

1 Eric S. Baxter (DC BN 479221)\*  
2 Daniel H. Blomberg (DC BN 1032624)\*  
3 Nicholas R. Reaves (DC BN 1044454)\*  
4 Kayla A. Toney (DC BN 1644219)\*  
5 Abigail E. Smith (CA SBN 330347)  
6 THE BECKET FUND FOR RELIGIOUS LIBERTY  
7 1919 Pennsylvania Ave., Suite 400  
8 Washington, DC 20006  
9 202-955-0095 tel / 202-955-0090 fax  
10 ebaxter@becketlaw.org / dblomberg@becketlaw.org

11 Reed N. Smith (VA BN 77334)\*  
12 Kimberlee Wood Colby (DC BN 358024)\*  
13 CENTER FOR LAW & RELIGIOUS FREEDOM  
14 8001 Braddock Road, Suite 302  
15 Springfield, VA 22151  
16 703-642-1070 tel / 703-642-1075 fax  
17 rsmith@clsnet.org / kcolby@clsnet.org

18 *Attorneys for Plaintiffs (\*admitted pro hac vice)*

19 *[Additional Counsel listed on Signature Page]*

20 **UNITED STATES DISTRICT COURT**  
21 **NORTHERN DISTRICT OF CALIFORNIA**

22 ELIZABETH SINCLAIR, CHARLOTTE  
23 KLARKE, FELLOWSHIP OF CHRISTIAN  
24 ATHLETES, an Oklahoma corporation, and  
25 FELLOWSHIP OF CHRISTIAN ATHLETES OF  
26 PIONEER HIGH SCHOOL, an unincorporated  
27 association,

28 Plaintiffs,

v.

SAN JOSÉ UNIFIED SCHOOL DISTRICT  
BOARD OF EDUCATION, in its official capacity,  
NANCY ALBARRÁN, in her official and personal  
capacity, HERBERT ESPIRITU, in his official and  
personal capacity, PETER GLASSER, in his  
official and personal capacity, and STEPHEN  
MCMAHON, in his official and personal capacity,

Defendants.

**CASE No. 5:20-cv-2798**

**JUDGE: Hon. Lucy H. Koh**

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
INJUNCTION**

Hearing Date: October 14, 2021  
Hearing Time: 1:30 PM PT  
Courtroom: Courtroom 8 – 4th Floor  
Judge: Hon. Lucy H. Koh

**NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

**TO ALL PARTIES AND COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that, on October 14, 2021, at 1:30 pm, or as soon as it may be heard, Plaintiffs, by and through their undersigned counsel, will, and hereby do, move for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and Civil Local Rules 7-2 and 65-2. This motion will be made before the Honorable Judge Lucy H. Koh, San Jose Courthouse, Courtroom 8 – 4th Floor, 280 South 1st Street, San Jose, CA 95113.

Plaintiffs hereby move for a preliminary injunction requiring Defendants to restore recognition to student chapters affiliated with Plaintiff Fellowship of Christian Athletes (“FCA”), including Plaintiff Fellowship of Christian Athletes of Pioneer High School (“Pioneer FCA”), as official “Associated Student Body” (“ASB”) approved student clubs, and to afford them all the benefits of such approval while this litigation is ongoing. In support of this motion, Plaintiffs submit the accompanying Memorandum of Points and Authorities, declarations and deposition testimony in support of this motion, and a proposed order.

Dated: July 30, 2021

Respectfully submitted,

By: /s/ Daniel H. Blomberg

Daniel H. Blomberg (DC BN 1032624)\*

Eric S. Baxter (DC BN 479221)\*

Nicholas R. Reaves (DC BN 1044454)\*

Kayla A. Toney (DC BN 1644219)\*

Abigail E. Smith (CA SBN 330347)

THE BECKET FUND FOR RELIGIOUS LIBERTY

1919 Pennsylvania Ave., Suite 400

Washington, DC 20006

202-955-0095

ebaxter@becketlaw.org / dblomberg@becketlaw.org

Reed N. Smith (VA SBN 77334)\*

Kimberlee Wood Colby (DC BN 358024)\*

CENTER FOR LAW & RELIGIOUS FREEDOM

8001 Braddock Road, Suite 302

703-642-1070 tel / 703-642-1075 fax

rsmith@clsnet.org / kcolby@clsnet.org

1  
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Stephen C. Seto (CA SBN 175458)  
Steven N.H. Wood (CA SBN 161291)  
Christopher J. Schweickert (CA SBN 225942)  
SETO WOOD & SCHWEICKERT LLP  
2300 Contra Costa Boulevard, Suite 310  
Pleasant Hill, CA 94523  
925-938-6100 tel / 925-262-2318 fax  
sseto@wcjuris.com / cjs@wcjuris.com

*Attorneys for Plaintiffs*  
(\*admitted *pro hac vice*)

1 Eric S. Baxter (DC BN 479221)\*  
Daniel H. Blomberg (DC BN 1032624)\*  
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6 ebaxter@becketlaw.org / dblomberg@becketlaw.org

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CENTER FOR LAW & RELIGIOUS FREEDOM  
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Springfield, VA 22151  
10 703-642-1070 tel / 703-642-1075 fax  
11 rsmith@clsnet.org / kcolby@clsnet.org

