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)

REPLY BRIEF IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL
RELIEF REQUESTED BY AUGUST 15, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, 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

Defendants concede that Fellowship of Christian Athlete clubs are ineligible for recognized status solely because they ask their leaders to affirm core religious beliefs. Defendants do not dispute that this ineligibility started after District employees attacked FCA's religious beliefs as "bullshit," recognized a Satanic Temple Club formed to "openly mock" FCA, and facilitated efforts to "ban FCA completely from campus." And Defendants concede that FCA's ineligibility arises under a supposed "all comers" policy and a nondiscrimination policy—policies which neither require all comers nor have restricted the District's discretion to provide a "multitude" of secular exceptions.

The District's mistreatment of FCA students—which is ongoing and will acutely recur when students return to school—violates the Equal Access Act, the Free Exercise Clause, and the Free Speech Clause. Plaintiffs need an injunction pending appeal so they don't lose something no court can later give them back: a year of high school free from unconstitutional religious discrimination.

Unable to defend its ongoing actions, the District tries misdirection. It argues that FCA lacks standing to challenge its policies denying access to FCA clubs, that *it* can break those policies at will, that these porous policies are "indistinguishable" from those in *Christian Legal Society v. Martinez*, and that it isn't accountable for years of ongoing hostility by its employees against FCA. Each argument fails.

At bottom, the District seems to think its harassment against Pioneer FCA students was so successful that the students gave up and are too frightened to seek recognized status. Not so. Pioneer FCA is still meeting, has selected leaders for next year, and will reapply once the District's discriminatory policies are enjoined. Regardless, the law does not require that schoolchildren re-submit futile applications to openly hostile government officials as the price of getting a hearing for their civil rights.

Parents of FCA students spent a year fruitlessly asking the District to stop its harassment before litigation. FCA lost another school year waiting for the district court to rule. FCA should not be required to lose yet another year to the District's discrimination.

ARGUMENT

I. Plaintiffs are Likely to Succeed on Appeal.

A. The District's actions violate the Equal Access Act.

The District admits that standard content-discrimination analysis is determinative under the EAA. Opp.18 n.13. This means the District cannot regulate FCA's speech by reference to its content. Mot.13-16. But that's what the District does via its ban on religious leadership and open hostility to FCA's beliefs. While *secular* mission-alignment or "good moral character" requirements are permissible, *religious* mission-alignment and character requirements are out. Mot.18-21; ER.588, ER.1914 (each Interact member "accepts the principles" of club, "agrees to comply

with" them); ER.1968 (Humane Society); ER.1998 (UNICEF); 2022-23 ASB Officer Application, https://perma.cc/U6QH-J7YH (ASB officers make "commitment" to be "role model").

The District agrees that *Hsu v. Roslyn Union School District* is the only EAA decision to squarely address a policy like the one here—and *Hsu* ruled in favor of the student group, rejecting Defendants' arguments. 85 F.3d 839 (2nd Cir. 1996). Thus, the District calls for this Court to split with the Second Circuit—precisely what this Court refused to do in *Truth*. The only authorities the District musters for this new split are *Alpha Delta* and *Martinez*, neither of which are EAA cases.

Both cases are also analytically distinct. They considered claims that required a heightened showing of *viewpoint* discrimination, not the EAA's lower showing of *content* discrimination. And while *Martinez* found the benefit/prohibition distinction relevant for *forum* analysis, the EAA eschews First Amendment forum analysis. Under the EAA, content-based denial of ASB benefits alone is dispositive. *Prince v. Jacoby*, 303 F.3d 1074, 1084-90 (9th Cir. 2002). Finally, *Martinez* did not purport to decide what a legislature *could* require, only what the constitution *did* require. Here, Congress has required content-discrimination-free access in exchange for federal funds, and the District has violated that deal.

B. The District's actions violate the Free Exercise Clause.

The District's response confirms its actions are neither generally applicable nor neutral. Mot.21.

General applicability. The District leaves undisputed that it has discretion to make exceptions from its policies, and it exercises that discretion for a "multitude" of District programs and activities. Those facts are fatal.

