

No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES, ET AL.,
Plaintiffs-Appellants,

v.

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

Appeal from the United States District Court
for the Northern District of California, No. 20-CV-2798
Honorable Haywood S. Gilliam, Jr.

**BRIEF OF THE JEWISH COALITION FOR
RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

The Jewish Coalition for Religious Liberty has no parent corporation and issues no stock. Accordingly, no publicly held corporation owns ten percent or more of its stock.

s/ Howard Slugh
Howard Slugh

INTERESTS OF *AMICUS CURIAE*¹

The Jewish Coalition for Religious Liberty (“JCRL” or “*Amicus*”) is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to foster cooperation between Jews and other faith communities in order to protect the ability of all Americans to practice their faith freely. Its founders have filed *amicus* briefs in the Supreme Court of the United States and lower federal courts, published op-eds in prominent news outlets, and established an extensive volunteer network to promote support for religious liberty within the Jewish community.

SUMMARY OF ARGUMENT

In a 1790 letter to the Hebrew Congregation of Newport, Rhode Island, George Washington wrote: “May the Children of the Stock of

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amicus* represents that all parties have consented to the filing of this brief. And in accordance with Rule 29(a)(4)(E)(i)–(iii), undersigned counsel states: No party or party’s counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. Undersigned counsel’s attorney-admission fee was paid by Cooper & Kirk, PLLC; otherwise, no person, other than the *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting this brief.

Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.”² James Madison, “the leading architect of the religion clauses of the First Amendment,” *Flast v. Cohen*, 392 U.S. 83, 103 (1968), was likewise alive to the danger that “the majority may trespass on the rights of the minority” in religious matters.³ As he wrote, a “just Government” would protect “every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”⁴ The Framers’ commitment to religious liberty is enshrined in the First Amendment, which safeguards the rights of coreligionists to practice their faith together under their “own vine and figtree.”

² *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, FOUNDERS ONLINE, NATIONAL ARCHIVES, <https://bit.ly/3OBXc9z> (last visited July 1, 2022).

³ *Memorial and Remonstrance against Religious Assessments* (1785), in 8 PAPERS OF JAMES MADISON 301 (W. Rachal, R. Rutland, B. Ripel & F. Teute eds., 1973).

⁴ *Id.*

The San Jose Unified School District's actions against the Fellowship of Christian Athletes ("FCA") violate this constitutional commitment. The District has barred FCA from becoming an approved student group because FCA requires its student leaders to affirm that they adhere to basic tenets of the group's faith. At the same time, the District exempts various other groups from the "All-Comers Policy" that FCA's religious leadership criteria apparently violate.

Plaintiffs' briefing thoroughly explains why the District's actions violate the First Amendment's speech and religion clauses, controlling precedent, and statutory protections. We agree with their excellent legal arguments. The purpose of this brief is to show why the freedom to choose leaders who share a religious student group's faith is vital to the group's ability to exist *as a religious group*. We do so through the lens of the Jewish community, though similar points apply across faith communities and are especially pertinent to members of minority faiths.

A religious student group is not like other affinity groups. It is not surprising that some other groups prefer to select leaders who possess traits that further the group's purpose, whether based on characteristics like gender or interests like athletics. It is also perfectly understandable

that the District allows many such secular groups to do so. But for devout students, religion is not just an affinity; it is a guiding principle of day-to-day life. Religious groups help those students practice their faith and form community with other students of that faith. Leaders who share the group's beliefs help ensure that the group fulfills that purpose, from serving the proper food at group events to counseling other students of faith. It is therefore quite surprising that the District singles out religious student groups by refusing to allow them to choose the leaders necessary for their flourishing. Allowing the District's actions to stand would set a precedent that threatens religious groups' religious identity and, as a result, religious students' well-being. Jewish, Christian, Muslim, and other religious students all have a stake in FCA's success.

Part I shows why religious student groups, and in particular minority religious groups such as Jewish students, must have the ability to select leaders who share their beliefs in order to exercise those beliefs. Religious leadership criteria are not, as the District purports to see them, tools of impermissible discrimination but are an essential means of maintaining group identity. Simply put, if religious groups are to exist on equal footing with other student groups, as the First Amendment

requires, they must be allowed to require that their leaders adhere to their faiths.

Part II shows some of the harms that Jewish groups and students could suffer if the District's actions are allowed to stand. Forcing Jewish student groups to forgo the ability to choose only practicing Jewish leaders renders those groups less capable of upholding Jewish practices and attracting Jewish students, thereby depriving those groups of their uniquely Jewish character and depriving observant Jewish students of the opportunity to observe the tenets of their faith together.

