No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES, an Oklahoma corporation; FELLOWSHIP OF CHRISTIAN ATHLETES OF PIONEER HIGH SCHOOL, an unincorporated association; CHARLOTTE KLARKE; ELIZABETH SINCLAIR,

Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; NANCY ALBARRAN, in her official and personal capacity; HERB ESPIRITU, in his official and personal capacity; PETER GLASSER, in his official and personal capacity; STEPHEN MCMAHON, in his official and personal capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
4:20-cv-02798-HSG

BRIEF FOR *AMICUS CURIAE* PROFESSOR MICHAEL W. MCCONNELL IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST

Amicus Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, as well as a Senior Fellow at the Hoover Institution. *Amicus* was counsel of record for petitioner in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and has written widely on religious liberty and freedom of speech and association under the First Amendment, including the speech and association rights of student religious groups in public institutions. *E.g.*, Michael W. McConnell, *Freedom of Association: Campus Religious Groups*, 97 WASH. U. L. REV. 1641 (2020).[1]

[1] All parties consent to the filing of this brief. Fed. R. App. P. 29(a)(2). No counsel for any party authored any part of this brief. No party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

The San Jose Unified School District's self-described "all comers" policy is anything but. In both letter and application, the policy permits a host of student clubs and school programs that the District itself sponsors to restrict student membership on secular grounds—race, sex, gender, even "good moral character"—but prohibits groups like Fellowship of Christian Athletes from reserving their leadership positions to those who share their religious beliefs and live in accordance with their Christian view of moral character. That unjustified disparate treatment of religion violates both the Free Exercise and Free Speech Clauses of the First Amendment.

The District tries to salvage its policy by relying on *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). But *Martinez* does not control here for a simple reason: It rested on the parties' stipulation that the "all comers" policy at issue there required all student groups without exception to accept all members regardless of status or beliefs. Properly understood, *Martinez* stands only for the narrow proposition that a truly categorical, exceptionless "all comers" policy may satisfy the First Amendment in some circumstances. That holding has no bearing where, as here, a policy allows student groups to limit membership and leadership based on a variety of secular criteria. *See, e.g.*, *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 985–86 (8th Cir. 2021); *see also Fraternal Order of Police Newark Lodge No. 12. v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011), cannot rescue the District's policy either. That decision held that a school engages in viewpoint discrimination only when it acts with "the *purpose* of suppressing Plaintiffs' viewpoint." *Id.* at 801. Intervening Supreme Court precedent makes clear, however, that disparate *treatment*, not an illicit *purpose*, is all that is required to establish discrimination under both the Free Speech and the Free Exercise Clauses. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Plus, even *Alpha Delta* recognized that a "nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly." 648 F.3d at 803. Given the number of groups the District permitted and even sponsored that did not comply with the letter of its policies, that is the case here.

ARGUMENT

I. *Martinez* Does Not Control the Free Exercise Question.

Martinez says nothing about the Free Exercise question here. In fact, *Martinez* says virtually nothing about the Free Exercise Clause at all. Consistent with the focus of the parties on the freedoms of speech and association, the Court relegated its entire discussion of the Free Exercise Clause to a footnote. (And, perhaps just as telling, Justice Alito did not even *mention* the Free Exercise Clause in his thorough dissent.) The whole sum of the *Martinez* Court's Free Exercise analysis reads as follows:

> CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in [*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)], forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.

Martinez, 561 U.S. at 697 n.27 (citations omitted).

In so many words, the *Martinez* Court reasoned that a true "across-the-board" policy fell within *Smith*'s safe harbor for "neutral and generally applicable" laws. But the essential premise of that holding—that Hastings' policy genuinely had no exceptions and, in turn, truly applied "across-the-board"—rested on the parties' trial court stipulation, not any independent examination of the facts. *Id.* at 668, 675–78. Indeed, the Court took pains to stress time and again that the "all comers" policy it was analyzing was an exceptionless policy that "requir[ed] *all* student groups to accept *all* comers." *Id.* at 694; *see also id.* at 704 (Kennedy, J., concurring) ("Here, the policy applies equally to all groups and views. And, given the stipulation of the parties, there is no basis for an allegation that the design or purpose of the rule was, by subterfuge, to discriminate based on viewpoint.").