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25 MCMAHON, in his official and personal capacity,

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**CASE No. 5:20-cv-2798**

**JUDGE: Hon. Lucy H. Koh**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

Hearing Date: October 14, 2021  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 After Fellowship of Christian Athletes lost recognized status in 2019 due to the San José Unified  
3 School District’s religious viewpoint discrimination, it was briefly (and partially) reinstated last year  
4 under a COVID-related exemption that granted provisional recognition to all student groups. But that  
5 temporary reprieve has come to an end. The District has enacted a new policy and confirmed that, under  
6 that policy, it will deny recognition to FCA again this fall. This derecognition violates FCA’s rights  
7 under the Equal Access Act and the First Amendment. Accordingly, it should be enjoined.

8 FCA has been providing voluntary religious ministry to students for decades and is a recognized  
9 student club on thousands of campuses nationwide. It has been a part of campus life in the District for  
10 over a decade. That changed in April 2019, when a Pioneer teacher announced that FCA’s religious  
11 beliefs were “bullshit,” that FCA’s “views needed to be barred from a public high school campus,” and  
12 that “attacking these views” was necessary to have a “better campus”—even if doing so harmed FCA’s  
13 students, who were just “collateral damage.” Pioneer and District officials then derecognized FCA  
14 chapters throughout the District. At the same time, the same officials recognized a new student club—  
15 The Satanic Temple Club—formed specifically to protest and ridicule FCA’s beliefs. The District  
16 justified its hostile treatment of FCA under its non-discrimination policy, saying that FCA was wrong  
17 to ask its student leaders to agree with religious beliefs the District found objectionable.

18 The District had never before enforced the non-discrimination policy in that way. FCA was and is  
19 the first and only ASB-approved club in the District to be derecognized for its leadership requirements.  
20 Indeed, for years, the District has otherwise taken a common-sense approach to leadership and  
21 membership selection. That approach reasonably allows girls’ clubs, academic clubs, and student sports  
22 teams—among others—to pursue their distinct missions by selecting leaders who can advance those  
23 missions. The District uses that same reasonable approach in its own internal programs, providing  
24 minority mentorship and training opportunities that make distinctions among students that would be  
25 impermissible under the strict reading of the non-discrimination policy the District applied to FCA.  
26 Indeed, it was only in 2019, as a part of “attacking” FCA’s views, that the District gerrymandered its  
27 previous approach to accommodate every other group, while excluding FCA.

28 After a partial reprieve last year due to a COVID-related policy of recognizing all student groups,

1 the District is returning to its gerrymander. The District has issued an “All Comers Policy” that will  
 2 resume excluding FCA from recognition in District schools. This new Policy allows numerous bases for  
 3 excluding students from leadership. The National Honor Society club can exclude students based on  
 4 GPA and “good character,” and the Latino Male Mentorship program for freshman boys can exclude  
 5 participants based on their sex, age, and ethnicity. But FCA is not allowed to select leaders on grounds  
 6 important to its *religious* mission—all because the District finds those grounds offensive.

7 As the Supreme Court has explained in cases like *Mergens*, *Martinez*, and *Mahanoy*, the EAA and  
 8 the First Amendment protect even controversial clubs and unpopular speech, and allow students with  
 9 minority views to enjoy equal access to student life at public high schools. The District’s targeted  
 10 discrimination against FCA’s religious beliefs falls far short of this standard and should be enjoined.

#### 11 **STATEMENT OF FACTS**

12 ***Fellowship of Christian Athletes.*** Founded in 1954, FCA is an international religious ministry with  
 13 more than 20,000 ministry groups in 107 countries, including more than 7,000 student chapters at middle  
 14 schools, high schools, and colleges across the United States. Lopez Decl. ¶ 8. FCA and its affiliated  
 15 Student FCA Chapters invite all students to attend and participate in their meetings, and welcome all to  
 16 become members of their clubs. *Id.* ¶ 13.

17 In the San José Unified School District, students have organized Student FCA Chapters at the Pioneer,  
 18 Willow Glen, and Leland High School campuses. In the 2018-19 school year, Plaintiffs Charlotte Klarke  
 19 and Elizabeth Sinclair served as co-presidents of Pioneer’s FCA chapter. During normal circumstances,  
 20 Pioneer FCA—like the chapters at Leland and Willow Glen—hosts weekly meetings throughout the  
 21 school year. Blomberg Decl., Ex. DD at ¶¶ 4, 5, 6. Bi-monthly meetings are open to all students and  
 22 include the “four W’s”: the welcome, the warmup (an icebreaker), the workout (which could include  
 23 Bible teaching, sharing how God has worked in one’s life, or a Christian message from a guest speaker),  
 24 and the wrap-up (where students fellowship and pray together). Lopez Decl. ¶¶ 8, 25. A few times a  
 25 year, a meeting will feature a respected professional or college athlete, who speaks about his or her  
 26 personal faith journey to any students who choose to attend. *Id.* ¶¶ 25-27. Leadership meetings, which  
 27 focus on prayer, equipping student leaders for ministry, and planning future events, are held in the  
 28 alternate weeks. *Id.* ¶ 25. In addition to weekly meetings, Student FCA Chapters also serve their

1 community by leading Christian sports camps and donating sports equipment to children in need. *Id.* ¶  
2 12. District officials have recognized that “FCA does great things on campus” and is led by “great  
3 students.” Blomberg Decl., Ex. Q.

