No. 22-15827

In the United States Court of Appeals for The Ninth Circuit

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

v.

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

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

MOTION FOR AN INJUNCTION PENDING APPEAL RELIEF REQUESTED BY AUGUST 15, 2022

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CORPORATE DISCLOSURE STATEMENT

Fellowship of Christian Athletes represents that it has no parent corporation and does not issue stock. Fellowship of Christian Athletes of Pioneer High School is an unincorporated entity that has no parent corporation and issues no stock.

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INTRODUCTION

Appellant Fellowship of Christian Athletes is a religious student group that has been a respected part of campus life in the San José Unified School District for over a decade—as it is at thousands of schools nationwide. But that changed when a District teacher announced that FCA's "views" about marriage "are bullshit," that these "views needed to be barred from a public high school campus," and that "attacking these views" was necessary to have a "better campus."

In short order, District officials denied club benefits to FCA clubs District-wide, began calling for on-campus protests against FCA, recognized a new student club—The Satanic Temple Club—formed specifically to openly mock FCA's beliefs, and supported student protests of almost every FCA meeting. This was the first and only time the District has ever derecognized a student club for asking its leaders to embrace the club's views.

This is also a textbook violation of the Equal Access Act—a federal statute prohibiting school districts from derecognizing clubs "on the basis of the religious, political, philosophical, or other content of the[ir] speech." 20 U.S.C. § 4071(a). It is a violation of the Free Exercise Clause, as it is the opposite of government action that is "neutral" and "generally applicable" toward religion. And it is a violation of the Free Speech Clause, because the punishment of FCA is both viewpoint-based and unreasonable in light of the purpose of the student forum.

Faced with this textbook violation of its legal rights, FCA in July 2021 asked the district court for a preliminary injunction so that it could continue to exist as a recognized student group during the 2021-2022 school year. But the district court did not rule on this request until June 2022, leaving the group excluded for the entire school year. And when it finally ruled on the request, it denied it—in the teeth of overwhelming contrary precedent.

Now, if this Court does not provide an injunction pending appeal, FCA's current students face another year (or more) of an ongoing violation of their First Amendment and statutory rights. More students will be marginalized because of their religious views. And the club itself, facing dwindling attendance, may cease to exist.

To prevent further irreparable harm to statutory and First Amendment rights, and to leave sufficient time for possible emergency proceedings to the Supreme Court before the District's September club-recognition deadline, Plaintiffs ask for a ruling by August 15, 2022. Defendants oppose this motion.

BACKGROUND

A. Fellowship of Christian Athletes

Appellant Fellowship of Christian Athletes is a religious ministry with more than 7,000 student clubs nationwide. ER.1324 ¶8. FCA's student-led clubs welcome all students to become members and participate in their meetings. ER.1325 ¶13. Before the start of this conflict, students

were leading FCA clubs on three campuses in the Appellee San José Unified School District, including Pioneer High School, where Appellant Pioneer FCA meets. These FCA clubs hosted regular meetings featuring games, religious instruction, testimonies of students' and leaders' faith, worship, and prayer. ER.1294-95 ¶¶4, 5, 6; ER.1324 ¶8; ER.1328 ¶25. District officials have admitted that "FCA does great things on campus" and is led by "great students." ER.1233.

FCA's Statement of Faith includes Christian doctrines regarding the deity of Christ, the elements of salvation, traditional beliefs about marriage, and that everyone "should be treated with love, dignity and respect." ER.1326 ¶18; ER.1394; ER.1407. FCA's student leaders are asked to affirm these beliefs because they represent FCA by leading prayer, worship, and religious instruction. ER.1325-26. Applicants who sincerely affirm and conduct themselves according to FCA's Statement of Faith are eligible for leadership. ER.1327. No District high school student has ever complained that he or she wanted to hold a leadership role but was ineligible due to FCA's leadership requirements. ER.1329; ER.573.