Here, by contrast, the record shows that the District's purported "all comers" policy does not really live up to its name. It provides exceptions that allow some groups to exclude students based on value-laden membership criteria or even race

or sex, while prohibiting FCA from relying on its own *religious* membership criteria. It is up to this Court, then, to determine whether that preferential treatment of other groups is constitutionally problematic. *Martinez* supplies no guidance when it comes to answering that question.

Instead, the Supreme Court's recent Free Exercise cases provide the framework for determining whether the school's purported all-comers policy is truly "generally applicable." *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon*, 141 S. Ct. 1294; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Under that framework, a policy is not generally applicable—and is thus subject to strict scrutiny—if it establishes "a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. So too is a policy that "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296; *see also Diocese of Brooklyn*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) ("once a State creates a favored class . . . , the State must justify why [religious institutions] are excluded from that favored class"). Thus, when a school district allows *some* student groups to exclude members based on status or beliefs, it cannot claim to have a generally applicable all-comers policy that can be applied against religious groups.

To be sure, the *Martinez* Court stated in a footnote that an all-comers policy is not necessarily undermined if it allows student groups to adopt certain "neutral

and generally applicable membership requirements unrelated to 'status or beliefs.'" 561 U.S. at 671 n.2. For example, an all-comers policy might still allow student groups to require members to "pay dues," "maintain good attendance," or "pass a skill-based test." *Id.* In the present case, however, the District allows groups to exclude members based on very different considerations. The District permits, for instance, student groups to exclude members for lacking (a secular understanding of) "good moral character." *See, e.g.*, 7-ER-1215. How that standard is understood and applied to concrete circumstances will necessarily depend on the values of the group in question. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) ("[T]he terms 'morally straight' and 'clean' are by no means self-defining."). The District cannot insist it simply requires each group to accept "all comers" while allowing some groups to gatekeep membership based on their collective values and denying the same right to *religious* student groups.[2]

[2] The District suggests a good-character requirement is analogous to a rule that a member can be expelled from the group "if the member is found to be involved in gross misconduct," which *Martinez* decided was neutral and generally applicable. 561 U.S. at 671 n.2. But in context, this rule must refer to expulsion after a concrete instance where the member violated an objective, external rule of conduct, like criminal law or school disciplinary policy. If read more broadly to refer to anything the group deems bad, the rule would be impossible to square with the principle that subjective, circumstance-dependent standards are not generally applicable. Although stated most recently in *Fulton*, 141 S. Ct. at 1877, this is a bedrock free exercise principle, with roots in both *Smith*, 494 U.S. at 884, and *Sherbert v. Verner*, 374 U.S. 398 (1963). Just as Congress "does not . . . hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), so too the Supreme

Further, the District's acceptance of secular good-character requirements does not just bring its policy outside of *Martinez*'s narrow safe harbor for "all comers" policies. It also affirmatively establishes that the District engages in constitutionally prohibited religious discrimination. If the District permits secular clubs to shape their membership and leadership based on their own understanding of moral rectitude, it must extend the same right to religious associations. *See Fulton*, 141 S. Ct. at 1878; *Diocese of Brooklyn*, 141 S. Ct. at 67.

The District also discriminates against religious exercise by exempting its *own* initiatives from its "all comers" and antidiscrimination policies. The Latino Male Mentor Group, which pairs male Latino seniors as student mentors for male Latino freshmen, limits participation by race, age, and gender. *See, e.g.*, 9-ER-1816. The District also allows for single-sex sports teams and sponsors groups like the "Girls' Circle," which is limited to students identifying as female. *See, e.g.*, 7-ER-1287–88; 10-ER-1941. These are not isolated examples. As the District's Rule 30(b)(6) witness admitted, the District sponsors a "multitude" of other programs that are limited to "students who are in a particular racial, ethnic, or gender category." 9-ER-1651–53.

Court does not create gaping exceptions to established doctrinal principles in unexplained footnotes.

The District defends these restrictions as "attempts to address different students' specific needs," rather than invidious discrimination. Answering Br. 41. Even assuming that is so, however, once the District determines that some considerations outweigh the goal of equal access, it can no longer claim that its all-comers or "non-discrimination policies can brook no departures." *Fulton*, 141 S. Ct. at 1882. Nor can it deny an exemption to FCA without making a judgment that the "specific needs" of religious students—including their need to engage in worship and religious study—are less valuable than other students' secular concerns. That is precisely what the Free Exercise Clause forbids. *Id.*; *Tandon*, 141 S. Ct. at 1296.

