. To sue the District's Board of Education is to sue the District, which is an arm of the state. California law makes clear that the Board is the District for the purposes of litigation. *See, e.g.*, Cal. Educ. Code §§ 35010(a) ("Every school district shall be under the control of a board of school trustees or a board of education"), 35162 ("In the name by which the district is designated the governing board may sue and be sued"). Thus, Plaintiffs cannot use artful pleading to circumvent § 1983's bar to suing an arm of the state.

Moreover, Plaintiffs cannot sue the individual Defendants' in their official capacities. The individual Defendants are District officials: Superintendent Nancy Albarrán; Principal Herb Espiritu of Pioneer High School; and Peter Glasser, a teacher at Pioneer High School. All 12 of Plaintiffs' claims in the instant case are 42 U.S.C. § 1983 claims. Thus, § 1983 is Plaintiffs' only cause of action against the individual Defendants in their official capacities. FAC ¶¶ 122–229. Yet as the Supreme Court held more than 30 years ago, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The reason is that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Cole, 228 F.3d at 1100 (quoting *Will*, 491 U.S. at 71). Thus, none of Plaintiffs' claims can proceed against the individual Defendants in their official capacities.

The Court need not address the parties' Eleventh Amendment immunity arguments because Plaintiffs lack a cause of action to sue Defendants in Defendants' official capacities. As the Ninth

Circuit has explained, "[t]he ability to bring an action against a state is governed, of course, not only by sovereign immunity, but also by whether the statute itself creates a cause of action against a state." *Pittman v. Oregon, Employment Dep't*, 509 F.3d 1065, 1071–72 (9th Cir. 2007). "[T]he two concepts are analytically distinct." *E.g.*, *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 857 (3d Cir. 2014). Here, Plaintiffs' cause of action against Defendants is 42 U.S.C. § 1983. FAC ¶¶ 122–229 (citing § 1983 for each claim).[4] Section 1983's cause of action only reaches "every *person*" who acts under color of law to deprive federal rights. 42 U.S.C. § 1983 (emphasis added). Neither the individual Defendants in their official capacities nor the District are "person[s]" subject to suit. *See, e.g.*, *Will*, 491 U.S. at 71 ("[N]either a State nor its officials acting in their official capacities are "persons" under § 1983.").

Accordingly, the Court dismisses all of Plaintiffs' claims against Defendants in Defendants' official capacities. Moreover, because § 1983 claims against Defendants in their official capacities would be futile as a matter of law, the Court dismisses these claims with prejudice. *See Leadsinger*, 512 F.3d at 532.

D. Under binding Ninth Circuit precedent, Plaintiffs' as-applied monetary claims against individual Defendants in their personal capacities survive the motion to dismiss.

The Court next addresses Plaintiffs' claims for monetary relief against the individual Defendants in their personal capacities. *See* FAC ¶¶ 122–238. Defendants make two arguments for dismissing these claims. First, Defendants argue that "this case is governed by the student organization limited public forum analysis" in three binding precedents: *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir.

[4] In their Opposition, Plaintiffs also cite "the judge-made cause of action recognized in *Ex parte Young*, 209 U.S. 123 (1908), which permits courts of equity to enjoin enforcement of state statutes that violate the Constitution or conflict with other federal laws." *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018); *see* Opp'n at 8. However, Plaintiffs fail to invoke *Ex parte Young* in the FAC. Nor would *Ex parte Young* allow Plaintiffs to sue for damages. The *Ex parte Young* cause of action is available only for declaratory and injunctive relief. *See Moore*, 899 F.3d at 1103 ("Plaintiffs would be required to proceed under 42 U.S.C. § 1983 if they sought to recover money damages.").

2011); and *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), *overruled on other grounds by Los Angeles County v. Humphries*, 562 U.S. 29 (2010). Reply at 4–7. Second, Defendants argue that the individual Defendants are entitled to qualified immunity. *See* Mot. at 13–16; Reply at 12.

The Court agrees with Defendants to a point. The Ninth Circuit's precedents *Alpha Delta* and *Truth* do control here. Indeed, Plaintiffs rely on the cases too. *See* Opp'n at 14–16, 19 (challenging nondiscrimination policies as-applied). The cases analyze the same overarching legal theories advanced by Plaintiffs here. *See Alpha Delta*, 648 F.3d at 805 (analyzing free speech, expressive association, free exercise, and equal protection); *Truth*, 542 F.3d at 651 (analyzing EAA, free exercise, Establishment Clause, and equal protection). *Alpha Delta* and *Truth* also confirm that the District's nondiscrimination policies are facially valid. *See Alpha Delta*, 648 F.3d at 800–03 (analyzing nondiscrimination policy given *Truth*).