4 FCA embraces a core set of religious beliefs identified in the FCA Statement of Faith, including key  
5 Christian doctrines regarding the inerrancy of the Bible, the death and resurrection of Jesus, God’s  
6 design for marriage, and the belief “that every person should be treated with love, dignity and respect.”  
7 ECF No. 25-2; Lopez Decl. ¶ 18. FCA’s student leaders are asked to affirm these core beliefs because  
8 they represent FCA and its affiliated FCA Chapters by leading prayer, worship, and religious teaching.  
9 Lopez Decl. ¶¶ 15-16. Leaders agree to “conduct themselves in a manner that affirms biblical standards  
10 of conduct in accordance with FCA’s Christian beliefs.” *Id.* ¶ 19. All student applicants who sincerely  
11 affirm FCA’s Statement of Faith and standards of conduct are eligible for leadership. *Id.* ¶ 21. No student  
12 at any District high school has ever complained that he or she wanted to hold a leadership role but was  
13 ineligible due to FCA’s leadership requirements. Lopez Decl. ¶ 28; Mayhew Tr. 203:15-23. Students  
14 selected for leadership roles receive training from FCA to prepare them for ministry. Lopez Decl. ¶ 17.

15 ***The District’s Student Group Forum.*** Since the early 2000s, FCA chapters have participated in the  
16 District’s program for recognized student organizations, known as the Associated Student Body (ASB)  
17 program. Lopez Decl. ¶¶ 5, 24. This program provides a forum for student groups to organize around  
18 “their own personal interests.” 30(b)(6) Tr. 63:23-64:1; Mayhew Tr. 35:20-36:4 (“similar interests”).  
19 Through the ASB program, the District has formally recognized hundreds of student groups with diverse  
20 viewpoints. For instance, during the 2019-20 school year, Pioneer recognized over 50 clubs, including  
21 Bachelor Nation; Chess Club; Gay-Straight Alliance (“GSA”); Communism Club; Harry Potter Club;  
22 Interact Club; Key Club; Latinx Club; Persian Club; Politics Club; and The Satanic Temple Club.  
23 30(b)(6) Tr., Ex. 99. District schools also give ASB accounts to athletic teams. Mayhew Tr. 73:9-10.

24 Club applications are submitted to the ASB for approval, but school officials have the “final say.”  
25 Espiritu Tr. 76:21-23; Mayhew Tr. 192:2-14. Students value ASB approval for their club because it  
26 marks the club as a full member of the school community that can take part in an important aspect of  
27 student life. 30(b)(6) Tr. 34:18-21 (“[S]tudents appreciate ... being recognized as an official club in their  
28 community, ... appearing in the yearbook, holding fundraisers and supporting the things that the club

1 finds of value.”); *id.* at 63:20-64:1. Further, only ASB-approved clubs are (1) included on their school’s  
2 official print and online club lists, an important recruiting tool; (2) featured in the yearbook, another key  
3 recruiting tool; (3) provided ASB accounts, where they can deposit and withdraw funds; (4) given access  
4 to ASB funding; (5) permitted to conduct ASB-approved fundraisers both on and off campus;  
5 (6) allowed to have an official campus advisor; and (7) given priority access to meeting space. *Id.* at  
6 34:8-35:15, 81:21-82:15; Espiritu Tr., Ex. 52 at 10-11; Mayhew Tr. 46:10-17, 147:9-149:3.

7 Student groups lacking ASB approval do not have access to these significant benefits. Mayhew Tr.  
8 51:7-16, 55:12-14; Espiritu Tr. 87:12-14, 130:18-131:6, 132:8-11; 30(b)(6) Tr. 65:2-14; *see also*  
9 Espiritu Tr., Ex. 52 at 11. Unapproved groups also have more difficulty hosting events, procuring  
10 meeting space, and communicating with school administrators. 30(b)(6) Tr. 81:10-82:15.

11 ***The District’s Application of Its Non-discrimination Policies.*** At the start of every school year,  
12 prospective student clubs must submit a draft application and constitution for ASB approval. Mayhew  
13 Tr. 21:1-21. The school’s activities director reviews the materials for compliance with District policies,  
14 including policies against discrimination on the basis of criteria such as race, sex, sexual orientation,  
15 and religion. *See* Espirtu Decl. Ex. 42, Ex. 43. Once a club is approved, schools do not monitor or  
16 enforce compliance with District policies absent a student complaint, even if a group’s name or purpose  
17 indicates it might violate the non-discrimination policy. Espiritu Tr. 145:17-146:3; Mayhew Tr. 101:21-  
18 102:11; 30(b)(6) Tr. 150:25-151:1, 155:9-19. During the initial review process, District officials  
19 sometimes dig deeper into applications if they deem them “controversial” or if “someone rais[es] a  
20 question on the inclusiveness of the club.” Espiritu Tr. 83:3, 84:25-85:18; 135:22-24. For example,  
21 Principal Espiritu thought that a student group named “Make America Great Again” was too  
22 controversial and requested that the group withdraw its application. *Id.* at 137:6-15. But he approved  
23 “The Satanic Temple Club” in 2019 after viewing its “national charter website.” Espiritu Tr. 84:15-20.