B. The District's Student Group Forum

Since the early 2000s, FCA clubs have participated in the District's program for recognized student organizations, known as the Associated Student Body (ASB) program. ER.1323-24 ¶5; ER.1328 ¶24. This program provides a forum for student groups to organize around "their own personal interests." ER.897-98; ER.405-06. Through the ASB program,

the District has recognized hundreds of student groups with diverse viewpoints, including Chess Club, Communism Club, Gay-Straight Alliance (GSA), National Honor Society (NHS), Interact Club, Key Club, Politics Club, and The Satanic Temple Club. ER.1108. The ASB program also governs District athletic teams' funding. ER.443.

Students value ASB approval because it marks their club as an equal member of the school community and provides several important benefits. ER.868; ER.897-98. For instance, only ASB-approved clubs are included in official club lists, featured in the yearbook, given priority access to meeting space, and receive ASB funding and related financial benefits. ER.868-69; ER.915-16; ER.333-34; ER.416; ER.517-19; ER.680.

C. The District's Nondiscrimination Policies

The ASB program and all District programs and activities are governed by "comprehensive, district-wide polic[ies]" which forbid discrimination based on criteria such as race, sex, sexual orientation, and religion. ER.4-5; ER.668; ER.1031. Every school year, clubs apply for ASB approval. ER.391. School officials review applications for compliance with District policies, including nondiscrimination policies. ER.301-04; ER.305-09. Once a club is approved, schools do not monitor or enforce compliance absent complaints. ER.170-71; ER.471-72; ER.984-85; ER.989.

The District reserves discretion regarding whether and how to apply its nondiscrimination policies to its own programs and activities. Defs.'

Prelim. Inj. Opp'n at 18-20, No. 20-2798 (N.D. Cal. Sept. 3, 2021), ECF No. 111 ("SJUSD Br."). Via this discretion, the District permits discrimination based on otherwise forbidden criteria where it determines that certain "governmental interests" are sufficiently "compelling" to justify "treat[ing] different students differently." *Id.*; *accord* ER.354.

The District has repeatedly exercised its broad discretion. For example, it offers a "multitude of programs" like the "Latino Male Mentor Group" for "ninth-grade Latino male students," and the "Girls' Circle" group for "female-identifying students." ER.1123; ER.948; ER.951-54; ER.960; ER.1035-36; ER.1248; SJUSD Br.20. The District also permits sex-segregated student events, such as Leland's "Mr. GQ" contest (the school's "annual male pageant show"), Pioneer's similar "Mr. Mustang" contest, and "Mustang Madness" games during school-spirit week that sex segregate. ER.1273; ER.1275; ER.1277; ER.1127; ER.315. In employment, the District discriminates based on race to achieve sufficient "educators of color" and proper "demographic[s]." ER.939; ER.1156. Other District programs also discriminate on sex (ER.1162-64), pregnancy or parental status (ER.1157-61; ER.1035), and immigration status (ER.1165).

D. The District's Revocation of FCA's Recognition

In April 2019, Pioneer teacher Peter Glasser obtained what he assumed to be a statement of FCA's religious beliefs. Without talking to FCA's student leaders—two of whom were his students—Glasser taped

the statement to his classroom whiteboard to highlight FCA's "moral stances" and "views" regarding marriage and sexuality that he found "objectionable." ER.1227; ER.1312-14. He wrote a message to his students beneath it: "I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements." ER.1322. Glasser wanted to stop what he considered an "implicit message that Pioneer as an institution approves of [FCA's] values" by allowing it "to have a photo in the yearbook, or to use [Pioneer facilities] for a guest speaker at lunch." ER.1226-27.

Glasser immediately sent the statement to Principal Espiritu on April 22. ER.360. Glasser told Espiritu that "FCA's views need to be barred from a public high school campus," that "attacking these views is the only way to make a better campus," and describing FCA's student leaders as "collateral damage." ER.1233-34. He further urged that "there's only one thing to say that will protect our students who are so victimized by religious views that discriminate against them: I am an adult on your campus, and these views are bullshit to me," "have no validity," and cannot be justified by " 'religious freedom.' " ER.1233.