To evade them, the District tries to muddy the waters. It claims that its multitude of exceptions have not yet arisen within the ASB forum. But that's irrelevant, since the District admits that it *has discretion* to grant individualized exceptions under the governing Board Policy, Opp.7 & n.4, which fully controls both the ASB program and all other District programs. Mot.17. Under *Fulton*, that's enough. Nor does this discretion need to be "unfettered" or intentionally burden religion. Opp.18. Even benign, "incidental[]" burdens on religion trigger scrutiny when the government has discretion to allow "individualized exemptions." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876-77 (2021).

The District also leaves uncontested that it has granted multiple discriminatory exceptions for its *own* programs and activities. Mot.5. Under *Tandon*, this is conclusive. What matters is the governmental *interest* at issue, and the District's asserted interests are vastly more burdened by the District's "multitude" of exemptions than by FCA's religious leadership requirements. Mot.18; Opening Br.8; *accord Hsu*, 85 F.3d at 871 (schools subject students to discrimination "all the time").

Defendants counter that *Tandon* only bars prohibitions on religion, not barriers to benefits. Opp.19. But the Supreme Court has "repeatedly"

held the opposite. *Carson v. Makin*, 142 S.Ct. 1987 (2022). *Tandon* does not give government more latitude to regulate student clubs than pandemics.

Finally, Defendants *do* make exceptions for ASB entities, as the de novo "independent examination" required here readily shows. *Thunder Studios v. Kazal*, 13 F.4th 736, 742 (9th Cir. 2021). For instance, sports teams fall within the ASB program. ER.443; *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 641 (9th Cir. 2008) (listing "school sports" among comparable ASB clubs). The District's misleading response is that its single-sex teams are required by "law." But the laws it cites merely *permit* single-sex teams, ER.1685, which is why courts consistently reject "Title-IX-made-me-do-it" defenses. *InterVarsity v. Univ. of Iowa*, 5 F.4th 855, 865 & n.2 (8th Cir. 2021) (granting Title IX exemption for Greek groups triggered strict scrutiny). The only single-sex *requirement* comes from the sports league the District *chose* to join. ER.1685. But privileging athletics over religion is only permissible in compelling situations, which the District has not attempted to show.

Similarly, the District fails to show that Senior Women and the South Asian Club do not discriminate based on sex and race. It speculates that the clubs are not currently discriminating because they filed boilerplate forms, ignoring their hand-written statements of discrimination on those forms. That's not the standard Defendants applied to FCA. For FCA,

they *condemned* without investigation; for other clubs, they *bless* without investigation. Such bespoke enforcement is not generally applicable.

Neutrality. It is undisputed that "the District sought to restrict [FCA's] actions at least in part because of their religious character." *Kennedy v. Bremerton*, 2022 WL 2295034, at *10 (U.S. June 27, 2022). Prohibiting FCA's "religious practice was thus the District's unquestioned 'object,'" rendering it non-neutral. *Id.*

The District also leaves uncontested that numerous District employees openly attacked FCA's religious beliefs. Its only response is asserting those employees didn't influence derecognition or policy enforcement. But the record shows that the Pioneer principal makes the "final call" on recognition, that his contemporaneous public explanation was that *both* the "Climate Committee" and "District" made the decision, and that he continued to allow Pioneer staff to influence his enforcement. ER.315; ER.360; ER.1219; ER.1226-27; ER.1652. *See also* Opening Br.12-13 (journalism program is curricular, controlled by faculty). Moreover, Espiritu testified that Glasser's abusive conduct (which the District still hasn't investigated) is *consistent with current District policy*—a position Defendants have never repudiated and in fact supported in arguing against FCA's "brand of religion," ECF 127 at 22, and relied on to target FCA just last year. Under *Masterpiece,* this is fatal. Mot.21.

C. The District's actions violate the Free Speech Clause.

The District fails to show that its ASB-forum restrictions are reasonable or viewpoint neutral, Mot.22, falling far short of "the First Amendment's double protection for religious expression." *Kennedy*, 2022 WL 2295034, at *16.