ARGUMENT

I. The Ability To Select Coreligionist Leaders Preserves Group Identity and thus Campus Diversity.

Under the guise of a policy purporting to make “campus communities . . . welcoming to all students,” the District has made its campuses unwelcoming to religious communities. Opening Br. of Pls.-Appellants, Doc. 23, at 14 (June 27, 2022) (record citations omitted). As a result, the District's actions will render its campuses less diverse. That

is because religious groups need the freedom to select leaders of their own faith in order to exist as religious groups.

The criteria for who will lead a group are part of what make the group a *group*. It would be uncontroversial to say that a sports club should be able to select leaders who play the sport, or that singing clubs should be able to select leaders who sing. The District allows such clubs to do so. *See* Opening Br. at 14, 37–38. If anything, it is more vital that religious student groups be allowed to select leaders who share the group’s deeply held beliefs and who are committed to the group’s shared practices. These beliefs and practices are essential to the students’ identities. But the way that the District has enforced its “All-Comers Policy” against FCA would force religious student groups to accept leaders who do not share their convictions, whether they like it or not.

Especially at risk are minority religious groups with unique sets of practices, including, but certainly not limited to, Jewish groups. The need for cohesive faith groups is acute in the Jewish community. History is replete with persecution of Jews, and anti-Semitic prejudice persists

today,⁵ including in the United States and in communities close to San Jose.⁶ Even if not motivated by such prejudices, actions like the District's ignore the importance to the ongoing vitality of the Jewish community of groups that are identifiably Jewish. And to be identifiably Jewish, the group must be able to select Jewish student leaders. This ability is important to the group's ability to exercise its religious beliefs. *See infra* Part II. It is part of what makes a Jewish group *Jewish*.

Religious leadership criteria are thus not means of exclusion and certainly not a sign of animus. *See Hsu By and Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). In addition to providing a home for coreligionists, religious student groups can serve the important function of educating other interested students about the faith. But to do so, a Jewish group must be Jewish, just as a Christian group must be Christian. And that is impossible without the ability to

⁵ *See generally, e.g.*, Anti-Defamation League, “A Brief History of Antisemitism,” <https://bit.ly/3R3DQvt> (last visited June 22, 2022).

⁶ *See* American Jewish Committee, *The State of Antisemitism in America 2021* (Oct. 25, 2021), <https://bit.ly/3OGiuD0>; *see also* Keri Brenner, *Jewish high school students in Marin County targeted in online attacks*, MARIN INDEPENDENT JOURNAL (Sept. 11, 2020, 10:31 AM), <https://bayareane.ws/3NBaD8c>.

select a leader who practices the faith—a fact that would be readily grasped by any hypothetical non-Jewish student interested in Judaism and in joining a Jewish student group. Indeed, JCRL understands why Jews are excluded from FCA leadership: FCA is a Christian organization. Its religious leadership criteria do not evince animus toward Jews or students of any other religion; they simply preserve the group’s right and ability to express its faith. Jewish leadership criteria would likewise not evince ill will toward Christians. Similarly, a requirement that leaders adhere to religious practice would not display ill will toward Jewish students who are not observant. Other student groups can choose leaders based on athletic ability or academic achievement; Jewish groups must be allowed to choose leaders based on their practice of Judaism. Neither case constitutes discrimination.

But *banning* Jewish groups from adopting religious leadership criteria *does* discriminate against those groups. Such a ban could eliminate Jewish student groups’ ability to serve their primary purpose as religious groups. *See Christian Legal Soc’y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). This concern is not hypothetical. Several public

schools in California and across this Circuit have Jewish student groups.⁷ Although a given group might not choose to restrict its leadership to Jewish students, the question is whether it can do so if doing so best aligns with the students' faith. And if a Jewish student group chooses to allow non-Jewish members, or is forced to do so under policies like the District's, a non-Jewish majority could select a non-Jewish leader. Jews are, after all, a minority in the U.S. population.⁸ The group's ability to adopt religious criteria for its leaders is therefore a bulwark for its unique religious identity. Removing that bulwark undermines religious groups' capacities to maintain their unique religious identities, risks transforming these groups into homogenized replicas of the student body at large, and renders Jewish groups less able to attract and provide a spiritual home for observant Jewish students.

In turn, actions like the District's will dilute diversity on school campuses. Student bodies can *be* religiously diverse, but *expressing* that

⁷ See, e.g., JEWISH STUDENT UNION, *Clubs*, <https://bit.ly/3uklhcS> (last visited June 30, 2022).

⁸ Less than 2% of U.S. Children are raised exclusively Jewish by religion. See PEW RESEARCH CTR., *Jewish Americans in 2020*, <https://pewrsr.ch/3R2DPrJ> (last visited July 1, 2022).

diversity—and affording the school community the benefits that come with it—requires different, thriving religious groups. If religious student groups like Jewish student groups are deprived of the ability to exist as such, then the District will be deprived of meaningful diversity. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (diversity means “exposure to widely diverse people, cultures, ideas, and viewpoints”).