24 Through this process, the District has approved numerous student group applications that discriminate  
25 on one or more of the criteria listed in its non-discrimination policy. For example, many clubs—such as  
26 the Big Sister/Little Sister club, the Girls Circle club, and the “all-female” Simone Club—have been  
27 allowed to select members and leaders based on sex. Mayhew Tr. 80:24-81:23, 154:15-22 (identifying  
28 clubs and testifying that all-female clubs help girls feel comfortable and that she granted approval

1 because no one complained); Blomberg Decl., Ex. U, Ex. V, Ex. GG.

2 ***The District Revokes FCA's Recognition.*** In April 2019, Pioneer teacher Peter Glasser was provided  
3 what he assumed to be a statement of FCA's religious beliefs. Without talking to FCA or its student  
4 leaders—two of whom, including Plaintiff Charlotte Klarke, were his students—Glasser posted the  
5 statement on his classroom whiteboard and highlighted language on FCA's "moral stances" regarding  
6 marriage and sexuality that he found "objectionable." Blomberg Decl., Ex. O. He added a message on  
7 the board to his students, stating: "I am deeply saddened that a club on Pioneer's campus asks its  
8 members to affirm these statements. How do you feel?" Blomberg Decl., Ex. HH. Glasser did this to  
9 express that the "FCA organization's views" of "sin" and "the way God created the universe" were an  
10 injury to "the rights of others in my community." Blomberg Decl., Ex. FF. Glasser further wanted to  
11 stop what he considered an "implicit message that Pioneer as an institution approves of [FCA's] values"  
12 by allowing it "to recruit at Club Rush Day, to have a photo in the yearbook, or to use [Pioneer facilities]  
13 for a guest speaker at lunch." *Id.*

14 To that end, on April 22, 2019, Glasser sent the Statement of Faith to Principal Espiritu, admitting  
15 that he didn't "really know anything about the club or [the beliefs]," but that a student was "very upset"  
16 about what FCA "requires of its members." Espiritu Tr., Ex. 60. A week later, on April 29, he sent a  
17 lengthy email to Espiritu arguing that "FCA's views need to be barred from a public high school  
18 campus," that "attacking these views is the only way to make a better campus," and describing FCA's  
19 student leaders as "collateral damage." Blomberg Decl., Ex. Q. He further urged that "there's only one  
20 thing to say that will protect our students who are so victimized by religious views that discriminate  
21 against them: I am an adult on your campus, and these views are bullshit to me" and "have no validity"  
22 and that holding them cannot be justified by "religious freedom." *Id.* Other Pioneer teachers expressed  
23 their strong opposition to FCA's beliefs, and Espiritu stated that the "fact that [FCA's beliefs] existed"  
24 was in his mind "enough" to derecognize FCA. Espiritu Tr. 200:6-201:2.<sup>1</sup>

25  
26 <sup>1</sup> Blomberg Decl., Ex. M (GSA advisor Chanel Sulc saying FCA's beliefs "automatically condemn all  
27 queer ... students" and calling protests against FCA an "act of love"); *id.*, Ex. K (Satanic Temple Club  
28 advisor Michelle Bowman calling "evangelicals, like FCA ... charlatans" who "choose darkness over  
knowledge"); *id.*, Ex. I (newspaper advisor Jason Goldman-Hall calling his student reporter an "idiot")

1 The next day, Espiritu and Mayhew attended a school leadership committee—the “Climate  
2 Committee”—to discuss what to do about the “FCA club on campus.” Mayhew Tr., Ex. 70 at 4. Espiritu  
3 said that FCA’s views “go[] against core values of [Pioneer]” of “open-mindedness” and being  
4 “inclusive” and that the committee should “take a united stance” against FCA. *Id.* The committee, which  
5 included Peter Glasser and Michelle Bowman, agreed. *Id.* Espiritu contacted District officials and they  
6 collectively decided to derecognize Pioneer FCA. Espiritu Tr. 33:14-34:17; 110:4-13.

7 On May 2, 2019, just 10 days after Glasser’s original actions against FCA, Espiritu informed  
8 Charlotte and Elizabeth of the District’s decision to immediately strip Pioneer FCA of ASB approval.  
9 McMahon Tr., Ex. 11. Espiritu told the school community that “the Climate Committee and District  
10 officials” had made the decision to “no longer be affiliated with” FCA because Pioneer “disagree[d]  
11 with” FCA’s beliefs and saw them as being “of a discriminatory nature.” Espiritu Tr., Ex. 48. Their  
12 decision was made without consulting FCA or its student leaders, and was based in part on the District’s  
13 mistaken understanding that affirming FCA’s Statement of Faith was required of members (not just  
14 leaders) and automatically banned LGBTQ students from leadership (it did not). McMahon Tr. 105:19-  
15 106:21. This was the first time a Pioneer club had lost ASB approval, Mayhew Tr. 26:4-8, and the first  
16 time any decision to revoke ASB approval had reached the District level, 30(b)(6) Tr. 37:7-10.