Reasonableness. The District's forum policy is unreasonable because it does not "respect the lawful boundaries it has itself set," *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 829-30 (1995), as it allows other students to engage in protected controversial speech, but not FCA. Rather than responding to this contention, the District insists the policy is controlled by *Martinez*. Opp.16-17. But *Martinez* assumed based on the parties' stipulation that every student organization truly accepted all comers—*i.e.*, the Hastings Democrats had to accept Republicans and vice-versa. 561 U.S. at 675. That's not even remotely true here, where the District's policy is riddled with exceptions, such as allowing campus officials to make case-by-case "common sense" exceptions for "nondiscriminatory" exclusions. ER.1046-47; ER.509; ER.556.

Viewpoint discrimination. For the same reason, the policy is also viewpoint discriminatory. This discrimination is exacerbated by the District's practice of ignoring known violations unless it receives a complaint. Mot.4, 24. And *Stormans v. Wiesman* is inapposite (*contra* Opp.16-17) because its complaint process was "tied to particularized, objective

criteria" that didn't ignore violations "when they occur for secular reasons but not … for religious reasons." 794 F.3d 1064, 1082-84 (9th Cir. 2015). Here, the District's amorphous policy left officials with discretion to impose "'arbitrary or discriminatory enforcement,'" which they fully employed. Opening Br.22-23, 49.

II. The Remaining Injunction Factors Favor Relief.

As the district court found, ER.20, loss of First Amendment and EAA rights is unquestionably an irreparable harm. Mot.24. Defendants manufacture an "*imminent*" harm requirement; that is not the law. *Winter v. Nat. Res. Def. Council,* 555 U.S. 7, 20 (2008). Regardless, Defendants' extension briefing concedes the imminent ASB approval deadline in early September. Dkt.5 at 2.

Plaintiffs have "raised serious First Amendment questions," and this alone "compels a finding that the balance of hardships tips sharply in [FCA's] favor." Mot.25; ER.1330, ER.1661-62, ER.1709-10 (severe harm to FCA clubs after derecognition, substantial effort to keep even one club alive). Defendants' contrary arguments ignore that Pioneer FCA was recognized on campus for years, was given provisional official recognition during the pandemic, ER.335, and that none of Defendants' exclusion concerns ever occurred. ER.217. There's no reason to think Defendants' claimed interests would be more at risk during this appeal.

III. FCA Has Standing and Its Claims are Not Moot.

Defendants' arguments on standing are so weak the district court did not think them necessary to address to be "sure of its own jurisdiction." *Ortiz v. Fibreboard*, 527 U.S. 815, 831 (1999); APP939.

First, Defendants' don't contest FCA National's standing, which alone forecloses their argument: only one plaintiff needs standing. *Preminger v. Peake*, 552 F.3d 757, 764 (9th Cir. 2008). And national organizations have standing to challenge policies forbidding the formation of student clubs on public school campuses. *Gay-Straight All. v. Visalia Unified Sch. Dist.*, 262 F.Supp.2d 1088, 1103 (E.D. Cal. 2001) (national GSA Network had standing "to form a GSA club"); *InterVarsity*, *supra* (relief to national organization). This is sufficient to reject Defendants' standing arguments. *See also* FER.30-32.

Pioneer FCA also has standing:

Injury in fact. When a private plaintiff is "challenging the legality of government action" and is "an object of the action," there is "little question" injury-in-fact has been shown. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And this Court has already held that when a school district has "written non-discrimination policies" requiring "den[ial] of ASB recognition" to the plaintiff student club, "there is an implicit likelihood of [the harm's] repetition in the immediate future" sufficient for forward-looking relief. *Truth*, 542 F.3d at 642; *Fortyune v. Am. Multi-Cinema,*

364 F.3d 1075, 1081 (9th Cir. 2004) (similar). Injury in fact is also particularly straightforward at the preliminary injunction stage, requiring "only … a risk or threat of injury." *San Francisco v. USCIS*, 944 F.3d 773, 787 (9th Cir. 2019).