II. Prohibiting Religious Leadership Criteria Is Particularly Harmful to Religious Jews.

Leaders serve a particularly important role in Jewish student groups. Certain features of the Jewish faith—such as intricate rules surrounding Sabbath observance and food preparation—make it essential that Jewish student groups be allowed to ensure that their leaders are Jewish.

As with other religions, appreciating Judaism fully requires experiencing it firsthand. One could read a book about observing the Sabbath, or repenting on the holiday of Yom Kippur, or reenacting the Jewish national origin story on Passover, but one must participate in those practices to internalize them as a member of the community with a shared sense of history, obligation, and belonging. In fact, that is a tenet of Judaism. The Passover service, or seder, emphasizes that every

participant should see himself as if he were personally taken out of Egypt. Services on the fast day known as Tisha B'Av include mourning rituals to commemorate the destruction of the Jewish temples and the exile from Israel. Jews spend the day acting as if a close family member had recently died. There is no substitute for experiencing these rituals firsthand—particularly if one is to lead such a community.

This is true not only for ritual practice, but also for the day-to-day living out of the Jewish faith. Jewish students—especially those who do not come from religious households—may rely on the leadership of their organizations to facilitate their understanding and practice of their faith. For example, Jewish student organizations may provide Matzoh on Passover, a lulav (palm branch) and esrog (citron fruit) on Sukkot, Megillah reading on Purim, and shofar blows on the High Holidays.

Given the importance of lived experience in the Jewish faith, an observant Jewish person is uniquely suited to lead a religiously Jewish student group. Consider compliance with the complex laws of keeping Kosher. These laws relate not only to the types of food that can be eaten, but to its preparation and heating and to the appliances and utensils that can be used to cook and eat it. Religious Jewish students will not eat food

served at group events unless they are confident that such laws were strictly followed. Such confidence will be hard to come by if those responsible for providing the food are either not dedicated to, or worse yet, unfamiliar with Kosher practices. Given the central role of food at group events, leadership by observant Jewish students enhances the group's ability to attract students who adhere to the Jewish faith—students who would otherwise be less likely to participate in the group and who would thus be deprived of an opportunity to practice their faith with their classmates.

Similarly, the laws that govern activity on the Sabbath “are quite complex, requiring careful study and a qualified teacher.”⁹ Derived from the Bible, these laws create a complex web of activities that are forbidden or required to be performed on the Sabbath. Jewish holidays also involve fasting (such as Yom Kippur) and other intricate celebratory practices (such as Passover). To host any sort of communal event on or related to these days, and to provide any guidance and support related to these rituals, a group's leadership must be intimately familiar with the

⁹ *The Shabbat Laws*, CHABAD, <https://bit.ly/3y9IxD> (last visited July 1, 2022).

relevant Jewish laws and practices. Non-Jewish or nonobservant leaders would lack such familiarity. The Jewish character of such events would wane accordingly, once again rendering Jewish students less likely to participate and leaving them without an important source of peer support.

Of course, not all Jews keep Kosher or observe the Sabbath. However, even those groups benefit from being allowed to choose leaders who match their faith. Imagine a group of progressive Jews who formed a club dedicated to an understanding of Judaism that aligns with their views. Such a group should also be able to select leaders who align with those views rather than more traditional Jewish students who oppose their interpretation of the faith. In the same vein, religious Jews who observe traditional practices need student leadership that is knowledgeable of and dedicated to the many principles, traditions, and laws of the Jewish religion. Without such knowledge and experience, non-Jews would find it difficult if not impossible to lead the group's members through the rituals, celebrations, and daily practices of the faith. As a result, the group's capacity to offer uniquely Jewish spiritual opportunities, and its ability to attract Jewish students to its ranks,

would suffer. Allowing schools to bar religious groups from requiring that their leaders subscribe to their faith would thus sap the groups of their spiritual identity and hamper the free exercise of religious students.

CONCLUSION

Ruling against FCA would harm minority religious groups, including Jews. Under targeted antireligious policies like the District's, groups of religious Jewish students would need to choose whether to *exist* in any meaningful way—as an officially recognized but fundamentally secular group—or whether to be *Jewish* as they define it. Unable to ensure that they will be led by Jews, these groups would be unable to ensure that Jewish students have a place to observe the many practices that define the Jewish faith. Students of other faiths, especially minority faiths, would suffer similarly, as would their schools as a whole. The First Amendment prohibits that result in this case. The Court should rule for FCA.

Date: July 5, 2022

Respectfully submitted,

s/ Howard Slugh

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,775 words.

s/ Howard Slugh
Howard Slugh

Date: July 5, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 5, 2022. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Howard Slugh
Howard Slugh

Date: July 5, 2022

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