17 On the same day District officials revoked Pioneer FCA’s ASB approval, they shunted the group into  
18 a made-for-FCA category of student groups called “student interest groups,” a category that had not  
19 previously existed at Pioneer. Mayhew Tr. 148:2-149:3. Student interest groups are not ASB approved  
20 and lack all accompanying benefits, but are still permitted to meet on campus. Espiritu Tr., Ex. 52 at 11.  
21 Thus, “[as] a consequence of that derecognition,” FCA was “no longer allowed to have an ASB account  
22 or fundraise on campus,” they were not listed in the yearbook, they were not eligible to be included on  
23 the lists of approved clubs, they lost priority access to room usage, and they could not receive support  
24 from the ASB clerk. 30(b)(6) Tr. 100:8-16; 34:12-21; Espiritu Tr., Ex. 52. Espiritu testified that he  
25 treated FCA the same way he would have treated a KKK club: he was obligated to let them meet on  
26 campus, but he withheld ASB approval. Espiritu Tr. 97:14-25.

27 \_\_\_\_\_  
28 for “feel[ing] bad” for FCA); Espiritu Tr., Ex. 48 (GSA advisor Danni McConnell calling FCA’s beliefs a “hurtful message and problem”).

1 For the same reasons, the District also derecognized the FCA chapters at Leland and Willow Glen.  
2 Espiritu Tr., Ex. 52 at 13; Espiritu Tr. 44: 12-14; 195:12-19; 261:8-17. Following derecognition, both  
3 the Leland and Willow Glen FCA chapters dissolved completely. Lopez Decl. ¶¶ 26-27.

4 Pioneer FCA was again denied recognition a few months later, at the same time that Pioneer granted  
5 recognition to a Satanic Temple Club chapter formed to “openly mock” FCA’s beliefs. Blomberg Decl.,  
6 Ex. EE, Espiritu Tr., Ex. 50, Ex. 68. When Pioneer FCA tried in Fall 2020 to meet as a “student interest  
7 group,” students from GSA and The Satanic Temple Club coordinated protests of FCA’s meetings.  
8 Blomberg Decl., Ex. CC; Espiritu Tr., Ex. 66 (“LGBTQ student group plans to protest Christian student  
9 group[.]”); Blomberg Decl., Ex. W. Despite FCA parents repeatedly raising concerns regarding their  
10 childrens’ safety because of the protests (Espiritu Tr., Ex. 63, 65), Principal Espiritu did nothing to  
11 protect FCA students from bullying or harassment. Espiritu Tr. 247:1-248:3; 255:5-20; 257:3-20. On  
12 October 23, 2019, over a dozen students loudly protested directly outside of Pioneer FCA’s meeting,  
13 carrying signs disparaging FCA’s religious beliefs as “HATRED.” See Blomberg Decl., Ex. S. Students  
14 from the school newspaper—known to be hostile to FCA’s religious beliefs, Espiritu Tr., Ex. 63—  
15 entered the FCA meeting and took hundreds of pictures of FCA students, standing within feet or inches  
16 of them, intimidating the FCA students. McMahon Tr., Ex. 93; Blomberg Decl., Ex. H.

17 Due to the COVID-19 pandemic, student club activities dwindled in Spring 2020, and clubs across  
18 the District did not meet in person until April 2021. Espiritu Tr., Ex. 52 at 11-14, Ex. 57. In light of  
19 COVID, for the 2020-21 school year, Pioneer granted conditional approval to all student clubs, including  
20 Pioneer FCA, although it did not give these groups full ASB benefits. Mayhew Tr. 176:7-177:1.

21 ***The District’s Purported “All-Comers” Policy.*** In February 2021—and admittedly in response to  
22 this litigation—the District altered the non-discrimination requirements for ASB-approved student  
23 clubs. 30(b)(6) Tr. 175:16-176:10. The District describes its latest requirements as implementing an “All  
24 Comers Policy,” thus requiring “ASB recognized student groups to permit any student to become a  
25 member or leader.” Espiritu Tr., Ex. 57. For the upcoming school year, the District has mandated “that  
26 clubs that seek or wish to maintain official ASB recognition” sign an “Affirmation statement,” which  
27 states that they “affirm” that “any currently enrolled student at the school [may] participate in, become  
28 a member of, and seek or hold leadership positions in the organization.” *Id.* The District’s stated purpose

1 with this new All Comers Policy (“Policy”) is to “help shape student leadership” and ensure “all of our  
2 campus communities” are “welcoming to all students.” *Id.*; *see also* Espiritu Tr. 63:5-7 (under the Policy,  
3 “if you’re going to form a club here at school, it has to be free to all”); McMahon Tr. 207:4-11 (Policy  
4 requires that “whatever the club does, all students are welcome to participate in it, whether that’s  
5 membership, leadership, activities, [or] fundraisers”). But the Policy is “all-comers” in name only. It  
6 allows exemptions permitting a variety of “campus communities,” including ASB-approved clubs and  
7 District programs, to restrict participation, membership, and leadership to far fewer than “all” students.