On April 30, Espiritu and Glasser participated in a school leadership committee—the "Climate Committee"—to discuss what to do about the "FCA club on campus." ER.577, 580. Espiritu said that FCA's views "go[] against core values of [Pioneer]" of "open-mindedness" and being "inclusive," and that the committee should "take a united stance" against FCA.

ER.580. The committee agreed. ER.580. Espiritu then contacted District administrators to derecognize Pioneer FCA. ER.58-59; ER.135.

On May 2, Espiritu told Pioneer FCA's student leadership that the District was immediately stripping them of ASB approval. ER.817-18. Espiritu announced in the school newspaper that "the Climate Committee and District officials" had made the decision to "no longer be affiliated with" FCA because Pioneer "disagree[d] with" FCA's beliefs and saw them as being "of a discriminatory nature." ER.315. The rushed decision was made without consulting FCA or its student leaders. ER.703-04. For Espiritu, the "fact that [FCA's beliefs] existed" was alone "enough" to derecognize FCA. ER.226.

This was the first time any Pioneer club had lost ASB approval, ER.396, and the first time the District had approved revoking ASB approval of any club, ER.871. Pioneer FCA could still hold meetings on campus, but was otherwise denied valuable ASB benefits, just as Espiritu testified he would have treated a KKK club. ER.122

District officials pressed for more. Glasser wanted to "ban FCA completely from campus," and so repeatedly suggested Espiritu accuse Pioneer FCA of "sexual harassment." ER.1652. Likewise, GSA's faculty advisor publicly lamented that Pioneer FCA was allowed to remain "on campus" despite its "hurtful" beliefs, and said the "best way" to change that "is to have students rally[] against the issue." ER.1229.

And rally they did, with teacher support. At the same time Pioneer FCA was (again) denied ASB recognition in Fall 2019, Pioneer officials recognized The Satanic Temple Club, which was formed to "openly mock" FCA's beliefs. ER.1309-10; ER.323; ER.367; ER.1204 (The Satanic Temple Club's faculty advisor, a Climate Committee member, viewed "evangelicals, like FCA" as "charlatans" who "choose darkness over knowledge"). When Pioneer FCA tried to meet in Fall 2019, students held protests immediately outside FCA's meetings with signs deriding its beliefs as "HATRED." *See* ER.1239; ER.1280-88; ER.365-66; ER.1254-55. GSA's other faculty advisor attended the protests, telling the school newspaper that they were "an act of love" and that FCA must choose between "hold[ing] events on campus" and its "statement of faith." ER.1219. Virtually all of Pioneer FCA's on-campus meetings that school year were protested. ER.1655-56.

Nor was protesting enough. Glasser confronted an FCA guest speaker about FCA's religious beliefs to dissuade him from presenting. ECF 137-5 at 6 ¶20. Reporters from the school newspaper, a District program, entered an FCA meeting and took hundreds of pictures of FCA students, standing within feet or inches of them. ER.830; ER.1195-97. A Pioneer teacher in attendance told Espiritu that this was "intimidating," and left FCA students visibly "embarrassed, harassed, and scared." ER.1196. He said FCA students were being "marginalized and socially ostracized for what they believe in," and that he had "never seen a club, sports team, or

class so targeted by Pioneer's Newspaper." ER.1196. The newspaper's faculty advisor, who called one of his reporters an "idiot" for "feel[ing] bad" for FCA, also stated that newspaper staff had been caught "verbally abusing" FCA members. ER.1199; ER.830.

E. The District's "All-Comers" Policy

Due to COVID, student club activities stopped in Spring 2020, and clubs did not meet in person until April 2021. ER.334-37; ER.354-56. For the 2020-21 school year, Pioneer granted a modified conditional approval to all student clubs, including FCA. ER.546-47.

But in Fall 2021, the District altered its nondiscrimination requirements for ASB-approved clubs. ER.1009-10. The District labeled the updated policy an "All Comers Policy," which requires ASB clubs "to permit any student to become a member or leader." ER.355. Any clubs seeking ASB recognition must sign an "Affirmation statement" agreeing that "any currently enrolled student at the school [may] participate in, become a member of, and seek or hold leadership positions in the organization." ER.356. The policy's guidelines state that the policy is intended to "be implemented and construed in accordance with the all comers policy" in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). ER.1423.