This standard is easily met. Defendants have a written all-comers policy that renders "student FCA clubs ineligible for ASB recognition," IPA.Resp.3, ER.355-56; issued written guidelines stating "ASB recognized status *will not* be granted to *any* student organization that restricts eligibility for … leadership" on "religious" grounds, ER.1424; and confirmed under oath that FCA is ineligible for ASB approval due to its existing religious leadership requirements, IPA.Resp.19, ER.218. *And* they have twice denied ASB status to Pioneer FCA for this reason. ER.817-18.

Fairly traceable. Defendants do not contest that "the harm [from ASB denial] is traceable to the District's policies," *Truth*, 542 F.3d at 642, nor could they.

Redressable. Plaintiffs need only show "it is likely, as opposed to merely speculative, that [their] injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000). Because Plaintiffs are the object of Defendants' actions, here too, there is "little question" that "a judgment preventing" that harm constitutes redressability. *Lujan*, 504 U.S. at 561-62. This Court could issue an injunction restoring Pioneer FCA's ASB-approved status, *see InterVarsity*,

supra, or enjoin the District's "express discrimination" preventing FCA clubs from applying on "equal footing" for ASB recognition, *Trinity Lutheran v. Comer*, 137 S.Ct. 2012, 2022 (2012).

Defendants' contrary arguments fail. *First*, Defendants suggest Plaintiffs' claims are not ripe, Opp.10 (citing "certainly impending" requirement), but later concede they are only asserting mootness. Opp.10 & n.7 (not challenging "Plaintiffs' original standing," arguing instead that graduation caused mootness). Accordingly, *Defendants* bear the "heavy burden" to prove the case is moot, which they fail to carry. *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017). A case is only moot if a court cannot award any "effective relief." *Id*. But, as shown above, Plaintiffs' injuries can be redressed by court order.

Second, Defendants claim "there is zero evidence" current Pioneer students "will seek recognition this fall." Opp.11, 12. But such evidence is unnecessary here. *Supra* 9-10. Nor do mootness standards require a plaintiff to engage in "futile gesture[s]," *Namisnak v. Uber Techs*, 971 F.3d 1088, 1092 (9th Cir. 2020), as FCA's reapplication would undeniably be absent relief. *Supra* 10; ER.218; Opp.3.

Defendants are also wrong about the record. At the preliminary injunction stage, Plaintiffs can show standing by "relying on the allegations in their complaint and whatever other evidence they submitted." *LA All. v. Los Angeles*, 14 F.4th 947, 956-57 (9th Cir. 2021) (cleaned up). And the record demonstrates that "[i]f the Court grants an injunction

allowing Pioneer FCA to have equal access to ASB recognition … Pioneer FCA's leadership will apply[.]" ER.1331; ER.1661-62; FER.11, 21. It also shows that Pioneer FCA continues to meet, select leaders, and plan for the future. ER.2059; ER.2060-61; ER.2064-275; FER.12, 15, 16, 38-39.

But Defendants' demand for unnecessary student declarations reveals yet again the "inherent power asymmetry" in this case, which Defendants have used to "chill and discourage" FCA students from "exercising [their] free-speech rights." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 869 (9th Cir. 2016). Defendants could have received all the testimony they wanted from Pioneer FCA's proffered Rule 30(b)(6) witness. But they instead insisted on deposing FCA students unless Pioneer FCA agreed not to submit student declarations. APP811. After years of hostility, the District can neither feign surprise that its students are afraid, nor leverage its intimidation to shut this Court's doors to them. *Cf. Gay-Straight All.*, 262 F.Supp.2d at 1103 (students "afraid" "to form a GSA club" "for fear of retaliation, humiliation, and further harassment").

CONCLUSION

The Court should grant an injunction pending appeal.

Respectfully submitted,

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July 5, 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 2,595 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
Daniel H. Blomberg

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, the foregoing reply brief in support of Appellants' 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
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