8 *First*, the Policy permits ASB-approved clubs to exclude students from membership or leadership  
9 based on secular exemptions that are important to the health of the group, including “regular attendance  
10 at group meetings, participation in group events, participation in the group for a minimum period of  
11 time, or participation in orientation or training activities.” Espiritu Tr., Ex. 57; 30(b)(6) Tr. 211:15-22.

12 *Second*, the Policy explicitly permits ASB-approved clubs to exclude students based on so-called  
13 “non-discriminatory criteria.” The District does not know or define what qualifies as “non-  
14 discriminatory,” leaving enforcement to the “common sense” discretion of each District school. 30(b)(6)  
15 Tr. 212:6-213:4-10; Mayhew Tr. 139:8-13, 186:22-25. No training has been conducted on how to apply  
16 the Policy, nor is there “any written district guidance or policy that would inform that process and  
17 decision-making” outside the “general expectations of [the District’s underlying] nondiscrimination  
18 policies.” 30(b)(6) Tr. 235:20-24. These exemptions for allegedly “non-discriminatory” criteria are  
19 permitted in part because student leaders are “essential” to “the direction and tenor” of the club, 30(b)(6)  
20 Tr. 72:20-73:5; 73:5-6, and “should represent the club’s purpose” and its “viewpoints,” McMahon Tr.  
21 121:2-6; Mayhew Tr. 41:4-42:42:11. Because “leadership is important” for groups to advance their  
22 intended purpose, “agreed upon leadership criteria that ... [don’t] discriminate amongst the members”  
23 are permissible. 30(b)(6) Tr. 210:18-24; *see also* Blomberg Decl., Ex. A (BP 6145) (“[p]rerequisites”  
24 for participation must be tailored to what is “essential to the success of the activity”).

25 Certain criteria have been pre-approved as “non-discriminatory.” These include not only age, GPA,  
26 and enrolled student status, but also good character. 30(b)(6) Tr. 211:23-212:5; Mayhew Tr. 69:15-19;  
27 139:25-140:3, 157:7-11; Espiritu Tr. 145:3-8. Similarly, an “ultimate Frisbee club” can select based on  
28 “athletic competency,” 30(b)(6) Tr. 214:23-215:4, and a choral club can “select its members on the basis

1 of their singing ability,” Mayhew Tr. 150:1-4.

2 But because their discretion to determine which criteria are deemed “non-discriminatory” is so  
3 indeterminate, District staff are often unsure of what qualifies. For instance, District officials were  
4 unsure if clubs could exclude leadership candidates who did not agree with the District’s non-  
5 discrimination policy itself. McMahon Tr. 128:8-21. And while Espiritu thought Big Sister/Little Sister  
6 might still be approved because no one had “asked” whether boys could join, Espiritu Tr. 134:14-24,  
7 the District testified that the club “likely violates” the Policy as “[b]oys would be prevented from being  
8 a part of the club,” 30(b)(6) Tr. 141:16-21. Furthermore, as this latter example demonstrates, Policy  
9 enforcement remains complaint-driven, meaning that even if the scope of the “non-discriminatory”  
10 exemption were clarified, school principals would likely only enforce the Policy after receiving a  
11 complaint. *See* Espiritu Tr. 145:9-16 (he would not correct a known Policy violation absent a complaint).

12 *Third*, the District allows groups to have a discriminatory *purpose*, so long as that purpose does not  
13 explicitly exclude students from leadership. The District will approve student groups with “whatever”  
14 purpose students “think will help support them and their needs moving forward”—including the Black  
15 Student Union, GSA, Latinos Unidos (whose purpose is “to bring issues raised by Latinx students to the  
16 fore”), and Girls Who Code (to “increase women in the sciences”). 30(b)(6) Tr. 126:24-127:3, 129:5-9,  
17 139:5-13, 148:5-24; Mayhew Tr., Ex. 72. ASB-approved groups thus may focus on supporting and  
18 advancing the interests of one protected class to the exclusion of all others. 30(b)(6) Tr. 237:3-17;  
19 Mayhew Tr. 62:21-63:6; 96:3-97:24; 98:25-99:5.

20 *Fourth*, the Policy effectively exempts student athletic teams because the District deems them to be  
21 “under a different umbrella within our school system,” even though they have ASB accounts. Espiritu  
22 Tr. 151:17-152:7. This exemption allows District schools to have single-gender athletic teams that  
23 exclude male-identifying or female-identifying students. Mayhew Tr., Ex. 85; Blomberg Decl., Ex. DD  
24 at ¶ 24. Athletic teams are also permitted to hold tryouts and cut students based on criteria such as  
25 athletic ability, skill, or even height and weight. Espiritu Tr. 179:6-180:21; Mayhew Tr. 116:17-118:16.

26 *Fifth*, the Policy is subject to other District Board Policies that provide additional exemptions. One  
27 example is Board Policy 5145.3 (Espiritu Tr., Ex. 43), which allows choral and cheerleading groups to  
28 select members based on “objective competencies” such as “competitive skill,” “singing ability” (for

1 chorus), and athletic ability (for cheer). Mayhew Tr. 114:19-22, 149:22-150:3; Espiritu Tr. 175:2-9.  
2 This, among other things, allows a cheer group to make selection decisions based on whether a student  
3 identified as male or female. Espiritu Tr. 174:14-22; Mayhew Tr. 113:6-11, 117:15-20.