Yet in both cases, the Ninth Circuit also held that a "triable issue of fact" exists where a challenged nondiscrimination policy *as applied* allegedly "exempt[s] certain student groups" but not others. *Id.* at 804. Here, Plaintiffs likewise allege that the District's nondiscrimination policy is "pretextual" because Defendants exempt groups "on an individualized basis." FAC ¶ 91. Thus, because the Court must "accept the factual allegations in the complaint as true" on a motion to dismiss, *Manzarek*, 519 F.3d at 1031, *Alpha Delta* and *Truth* require the Court to deny Defendants' motion to dismiss Plaintiffs' monetary claims against the individual Defendants only as to Plaintiffs' as-applied challenge.

The Court's analysis below proceeds in two steps. First, the Court explains why the District's nondiscrimination policies are facially valid. Second, the Court explains why Plaintiffs' as-applied challenge to those policies survives the motion to dismiss.

1. To the extent Plaintiffs allege that the nondiscrimination policies are facially invalid, the Court dismisses such allegations with prejudice.

The District's nondiscrimination policies are facially valid under *Alpha Delta* and *Truth*. In the Ninth Circuit precedent *Alpha Delta*, two Christian fraternities and their members appealed a grant of summary judgment for San Diego State University. *See Alpha Delta*, 648 F.3d at 795–96.

San Diego State had repeatedly denied the fraternities official recognition "because of [the fraternities'] requirement that their members and officers profess a specific religious belief, namely, Christianity." *Id.* That religious requirement violated nondiscrimination policies, which proscribed discrimination on the basis of enumerated grounds such as sexual orientation. *Id.*

The *Alpha Delta* fraternities, like Plaintiffs here, appealed a broad set of related claims. The fraternities argued that (1) the nondiscrimination policies violated the fraternities' rights to free speech and expressive association; and (2) San Diego State was "targeting [the fraternities] because of their religious beliefs in violation of their right to" free exercise and equal protection. *Id.* at 800, 804. The district court granted summary judgment to San Diego State on all claims. On appeal, the Ninth Circuit affirmed in part and reversed in part the summary judgment.

The Ninth Circuit affirmed the summary judgment as to validity of the nondiscrimination policies. The Ninth Circuit held that the nondiscrimination policies were facially "reasonable and viewpoint-neutral" under U.S. Supreme Court precedent. *Id.* at 801–03 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984), and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995)).

The *Alpha Delta* Court further explained that its conclusion tracked the Ninth Circuit's decision in *Truth*. *See id.* at 801–02 (discussing *Truth*, 542 F.3d 634). There, a Christian high school organization also alleged claims similar to those in *Alpha Delta* and the instant case—including a claim under the Equal Access Act ("EAA"). *See id.* at 802 & n.5 (discussing EAA). The *Alpha Delta* Court explained that "the Equal Access Act, like the First Amendment, forbids 'denial of equal access, or fair opportunity, or discrimination' based on the content (or viewpoint) of a group's speech." *Id.* Thus, whether plaintiffs raised EAA claims or other claims, plaintiffs could not facially challenge "a nondiscrimination policy prohibiting exclusion on enumerated grounds." *Id.* at 801.

Here too, the Plaintiffs cannot facially challenge the District's nondiscrimination policies, which simply "prohibit[] exclusion on enumerated grounds." *Id.* To the extent Plaintiffs argue that the District's nondiscrimination policies are facially invalid, Plaintiffs' argument is foreclosed by

Alpha Delta and *Truth*. Those precedents' nondiscrimination policies parallel those here. All the policies ban discrimination based on enumerated grounds, including sexual orientation:

- In *Alpha Delta*, the nondiscrimination policy derecognized any group "which discriminates on the basis of . . . sexual orientation." 648 F.3d at 796.
- In *Truth*, the nondiscrimination policy proscribed discrimination "regardless of . . . sexual orientation." 542 F.3d at 640.
- Here, Policy BP 0410 proscribes "discrimination based on . . . sexual orientation." FAC ¶ 116. Similarly, Policy 5145.3 proscribes "discrimination . . . with respect to . . . sexual orientation." *Id.* ¶ 117.

As in *Alpha Delta* and *Truth*, the nondiscrimination policies here are facially valid. *See Alpha Delta*, 648 F.3d at 805 (rejecting plaintiffs' free speech, expressive association, free exercise, and equal protection arguments); *Truth*, 542 F.3d at 651 (rejecting EAA and First Amendment arguments). Any allegation to the contrary would be legally futile under these binding precedents.