But the Policy allows broad exemptions both expressly and in practice. For instance, the Policy explicitly permits ASB-approved clubs to exclude students based on so-called "non-discriminatory criteria." The District

does not define "non-discriminatory," leaving enforcement to the "common sense" discretion of officials at each school to apply on a "case-by-case basis." ER.1046-47; ER.509, ER.556.

Certain criteria have been pre-approved as "non-discriminatory." These include age, GPA, and enrolled student status. ER.1045-46; ER.439; ER.509-10, ER.527; ER.171. Similarly, sports clubs can select based on "athletic competency," ER.1048-49, and choral clubs can select "members on the basis of their singing ability," ER.520.

Clubs can also exclude students based on the clubs' assessment of whether they have "good moral character." ER.522. Several leading District clubs have done so for decades, as is required by their national organizations. ER.1516-23 (NHS, excludes on "character," "GPA," "leadership," and "service"); ER.1673 (Interact Club, "good character"); ER.1677 (California Scholarship Federation, "worthy citizen").

The District grants other exemptions. For instance, it exempts student athletic teams from the Policy even though they have ASB accounts, which allows District schools to have single-gender athletic teams. ER.594-95; ER.1297 ¶24; ER.176-77. Similarly, other District Board Policies allow District cheerleading groups to select members based on whether a student identifies as male or female. ER.305-06; ER.200-01; ER.483-84, ER.487, ER.519.

The District has also long approved student group applications that exclude students on criteria such as sex or ethnicity. For example, clubs

such as the Big Sister/Little Sister club have been allowed to select members and leaders based on sex. ER.450-51; ER.524 (testifying she approved all-female clubs, in part because no one complained); ER.158-60. Since announcing the All-Comers Policy, District schools have granted recognition to clubs such as Senior Women, which is open only to "seniors who identify as female," and the South Asian Heritage Club, which "prioritize[s] south asian" membership. ER.1930; ER.1936.

F. FCA Clubs under the "All-Comers" Policy

FCA clubs are not eligible for ASB approval under the Policy because, in the District's view, they discriminate both based on religion (by requiring leaders to hold such religious beliefs as that Jesus is the Son of God) and sexual orientation (by requiring leaders to hold religious beliefs on traditional marriage and sexual conduct). ER.1057-58; ER.1066, ER.1086-87; ER.1296-97 ¶¶18, 19, 20; ER.708, ER.572-73. Principal Espiritu, who has the "final say" on approving Pioneer clubs, confirmed that Pioneer FCA would be ineligible if it had its "same leadership requirements." ER.89; ER.218. Pioneer FCA's leadership requirements are unchanged. ER.1326 ¶18.

Derecognition has severely harmed FCA. There used to be three thriving clubs on District campuses; now there is only one club and it is struggling to stay afloat. ER.1660-61; ER.1328-29 ¶¶26-27. Before, club meetings could draw over a hundred students; now, the surviving club's largest meetings this past year have drawn just a handful. ER.2060-61.

The District has taken no action to prevent future harm to FCA students. ER.894-95. To the contrary, Glasser told Espiritu he "would do the same all over again" and that he was "morally and professionally bound" to do so. ER.1171-72; ER.1896-97; ER.1812-13. No District employee has ever been reprimanded for the actions taken against FCA students. ER.1812-13; ER.1851-52, ER.1860, ER.1875-76. In fact, when the California Department of Education instructed the District to investigate complaints from FCA parents about teacher misconduct, the District responded in writing that it would do so—only to admit later that it never did and never intended to. ER.1764. Yet in the District's view, "the system worked in the way it's supposed to work." ER.1764.