4 *Sixth*, the District itself does not follow the Policy. The District admits it does not consider itself  
5 bound to offer its own programs equally to “all students” in the “campus communities.” Espiritu Tr.,  
6 Ex. 57. Further, the District’s own programs exclude students and employees on a variety of bases  
7 otherwise prohibited by the Policy and the District’s non-discrimination policies. For example, the  
8 Latino Male Mentoring Group at Pioneer is a program where male Latino seniors mentor male Latino  
9 freshmen, which was publicly praised by Espiritu in February 2020 as a means to set up “ninth-grade  
10 Latino male students ... for success” in high school and college. 30(b)(6) Tr., Ex. 103 at 4; *id.* at 114:1-  
11 3; 117:7-120:20; 201:13-202:2. Likewise, the Male Summit Conference is another District program for  
12 “[o]nly males,” intended to encourage graduation and higher education for boys. 30(b)(6) Tr., Ex. 104;  
13 *id.* at 119:18-120:14. The District also permits gender or gender-identity segregation in the classroom  
14 during “class discussions” or for “sexual education.” 30(b)(6) Tr. 207:3-209:13; Espiritu Tr., Ex. 43.  
15 And the District has long permitted sex-segregated student events and celebrations, such as Leland’s  
16 “Mr. GQ” contest (the school’s “annual male pageant show[s]”), Pioneer’s similar “Mr. Mustang”  
17 contest, and “Mustang Madness” games during school-spirit-week that segregate boys and girls for  
18 competitions. Blomberg Decl., Ex. Z, AA, BB; 30(b)(6) Tr., Ex. 103 at 8; Espiritu Tr., Ex. 48 at 1. In  
19 employment, the District discriminates based on race to achieve sufficient “educators of color” and to  
20 “accurately reflect our student community demographically.” 30(b)(6) Tr. 105:16-24; *accord* Blomberg  
21 Decl., Ex. A (AR 0210(7)). Other District programs and policies also discriminate on the basis of  
22 pregnancy or parental status (Blomberg Decl., Ex. A (BP 5146); 30(b)(6) Tr. 201:5-11), sex (Blomberg  
23 Decl., Ex. A (BP 4033)), and immigration status (Blomberg Decl., Ex. A (BP 4111.2)).

24 ***The 2021-22 School Year.*** In the upcoming academic year, the District will require compliance with  
25 the new Policy, explicitly motivated by “the controversy at Pioneer” and the “frustration” “that w[as]  
26 expressed” regarding the Pioneer FCA club. 30(b)(6) Tr. 79:4-5. Before a group can be ASB-approved,  
27 the District will mandate that all student club leaders “affirm” that they will “permit any student to  
28 become a member or leader.” Espiritu Tr., Ex. 57.

1 FCA clubs will not be eligible for ASB approval under the Policy because, in the District’s view, they  
 2 discriminate on the basis of religion and sexual orientation. 30(b)(6) Tr. 252:18-253:3; McMahon Tr.  
 3 110:13-21, Mayhew Tr. 202:21-203:9. Principal Espiritu, who has the “final say” on approving student  
 4 clubs at Pioneer, confirmed that under the new Policy, FCA clubs with the “same leadership  
 5 requirements” as at the time of derecognition are ineligible for recognition. Espiritu Tr. 64:3-5; 192:5-  
 6 14; *see* 30(b)(6) Tr. 223:13-224:10-14; 232:14-17 (same); Blomberg Decl., Ex. DD at ¶ 18, 19, 20.  
 7 FCA’s leadership applications remain unchanged. Lopez Decl. ¶ 18.

8 No other District student group has been subjected to the level of scrutiny and open hostility  
 9 experienced by Pioneer FCA. Mayhew Tr. 179:24-180:4; 26:4-13 (only FCA has ever had its ASB  
 10 approval revoked at Pioneer); *id.* at 180:2-4 (unaware of protests against any other Pioneer student  
 11 group); 30(b)(6) Tr. 37:7-10 (only FCA has ever had its ASB status reviewed at the District level);  
 12 Blomberg Decl., Ex. DD at ¶¶ 22, 33 (“In the past 5 years, the Pioneer Student FCA Chapter is the only  
 13 student group at Pioneer that had its ASB approval revoked.”). The District has taken no action to  
 14 prevent future discriminatory treatment or harassment of FCA students. 30(b)(6) Tr. 60:15-61:12.  
 15 Indeed, Glasser told Espiritu he “would do the same all over again” and that he was “morally and  
 16 professionally bound” to take those actions against FCA. Blomberg Decl., Ex. B.

### 17 **ARGUMENT AND LEGAL STANDARD**

18 A preliminary injunction is appropriate when a plaintiff shows (1) likelihood of success on the merits,  
 19 (2) likelihood of irreparable harm absent relief, (3) the equities favor relief, and (4) relief is in the public  
 20 interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). If “the balance of hardships  
 21 tips sharply in the plaintiff’s favor,” the plaintiff need show only “serious questions going to the merits.”  
 22 *Id.* at 1134-35. Here, all four factors favor relief.