The District also claims that the Latino Male Mentor Group and other programs it runs are not comparable to student-run groups, because it should have greater leeway to shape its own programs to serve governmental interests. But that too misses the mark. The Supreme Court has repeatedly rejected attempts by governments to define comparability in exceedingly narrow terms, lest they launder "religious gerrymanders" through manipulation of categories. *Carson v. Makin*, 142 S. Ct. 1987, 2000 (2022). Comparability does not turn on government labels ("ASB clubs" versus "district programs"). *See*, *e.g.*, *Diocese of Brooklyn*, 141 S. Ct. at 67 (comparing synagogues with big box stores even though the State's COVID policy placed them in different categories). It turns on whether the "secular conduct" in question "undermines the government's asserted interests in a similar way." *Fulton*,

141 S. Ct. at 1877. The District has chosen to make its antidiscrimination policy apply "equally" to District- and student-run groups. 9-ER-1724; *see* 6-ER-1048–49. It cannot now claim that exemptions for the former have no bearing on whether it can accommodate exemptions for the latter.

Indeed, the District has it backwards. The government has far *less* of a legitimate basis to exclude based on status and belief than private associations. There is no such thing under the Constitution as a "benign" racial, ethnic, or sex classification by the government. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). *All* such classifications are presumptively unconstitutional. *Id.* By contrast, the First Amendment *protects* "freedom of association," which "plainly presupposes a freedom not to associate." *Dale*, 530 U.S. at 648 (alteration omitted). As Tocqueville observed long ago, "the right of association" is "by nature almost as inalienable as individual liberty. No legislator can attack it without impairing the foundations of society." 1 Alexis de Tocqueville, *Democracy in America* bk. 1, ch. 12 (George Lawrence trans., Anchor Books 1969) (1835). Limiting membership or leadership in an association to those who share and abide by its beliefs is not invidious; it is the very core of the right. By definition, an "association simply consists in the public and formal support of specific doctrines by a certain number of individuals who have undertaken to cooperate in a stated way in order to make those doctrines prevail." *Id.* Indeed, it is grotesque for a public institution to demand

that non-Christians be allowed to lead a Christian prayer group, gentiles to lead a Torah study, or non-Muslims to act as imams.

What is more, the District has in practice long permitted certain student groups to exclude students from membership and leadership based on characteristics that are prohibited under its all-comers and antidiscrimination policies. The Senior Women Club, for instance, limits its membership to students identifying as female. *See, e.g.*, 2-ER-164. Despite this, FCA is the first and only student group against which the District has enforced its policies—and even then, enforcement came only after many years, and as a result of an intolerant teacher who openly objected to the group on the basis of its views. *See, e.g.*, 10-ER-1926. This is not consistent with the constitutional command to extend to religious practitioners the same benefits enjoyed by those engaged in comparable secular conduct.

To be clear, *amicus* does not object in the slightest to the right of other student groups to organize around shared beliefs and identities and to limit their leadership accordingly. That is an elemental right, and should be open to all. The point is that religious associations are entitled to no less respect.

Nor does the District's general nondiscrimination policy fare any better when considered apart from the all-comers policy. For starters, on its face, the policy prohibits discrimination only on certain enumerated grounds (race, sex, sexual orientation, religion, and the like). It does not prohibit discrimination on the basis

of (secular) ideological beliefs. The Communist Club does not need to admit free-marketeers; the Vegan Club may close its doors to carnivores. But religious groups like FCA are barred from requiring their leaders to share their beliefs. Such disparate treatment cannot survive under *Fulton*, *Tandon*, and *Diocese of Brooklyn*—cases that have since refined what it means to be "generally applicable" under *Smith*. Plus, as already discussed, the District permits and itself sponsors groups that limit eligibility based on race and sex—characteristics the policy prohibits.

In short, *Martinez* does not control here because it applied a pre-*Fulton* view of *Smith* to an "all comers" policy that the parties stipulated was categorical. Where, as here, a purported "all comers" policy has material exceptions—secular exceptions that directly implicate the policy's justifying interests—*Martinez* has nothing to say. And *Martinez* certainly does not give the District license to ride roughshod over the Free Exercise Clause just by paying lip service to an "all comers" policy that, in reality, is anything but. Instead, the District's "some comers" policy is governed by *Fulton*, *Tandon*, and *Diocese of Brooklyn*. And under those recent Supreme Court precedents, the free exercise issue here is remarkably straightforward.