Thus, to the extent that Plaintiffs allege that the District's nondiscrimination policies are facially invalid, the Court dismisses those allegations with prejudice. *See Leadsinger*, 512 F.3d at 532. These allegations are found in all 12 claims in the FAC. *See, e.g.*, FAC ¶ 129 (allegation against actions "taken pursuant to official policy" repeated throughout FAC), 215 (alleging that nondiscrimination policies compel speech), 229 (incorporating other allegations by reference).

2. Under binding Ninth Circuit precedents, Plaintiffs adequately plead an as-applied challenge to Defendants' facially valid nondiscrimination policies.

Although the District's nondiscrimination policies are facially valid, Plaintiffs adequately plead an as-applied challenge to those policies under *Alpha Delta* and *Truth*. The Court reaches this conclusion in three parts. First, the Court addresses the first element of overcoming qualified immunity: that "the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional [or statutory] right." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1100 (9th Cir. 2011) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, the Court addresses the other element of overcoming qualified immunity: that the right at issue "was clearly established 'in light of the specific context of the case' at the time of the alleged misconduct." *Id.* (quoting *Saucier*, 533 U.S. at 201). Lastly, the Court explains why the

Coverdell Teacher Protection Act does not shield the individual Defendants from damages on a motion to dismiss.

a. Plaintiffs adequately plead that Defendants' application of nondiscrimination policies violated Plaintiffs' rights.

The individual Defendants argue that they are entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To overcome qualified immunity, Plaintiffs must first show that "the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional [or statutory] right." *Clairmont*, 632 F.3d at 1100. Plaintiffs' allegations of as-applied viewpoint discrimination make that showing here. Specifically, *Alpha Delta* and *Truth* show that the nonuniform application of facially valid nondiscrimination policies violates Plaintiffs' rights.

In *Alpha Delta*, the Ninth Circuit reversed in part the summary judgment for San Diego State. The *Alpha Delta* Court reasoned that "[a] nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly." *Alpha Delta*, 648 F.3d at 803. For support, the *Alpha Delta* Court relied on *Truth*. In *Truth*, the Christian high school organization "raised a triable issue of fact" by "alleg[ing] that the school district provided waivers to [the Men's Honor Club and Girl's Honor Club] while denying them to others, and that decision was made on the basis of religion or the religious content of speech." *Id.* (alterations in original omitted) (quoting *Truth*, 542 F.3d at 648). The *Truth* Court therefore reversed the district court's summary judgment and allowed plaintiffs' claims to proceed to trial under the EAA, Free Exercise Clause, Establishment Clause, and Equal Protection Clause. *Truth*, 542 F.3d at 651.

As in *Truth*, the *Alpha Delta* plaintiffs alleged that "some officially recognized groups appear to discriminate on prohibited grounds." *Alpha Delta*, 648 F.3d at 804. "For instance, the African Student Drama Association's constitution limits its leadership positions to students from

Africa." *Id.*[5] Thus, the Ninth Circuit held that "[a]s in *Truth*, the evidence that some student groups have been granted an exemption from the nondiscrimination policy raises a triable issue of fact." *Id.*

So too here. Plaintiffs allege that the District's nondiscrimination policy is "pretextual" because Defendants exempt groups "on an individualized basis." FAC ¶ 91; *see id.* ¶ 136 (same allegation). Plaintiffs specifically cite "numerous single-sex athletic teams," the Big Sister/Little Sister club, and the Black Student Union. *Id.* ¶¶ 91–92. Plaintiffs allege that these recognized student groups "express[] gender, religious, or facial membership or leadership requirements in their applications." *Id.* ¶ 92. Similarly, *Alpha Delta* and *Truth* expressly cited membership restrictions for the "Men's Honor Club," "Girl's Honor Club," and "African Student Drama Association" as examples of "exemption[s] from the nondiscrimination policy" that raised a triable issue of fact. *Alpha Delta*, 648 F.3d at 803–04 (quoting *Truth*, 542 F.3d at 648).

Just as those allegedly selective exemptions required a trial in *Alpha Delta* and *Truth*, similar allegations here require that Plaintiffs' as-applied challenge survive a motion to dismiss. At the motion to dismiss stage, the Court must accept the FAC's factual allegations as true. *See Manzarek*, 519 F.3d at 1031. Thus, Plaintiffs' allegations satisfy the first element of overcoming qualified immunity: that "the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional [or statutory] right." *Clairmont*, 632 F.3d at 1100.

b. Plaintiffs adequately plead that Defendants violated "clearly established" rights.