Facing the loss of provisional recognized status obtained during the remote 2020-2021 school year, and with students returning to campus again in Fall 2021, Plaintiffs sought a preliminary injunction on July 30, 2021, requesting an order allowing Pioneer FCA to retain its recognized status and FCA clubs to have equal access to ASB status. Briefing concluded on September 20, 2021. Judge Gilliam was assigned to this case on January 21, 2022, after Judge Koh was elevated to this Court. Plaintiffs moved to expedite resolution of their injunction motion on January 28, which was denied. Oral argument was held on May 12, and the injunction denied on June 1. Plaintiffs moved the district court for an injunction pending appeal on June 6, which remains unresolved.

ARGUMENT

An injunction pending appeal is appropriate when the plaintiff shows (1) likelihood of success on the merits, (2) likelihood of irreparable harm absent relief, (3) the equities favor relief, and (4) relief is in the public interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1130 (9th Cir. 2011); *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 367 (9th Cir. 2016). When "the balance of hardships tips sharply in the plaintiff's favor," plaintiff need show only "serious questions going to the merits." *Cottrell,* 632 F.3d at 1134-35. And because FCA seeks resumed equal access to ASB-approved status—a return to the status quo—the requested injunction here is "a classic form of prohibitory injunction" that "prevents future constitutional violations." *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017).

I. The District's Actions Violate the Equal Access Act.

Congress enacted the Equal Access Act (EAA) with a "broad legislative purpose" to address "widespread discrimination against religious speech in public schools." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990). Once a school that receives federal funds creates a "limited open forum" for student clubs, the EAA prohibits it from excluding clubs "on the basis of the religious, political, philosophical, or other content of the[ir] speech." 20 U.S.C. § 4071(a). Notably, Congress chose not to incorporate either the First Amendment's heightened viewpoint-discrimination requirement or its strict-scrutiny test. *Mergens*, 496 U.S. at 242. Rather, a showing of

content-based speech regulation is enough to require relief. *Prince v. Jacoby*, 303 F.3d 1074, 1078-79 (9th Cir. 2002).

Here, the District is undisputedly subject to the EAA and has established a limited open forum, so the only question is whether the District's exclusion of FCA based on its religious leadership requirements is a content-based speech restriction. ER.14. It is.

First, leadership selection is inherently expressive, since "*who* speaks on [a club's] behalf … colors *what* concept is conveyed." *Martinez*, 561 U.S. at 680. Indeed, an expressive organization's "choice of a candidate is the most effective way in which that [organization] can communicate." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). And this "principle applies with special force with respect to religious groups," since "the content … of a religion's message depend[s] vitally on the character" of its leaders. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 200-01 (2012) (Alito, J., joined by Kagan, J., concurring).

Thus, the leading case to consider application of a nondiscrimination policy to ban religious leadership selection, *Hsu v. Roslyn Union Free School District*, concluded the ban was impermissibly content-based. 85 F.3d 839 (2d Cir. 1996). As *Hsu* explained, leadership is "essential to the expressive content of the [club's] meetings," and thus a rule against religious leadership "will affect the 'religious … content of the speech at [a club's] meetings,' within the meaning of the [EAA]." *Id.* at 848, 858. This Court's decision in *Truth v. Kent School District* confirmed its consistency

with *Hsu* and noted the connection between leadership selection and the content of a group's speech. 542 F.3d 634, 647 (9th Cir. 2008) (unlike leadership selection, it is "difficult to understand how allowing non-Christians to attend … would change the Club's speech").

The District agrees that club leaders are "essential" to a club's "direction," required to "communicate [its] message," and "should represent the club's purpose" and "viewpoints." ER.906-07; ER.1346. That's particularly true for Pioneer FCA, since its leaders not only express its beliefs in religious teaching, worship, and prayer, but also exemplify its beliefs with their lives. ER.1325-26.

Nor does the content neutrality requirement protect only against animus. ER.11. Rather, "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech," a restriction is "content based" if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 164, 165 (2015); *Prince*, 303 F.3d at 1080-81. Here, the District expressly references the religious content of FCA's leadership requirements as the basis for banning them. *Supra* Section D at 8. That is content discrimination.