II. *Martinez* Also Does Not Control the Free Speech Question.

In the same light, the District also cannot rely on *Martinez* to save its policy under the Free Speech Clause. As with free exercise, the parties' trial court stipulation was the rock upon which the *Martinez* Court built its free speech analysis.

561 U.S. at 675–78. As the Court put it: "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers." *Id.* at 694.

But once more, that is not *this* case. As noted, the District permits certain groups to close their doors to some comers on the basis of race, sex, gender, and the like. Groups may exclude members based on a raw value judgment about personal character. The Latino Male Mentoring Group may restrict its program to Latino men. Senior Women may limit its members to students identifying as female. But not FCA, which may be required to accept leaders whose beliefs are antithetical to the purposes of the group. Imagine an atheist leading a prayer or Bible study session.

That is viewpoint discrimination. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1593 (2022); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). It is by now black-letter law that an organization's selection of its members or leaders is an expressive act that merits constitutional protection. *See, e.g.*, *Dale*, 530 U.S. at 648; *see also Democratic Party of U.S. v. Wis. ex rel. Follette*, 450 U.S. 107 (1981) ("[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." (citation omitted)). That is especially so where, as here, it is a religious organization whose leaders are tasked with conducting prayer, worship, and religious expression. *See,*

e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 201 (2012) (Alito, J., joined by Kagan, J., concurring).

Yet under the District's policy, favored secular student groups are allowed to limit their leadership—and, in turn, shape their message—based on secular considerations, while religious ones are forbidden from doing the same based on religious considerations. That hamstrings religious groups from defining their membership and leadership as part of facilitating their expressive and associational activities, while leaving secular groups free to do just that. Such disparate treatment devalues religious expression and association in relation to comparable secular varieties, all in marked violation of the Free Speech Clause.

The District replies that its policy does not discriminate against viewpoint because it does not target religious speech, only burdening it incidentally. Drawing on *Alpha Delta Chi-Delta Chapter v. Reed*, the District contends that its policy is constitutional because it is not done "for the *purpose* of suppressing [a religious] viewpoint." 648 F.3d at 801; *see also Truth v. Kent Sch. Dist.*, 542 F.3d 634, 650 (9th Cir. 2008) (asking whether action "based" on group's religious viewpoint).

That misunderstands the current state of the law. As the Supreme Court has made clear since *Martinez* and *Alpha Delta*, differential *treatment* of religious speech and exercise amounts to presumptively unconstitutional discrimination even

in the absence of a discriminatory *purpose*. In *Reed v. Town of Gilbert*, for example, there was no whiff of "illicit legislative intent" or "an improper censorial motive" in the in the town's signage ordinance. 576 U.S. at 165 (alteration omitted). Instead, the plaintiff church won its free speech case simply because the ordinance treated other categories of speech more favorably than its religious speech. *Id.* at 164–65. Likewise, there was no indication of improper intent in *Tandon*. Yet the church there prevailed on its free exercise claim because "California treat[ed] some comparable secular activities more favorably than at-home religious exercise." 141 S. Ct. at 1297.[3]

When a governmental body exempts favored secular organizations from an otherwise-generally applicable rule, but not comparable religious organizations, the policy necessarily harbors a latent value judgment that is hostile toward religion, under the Supreme Court's precedents. It inherently "devalues religious reasons for [acting] by judging them to be of lesser import than non[-]religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993); *see also Fulton*, 141 S. Ct. at 1877. Here, the school district has made plain that it values advancing certain secular interests—such as "bridg[ing] th[e] gap" in

[3] In any event, even if a discriminatory *purpose* were required, the evidence of hostility and animus from teachers and administrators, and their encouragement of bullying behavior from other students, far exceeds that in cases like *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

academic success between "Latino males" and "other demographics," 9-ER-1816—over the ability of a faith-based group to control its message. That latent value judgment—no matter the policy's supposed purpose or the policymaker's intent—renders an expression-regulating policy unlawful under *both* the Free Exercise and Free Speech Clauses. Simply put, a policy that is discriminatory under the Free Exercise Clause cannot be viewpoint neutral under the Free Speech Clause under the logic of *Reed* and *Tandon*.