Having determined that the FAC adequately pleads an as-applied challenge to the District's

[5] *Alpha Delta* makes clear that a student group violates a valid nondiscrimination policy if the group "limits its leadership positions to students" based on enumerated characteristics. *Alpha Delta*, 648 F.3d at 804; *accord id.* at 796 (discussing nondiscrimination policy for "appointed or elected student officer positions"), 803 (discussing "groups, like [p]laintiffs, [that] restrict membership *or eligibility to hold office* based on religious belief" (emphasis added)). Thus, Plaintiffs are incorrect that *Alpha Delta* and *Truth* exempt FCA's leadership requirements from the District's nondiscrimination policies. *See* Opp'n at 15.

nondiscrimination policies, the Court now turns to the second prong of the qualified immunity analysis. Under this second prong, the Court considers whether the "contours" of Plaintiffs' right to uniformly applied policies was "'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Whether the law was clearly established is an objective standard; the defendant's 'subjective understanding of the constitutionality of his or her conduct is irrelevant.'" *Clairmont*, 632 F.3d at 1109 (quoting *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008)).

Even so, qualified immunity is designed "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206. Thus, the key question is whether existing law at the time of Defendants' alleged conduct provided Defendants "fair notice" that as-applied viewpoint discrimination against a high school religious group was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In answering this question, the Court bears in mind that "'closely analogous preexisting case law is not required to show that a right was clearly established.'" *Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009) (quoting *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001)). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances" if the claimed right is defined at an appropriately low "level of generality." *Hope*, 536 U.S. at 741; *Anderson*, 483 U.S. at 639.

Here, *Alpha Delta* and *Truth* clearly established that viewpoint-discriminatory application of a valid nondiscrimination policy violates the First Amendment, Fourteenth Amendment, and the EAA. The Ninth Circuit decided *Alpha Delta* and *Truth* in 2011 and 2008, respectively—years before Defendants began their allegedly discriminatory conduct towards Plaintiffs in April 2019. *See* FAC ¶ 5 (alleging Glasser posted Sexual Purity Statement on April 23, 2019). Moreover, as detailed above, *Alpha Delta* and *Truth* are "closely analogous preexisting case law" for the instant case. *Robinson*, 566 F.3d at 826 (quoting *Hufford*, 249 F.3d at 1148). In *Truth*, the Ninth Circuit reversed the district court's summary judgment against the *Truth* plaintiffs who—like Plaintiffs here—were a Christian high school organization and its members. *Truth*, 542 F.3d at 651. The

Ninth Circuit reasoned that the *Truth* plaintiffs' had "alleged that the school district provided waivers to [the Men's Honor Club and Girl's Honor Club] while denying them to others, and that decision was made on the basis of religion or the religious content of speech." *Id.* (alterations in original omitted) (quoting *Truth*, 542 F.3d at 648). The *Truth* plaintiffs, like Plaintiffs here, raised claims under the First Amendment, Fourteenth Amendment, and EAA. *Truth*, 542 F.3d at 651.

The *Alpha Delta* plaintiffs—like the *Truth* plaintiffs and Plaintiffs here—raised claims under various First Amendment and Fourteenth Amendment theories such as free speech, expressive association, free exercise, and equal protection. *Alpha Delta*, 648 F.3d at 805. The *Alpha Delta* Court also reversed the district court's summary judgment against Christian fraternities who had made allegations like those in *Truth*. *Id.* The *Alpha Delta* Court cited allegations that "some officially recognized groups appear to discriminate on prohibited grounds." *Id.* at 804. As an example, the Ninth Circuit specified "the African Student Drama Association's constitution limit[ing] its leadership positions to students from Africa." *Id.* Thus, the *Alpha Delta* Court held that "[a]s in *Truth*, the evidence that some student groups have been granted an exemption from the nondiscrimination policy raises a triable issue of fact." *Id.*

Similarly here, Plaintiffs allege that the District's nondiscrimination policy is "pretextual" because Defendants exempt groups "on an individualized basis." FAC ¶ 91; *see id.* ¶ 136 (same allegation). Plaintiffs specifically cite recognized groups that allegedly exclude members or leaders based on gender, religion, or race. FAC ¶¶ 91–92. These groups allegedly include the Big Sister/Little Sister club—which is closely analogous to the Girl's Honor Club in *Truth*—and the Black Student Union—which is closely analogous to the African Student Drama Association in *Alpha Delta*. Moreover, at the motion to dismiss stage, the Court must accept the FAC's factual allegations as true. *See Manzarek*, 519 F.3d at 1031. Thus, Plaintiffs have adequately pled violations of clearly established law under *Alpha Delta* and *Truth*.