Second, the District's obvious targeting of FCA's religious message provides independent confirmation of its content discrimination. For instance, *Colin v. Orange Unified School District* found that evidence of defendants' inflammatory statements, targeted changes in Board policy,

and extended review of the Gay-Straight Alliance club's application demonstrated content-based discrimination under the EAA. 83 F. Supp. 2d 1135, 1148-49 (C.D. Cal. 2000). So too here.

District officials called FCA students' beliefs about marriage and sexuality "bullshit," declared that "evangelicals, like FCA" are "charlatans" who "choose darkness over knowledge," and agreed to present a "united front" against FCA students' beliefs. ER.1204-05, ER.1231-34. Espiritu announced to the entire campus that "the Climate Committee and District officials" decided FCA was "no longer" welcome because Pioneer "disagree[d] with" FCA's beliefs and saw them as being "of a discriminatory nature." ER.315. And he testified that the "fact that [FCA's beliefs] existed" was alone "enough" to derecognize FCA. ER.225-27. Other District officials have similarly justified their actions by reference to the content of FCA's religious beliefs. *E.g.*, ER.536; ER.1063-65; ER.315; *supra* 5-7. This content-based exclusion violates the EAA and requires an injunction.

II. The District's Actions Violate the Free Exercise Clause.

The District's actions are also subject to strict scrutiny under the Free Exercise Clause for three independent reasons: (a) the District has discretion to make individualized exemptions from its policy; (b) the District treats comparable secular activity more favorably than FCA; and (c) the District acted with overt hostility toward FCA's beliefs. Further, because

the District did not attempt to meet its affirmative burden on strict scrutiny below, it has waived it. Thus, an injunction is warranted.

A. The District's broad discretion to deviate from the policy renders it not generally applicable.

A policy "is not generally applicable if it invites the government to consider the particular reasons" underlying requests for "individualized exemptions" to the policy, because it allows government officials "to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877, 1879 (2021) (cleaned up). Such a policy must pass strict scrutiny, even where it otherwise serves "weighty" nondiscrimination interests. *Id.*

The policy at issue here is a "comprehensive, district-wide policy," ER.668, which expressly states that it governs not only student clubs but also the District and *all* of its activities and programs. ER.355; ER.1686; ER.1031, ER.1033. But while the District has applied its policy stringently to FCA, it freely admits that it retains discretion regarding how and even *if* to apply the same policy to its own programs and activities. *Supra* 5; SJUSD Br.17-20. The District has a "multitude" of programs that "treat different students differently" based on criteria such as race, ethnicity, and sex, when it believes doing so is sufficiently "compelling." SJUSD Br.18, 20 n.12; ER.960. Because the District has broad discretion to "decide which reasons for not complying with the

policy are worthy of solicitude," strict scrutiny is required. *Fulton*, 141 S.Ct. at 1879.

The District's history of exercising its discretion makes this case even easier than the unanimous outcome in *Fulton*. There, the discretion had never been exercised to grant an exemption from the nondiscrimination policy. Here, the District regularly and unapologetically exercises its discretion and has no intent to stop. There, the discretion was explicit in the policy and thus had a textual limit. Here, the District's amorphous discretion is unbounded. There, the government at least tried to pass strict scrutiny. Here, the District made no such effort. *Fulton* therefore requires an injunction.

B. The District's exemptions to the policy render it not generally applicable.

"[T]reat[ing] *any* comparable secular activity more favorably than religious exercise" likewise "trigger[s] strict scrutiny." *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021). Comparability is assessed by looking at the harm to the government's asserted interests. *Id.* A policy that treats religious activities less favorably than "secular conduct that undermines the government's asserted interests in a similar way" "lacks general applicability." *Fulton*, 141 S.Ct. at 1877.

The District has asserted that FCA may not require its student leaders to share its religious beliefs, because that would violate the District's "All-Comers" policy and harm its interests in "equal access for all

students to all programs," ER.1029, and in prohibiting discrimination on "enumerated bases" in "all" school programs and activities ER.1033; ER.668. Yet the District has a long history of allowing programs, clubs and activities that undermine both its purported "all-comers" interests and nondiscrimination interests.