In this sense, the Free Speech and Free Exercise Clauses "work in tandem" to provide "double protection for religious expression." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 2431 (2022). When a policy treats religious expression worse than comparable secular expression, it thereby violates the First Amendment twice over—discriminating not only against religious exercise, but also against the religious *viewpoint* necessarily underlying that exercise. The fact of unjustified disparate treatment suffices to establish viewpoint discrimination against religion; neither animus nor discriminatory purpose is required.

To the extent cases like *Alpha Delta* stand for anything to the contrary, they are no longer good law. *See Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1073 (9th Cir. 2021) (a prior circuit decision is not binding, even on a three-judge panel, when "a Supreme Court case has undercut the theory or reasoning underlying the precedent" (cleaned up)). The government cannot, consistent with the Free Speech

and Free Exercise Clauses, exempt secular groups from an all-comers or antidiscrimination policy while denying the same privilege to religious groups.

To be sure, there is no need to read cases like *Alpha Delta* as in tension with current Supreme Court precedent. *Alpha Delta* itself recognized that a "nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly." 648 F.3d at 803; *see also Truth*, 542 F.3d at 648. And as explained, that basic principle settles this case.

Perhaps recognizing the folly of relying on *Alpha Delta*'s definition of discrimination, the District now invokes the case only to raise an entirely distinct argument—that the "inadvertent" approval of discriminatory groups does not give rise to a selective-enforcement claim. En Banc Pet. 8–12; *see Alpha Delta*, 648 F.3d at 804. This argument fails at its premise. While it may be possible to inadvertently approve a noncompliant application *by a student group*, here the District *itself* designed and established a group—the Latino Male Mentor Group—whose membership criteria flatly contradicted its antidiscrimination policy as written. Likewise, the District's approval of "good moral character" requirements is not an "administrative oversight." *See Alpha Delta*, 648 F.3d at 804. The District has unequivocally represented that these requirements, which are not generally applicable, comply with its policy. 7-ER-1215.

Finally, *Alpha Delta*'s inadvertence holding is not on point even for student groups, like the Senior Women Club, that the District claims it may have accidentally approved. *Alpha Delta* was a summary-judgment case. In that posture, the court does not make findings of fact but must deny judgment if there are "any genuine issues of material fact" for a jury to resolve. 648 F.3d at 796. Because the plaintiffs in *Alpha Delta* could not conclusively rule out an inadvertent approval, summary judgment was not warranted. *Id.* at 804.

Here, in the preliminary-injunction context, courts *do* make "findings of fact." *FTC v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004). Indeed, because the standard is *likelihood* of success on the merits, not *actual* success, a plaintiff need not "prove his case in full" to obtain relief. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In the case of the Senior *Women* Club, the exclusionary nature of the group was evident from its name, and the group's application was explicit that it limited membership to "seniors who identify as female." 2-ER-164. On these facts, FCA will likely be able to show that the District was aware of the group's exclusionary membership criteria when it approved the group. It strains credulity to conclude otherwise.

In sum, whatever the merits of the Supreme Court's decision in *Martinez*, it cannot save the District's discriminatory policy here. *Martinez* has no bearing on an "all comers" policy like the one here that treats religious exercise worse than

comparable secular conduct. Such a policy is governed—and decisively foreclosed—by the Supreme Court's more recent cases.

III. This Court Should Make Emphatically Clear that Religious Student Groups Are Fully Protected By the First Amendment.

This case is, unfortunately, all too typical. In both public universities and public school districts, administrators seem to regard religious speech as offensive and second-class, cloaking a host of discriminatory policies under the nominal garb of neutrality. *See, e.g.*, *Kennedy*, 142 S. Ct. at 2432; *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *Perlot v. Green*, No. 22-cv-00183, 2022 WL 2355532 (D. Idaho Jun. 30, 2022). Congress thought it solved this problem decades ago with the Equal Access Act, 20 U.S.C. § 4071, but to the extent that Act has loopholes, they must be plugged. Without an emphatic statement of constitutional principle, school administrators are unlikely to get the message.

CONCLUSION

For the reasons provided above, this Court should reverse the decision below.

February 21, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document 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 February 21, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 21, 2023

/s/ Anthony J. Dick
Anthony J. Dick