Accordingly, the Court rejects Defendants' argument that the individual Defendants are entitled to qualified immunity.

c. The Coverdell Teacher Protection Act does not shield the individual Defendants from damages on a motion to dismiss.

Aside from qualified immunity, the individual Defendants' other asserted defense to damages is the Coverdell Teacher Protection Act, 20 U.S.C. § 7941 *et seq.* ("the Act"). Defendants argue that the Act shields the individual Defendants from damages, whether compensatory or punitive. Defendants specifically cite 20 U.S.C. § 7946(a), which provides that "no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school" on five conditions. In response, Plaintiffs argue that Defendants fail to meet one key condition: that "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher." *Id.* § 7946(a)(4). The Court agrees with Plaintiffs.

The FAC alleges that "[a]ll actions performed by Defendants as alleged herein were malicious, oppressive, and in reckless disregard for Plaintiffs' rights." FAC ¶ 120. Evidencing this allegedly reckless conduct is Defendants' nonuniform application of facially valid nondiscrimination policies. Plaintiffs specifically allege that Defendants have exempted from those policies several other student groups, but not FCA. FAC ¶¶ 91–92. At the motion to dismiss stage, the Court must "accept [these] factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek*, 519 F.3d at 1031. Thus, at the motion to dismiss stage, the Court cannot conclude that the Act shields Defendants from liability.

Defendants' only counterargument contravenes the plain text of the Act. Defendants argue that the Act "on its face[] applies to more than negligent failures to act, and also applies to intentional acts." Reply at 13. As support, Defendants cursorily note that the Act "applies to both 'acts and omissions.'" *Id.* (original alteration omitted) (quoting 20 U.S.C. § 7946(a)). Yet the statutory phrase "acts and omissions" says nothing about the *mens rea* behind those acts and omissions. The rest of the Act plainly states that Defendants may still be liable for "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference." 20 U.S.C. § 7946(a)(4).

In sum, Defendants' arguments against Plaintiffs' as-applied personal-capacity claims for damages are unavailing. Accordingly, the Court DENIES Defendants' motion to dismiss Plaintiffs' as-applied monetary claims against the individual Defendants in their personal capacities. Going forward, the parties should consider "whether [Defendants] ha[ve] (1) exempted certain student groups from the nondiscrimination polic[ies]; and (2) declined to grant Plaintiffs such an exemption because of Plaintiffs' religious viewpoint." *Id.* at 804. These considerations may be relevant to all the claims in the FAC, which resemble those in *Alpha Delta* and *Truth*. *Compare, e.g.*, FAC ¶¶ 127, 136, 148, 158, 168 (alleging selective enforcement of nondiscrimination policies), *with Alpha Delta*, 648 F.3d at 804 (same allegations supporting claims under free speech; freedom of expressive association; free exercise; and equal protection), *and Truth*, 542 F.3d at 651 (same allegations supporting claims under EAA; free exercise; Establishment Clause; and equal protection).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss the First Amended Complaint. Specifically, the Court GRANTS the motion to dismiss the following with leave to amend:

- All of the FAC for violating Federal Rule of Civil Procedure 10(a) by failing to disclose the identities of Doe and Roe.
- All of FCA's claims for prospective relief for lack of jurisdiction.

The Court GRANTS the motion to dismiss with prejudice as to the following:

- All of Doe and Roe's claims for prospective relief for lack of jurisdiction.
- All of Plaintiffs' monetary claims against Defendants in Defendants' official capacities.
- All of Plaintiffs' claims that the District's nondiscrimination policies are facially invalid.

The Court DENIES the motion to dismiss as to Plaintiffs' as-applied monetary claims against the individual Defendants in their personal capacities.

Should Plaintiffs elect to file a second amended complaint curing the deficiencies identified herein, Plaintiffs shall do so within 21 days of the date of this Order. Failure to meet the

21 day deadline to file a second amended complaint or failure to cure the deficiencies identified in (1) this order; (2) Defendants' opposition to Plaintiffs' proceeding pseudonymously; or (3) Defendants' motion to dismiss will result in dismissal of the deficient claims with prejudice. Plaintiffs may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure 15. Plaintiffs are directed to file a redlined complaint comparing the FAC to any second amended complaint as an attachment to Plaintiffs' second amended complaint.

IT IS SO ORDERED.

Dated: January 28, 2021

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California