For instance, the District has for decades allowed clubs affiliated with the National Honor Society to exclude students who fail to meet "membership requirements," such as "character" and having an unweighted GPA of "3.2 or above." ER.1517-24. Further, the District allows student clubs, student activities, and its own programs to exclude students based on such grounds as sex, gender identity, race, and ethnicity, undermining both its "All-Comers" and nondiscrimination interests. SJUSD Br.20 n.12; ER.1123 (Latino Male Mentor Group); ER.1248 (Girls' Circle); ER.1273 (Mr. GQ); ER.1991 (Senior Women); ER.1936 (South Asian Heritage Club). The District offers no justification for why these exemptions undermine its interests less than allowing Pioneer FCA to select a handful of leaders based on shared religious beliefs. A single exemption is enough to enter an injunction. *Tandon*, 141 S.Ct. at 1296; *BLinC v. Univ. of Iowa*, No. 17-80, 2018 WL 4701879, at *15 (S.D. Iowa Jan. 23, 2018) (possible exemption for single club justified injunction).

Nor is it any answer that some of the exemptions are granted to District programs or athletic teams instead of to student clubs. That only

shows that the exemptions are *worse* for the District's interests, since the discrimination carries the District's own "imprimatur." SJUSD Br.19. And many of the programs aren't meaningfully distinct from student clubs, including sports teams (which are also under the ASB program) and groups like Girls' Circle (which has student "members," is open to all female students, and meets at the same time as student clubs). *Supra* 5.

Regardless, the dodge is analytically irrelevant "for purposes of the Free Exercise Clause." *Tandon*, 141 S.Ct. at 1296. Under free exercise analysis, "whether two activities are comparable … *must* be judged against the asserted government interest that justifies the regulation at issue," *id.* (emphasis added), not in the gerrymandered lines the government artificially draws around disfavored religious groups. Thus, *Lukumi* looked not only to the specific "ordinances prohibiting" religious exercise for express exemptions, but also to conduct that "the ordinances did not regulate" but which still "posed a similar hazard" to the government's "claimed" interests. *Fulton*, 141 S.Ct. at 1877 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 544-45 (1993)). And *Tandon* "summarily rejected" a ruling that both artificially compared only secular and religious in-home gatherings for purposes of the government's interests in controlling COVID and refused to consider "commercial activity in public buildings" that

equally threatened those interests. *Compare* 141 S.Ct. at 1297, *with* 992 F.3d 916, 923 (9th Cir. 2021).

C. The District is not neutral toward FCA's religious beliefs.

The government triggers strict scrutiny under the Free Exercise Clause's independent neutrality requirement if its actions raise "even slight suspicion" they "stem from animosity to religion or distrust of its practices." *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S.Ct. 1719, 1731 (2018). As shown above, the animus in this case is not merely suspected, it is overt. The District's exclusion of FCA students because of their "honorable and decent" religious beliefs about marriage and sexuality accordingly violates the First Amendment. *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015).

III. The District's Actions Violate the Free Speech Clause.

By "withhold[ing] benefits from [FCA clubs] because of their religious outlook," the District is violating the Free Speech Clause's protection for speech and association. *Martinez*, 561 U.S. at 685; *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 864 (7th Cir. 2006) (same). Under decades of precedent governing student-group fora, public schools may neither "exclude speech" where doing so is "'[un]reasonable in light of the purpose served by the forum,'" nor "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The District does both.

A. The District's exclusion of FCA is unreasonable.

A content-based limitation is reasonable only if it "respect[s] the lawful boundaries [the forum] has itself set." *Id.* For example, a forum dedicated to the exchange of *students'* ideas about *art* can reasonably exclude *non*-student speech about *science*. *Martinez*, 561 U.S. at 703 (Kennedy, J., concurring). But it cannot make "other content-based judgments" that disrespect the forum's own boundaries. *Id.*

That's the kind of disrespect at issue here. The purpose of the ASB forum is to help students form communities around "similar interests" with "other students that are like them." ER.405-06. The District allows many other groups to select leaders with the skill and ability to advance the groups' purposes. *Supra* 4-5, 10-11. The only reason it bans FCA from doing the same is impermissibly content-based. *Supra*, Section I at 15-17. Nor is it any answer, as the district court thought (ER.10), that students might find FCA's criteria offensive. That is not only content-based, but also expressly forbidden by the rules of the forum guaranteeing clubs "rights to express ideas … *even when such speech is controversial or unpopular*." ER.1140 (emphasis added).

B. The District is discriminating based on viewpoint.

Public schools engage in viewpoint discrimination when their actions turn on the "ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. Viewpoint discrimination is a "blatant" and

"egregious" violation of free speech that is "presumptively" unconstitutional. *Id.* at 829-30. Here, the District has done it four times over.

First, the District targets religious views while leaving similar secular views unregulated. Secular clubs can exclude students from *any* role in the club if they are deemed not to have *secular* "good moral character" necessary for their secular mission, *supra* 11. By stark contrast, FCA cannot ask its *leaders* to exemplify the *religious* moral character required to express its religious message. It's been "quite clear" for decades that this distinction by a public school is viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-12 (2001).

Second, the District selectively enforces its nondiscrimination policies, making *ad hoc* exceptions for popular groups and activities, like sports and choir and the Senior Women club, to discriminate based on protected characteristics. This is viewpoint discrimination. *BLinC v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021). And the District's transparently pretextual labeling of its policy as a *Martinez*-like "All-Comers Policy" makes the discrimination all the more apparent, since it is beyond dispute the policy doesn't nearly require "*all* student groups to accept *all* comers." 561 U.S. at 694.

Third, the District's intentionally myopic reliance on complaint-driven enforcement empowers a "heckler's veto" to silence unpopular viewpoints. *Ctr. for Bio-Ethical Reform v. L.A. County*, 533 F.3d 780, 787-88 (9th Cir. 2008). District officials charged with regulating student clubs

admitted that even where they knew that a student club was likely in violation of its All-Comers Policy, they would not investigate or enforce the policy absent a complaint. ER.170-71; ER.472; ER.900-01. This head-in-the-sand enforcement scheme allows the District to ignore socially popular forms of "discrimination" (such as single-sex sports teams or the Senior Women), while excluding unpopular ones. *Compare* ER.165 *with* ER.170; *see also* ER.450-51, ER.524 (student group advertised "female-only" membership in school newspaper without controversy or investigation).

Fourth, the District has subjected FCA to enhanced scrutiny no other club has undergone, which itself shows viewpoint discrimination. *See Gerlich v. Leath*, 861 F.3d 697, 705 (8th Cir. 2017). FCA is the *only* Pioneer club to have its ASB status revoked due to its leadership criteria, ER.549-50; the *only* Pioneer club to face severe public protests, ER.396; and the *only* club District-wide to have had its ASB revocation approved by District superintendents, ER.871.

IV. The Remaining Injunction Factors Favor Granting Relief.

Irreparable harm is "easy to establish" here. *CTIA v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019). Loss of First Amendment and EAA rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020); *Hsu*, 85 F.3d at 872.

The balance of equities and the public interest "merge" because the District is a government entity. *Nken v. Holder*, 556 U.S. 418, 435 (2009). That FCA has "raised serious First Amendment questions" alone "compels a finding that the balance of hardships tips sharply in [FCA's] favor." *Am. Beverage Ass'n v. City & County of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (cleaned up). And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.*

Without relief, Pioneer FCA may soon cease to exist, just like other derecognized FCA clubs in the District. Before this controversy, it had numerous leaders and members, and held school-wide events that attracted over a hundred students. Now all that remains is a handful of students who, with good cause, fear more retaliation. Without relief, some of those students will graduate next year without having ever known a time when their high school wasn't discriminating against their club. This ongoing constitutional harm warrants immediate injunctive relief.

CONCLUSION

The Court should grant an injunction pending appeal.

Respectfully submitted,

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June 7, 2022

CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it has 5,597 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Daniel H. Blomberg
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, the foregoing motion for an injunction pending appeal was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Daniel H. Blomberg
Daniel H. Blomberg