#### 23 **I. The District’s Refusal to Recognize FCA Violates the Equal Access Act.**

24 Under the EAA, a public secondary school that has created a “limited open forum” is prohibited from  
 25 discriminating against students who wish to conduct a meeting within that forum on the basis of the  
 26 “religious, political, philosophical, or other content of the speech at such meetings.” 20 U.S.C. § 4071(a).  
 27 A “limited open forum” is created whenever a public secondary school “grants an offering to or  
 28 opportunity for one or more noncurriculum related student groups to meet on school premises during

1 noninstructional time.” *Id.* § 4071(b). *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990) (once “one  
2 ‘noncurriculum related student group’” is allowed “to meet, the Act’s obligations are triggered”).<sup>2</sup>

3 While originating to protect religious student clubs, the EAA has ensured equal access for *all* student  
4 groups—religious and non-religious. In his *Mergens* concurrence, Justice Kennedy explained that “one  
5 of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character  
6 might have access to the student life of high schools that in the past have given official recognition only  
7 to clubs of a more conventional kind.” *Id.* at 259; *see also Colin ex rel. Colin v. Orange Unified Sch.*  
8 *Dist.*, 83 F. Supp. 2d 1135, 1142 (C.D. Cal. 2000) (EAA protects the right of gay students to form a club  
9 on campus); *Straights & Gays for Equal. v. Osseo Area Schs.-Dist.*, 471 F.3d 908, 909 (8th Cir. 2006)  
10 (same); *Gonzalez v. Sch. Bd. of Okeechobee Cty.*, 571 F. Supp. 2d 1257, 1270 (S.D. Fla. 2008) (same).

11 **A. The EAA applies to the District.**

12 The EAA applies to all “public secondary school[s] that receive[ ] federal funding” and that have  
13 established a “limited open forum” by allowing at least one “non-curriculum” group to meet on school  
14 premises. *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002). These criteria are met here.

15 There is no dispute that the District’s schools are public secondary schools that receive federal funding.  
16 Espiritu Tr. 91:24-92:2; Blomberg Decl., Ex. X at 13, Ex. DD at ¶¶ 7-10. Nor is there any dispute that  
17 the District allows at least one other “noncurriculum related student group” to meet during  
18 “noninstructional time” on its school campuses. 20 U.S.C. § 4071(b). District officials agree that many  
19 of the District’s ASB approved groups are noncurricular groups. Courts have found that “chess club, a  
20 stamp collecting club, or a community service club,” *Mergens*, 496 U.S. at 240, as well as a “Key Club,”  
21 “Red Cross Club,” “Gay-Straight Alliance,” and “National Honor Society” are all noncurricular student  
22 groups. *See Garnett ex rel. Smith v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 643 (9th Cir. 1993); *Truth*  
23 *v. Kent Sch. Dist.*, 542 F.3d 634, 640 (9th Cir. 2008), *overruled on other grounds by L.A. Cnty. v.*  
24 *Humphries*, 562 U.S. 29 (2010); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291,  
25 1293 (C.D. Cal. 2008). District schools—including Pioneer, Leland, and Willow Glen—provide ASB  
26

27 <sup>2</sup> Unlike a limited *public* forum under the First Amendment, the EAA’s statutorily created limited *open*  
28 forum is, as the Supreme Court has explained, an “artificial construct.” *Mergens*, 496 U.S. at 242. Hence,  
limited *public* forum analysis does not apply to the EAA’s statutory framework. *Id.*

1 approval to such groups, including Key Clubs, National Honors Society clubs, GSA clubs, and Red  
 2 Cross Clubs. *See, e.g.*, Leland Key Club (Blomberg Decl., Ex. D); Willow Glen Key Club (Blomberg  
 3 Decl., Ex. F); Pioneer Red Cross Club (Blomberg Decl., Ex. N); Blomberg Decl., Ex. DD at ¶¶ 11-13;  
 4 30(b)(6) Tr., Ex. 99 (Pioneer ASB approved student clubs include Bachelor Nation, Chess Club, GSA,  
 5 Harry Potter Club, and The Satanic Temple Club); 30(b)(6) Tr., Ex. 101 (Leland ASB approved student  
 6 clubs include Chess Club, GSA, and Interact Club).

7 Finally, the District’s ASB-approved noncurricular clubs (including the FCA clubs) meet during  
 8 “noninstructional time.” *Espiritu Tr.* 67:5-68:4; 97:24-25; (lunch and S-period are noninstructional  
 9 time); *Mayhew Tr.* 39:20-40:6 (same). *See also* 2019-2020 Pioneer Club List (*Espiritu Tr.*, Ex. 45);  
 10 Leland Club List (Blomberg Decl., Ex. E) (showing clubs meeting during noninstructional times).

11 Thus, the district has created a limited open forum. *See Mergens*, 496 U.S. at 239; *also Garnett*, 987  
 12 F.2d at 645 (same); Blomberg Decl., Ex. DD at ¶¶ 14-16 (District schools “created a ‘limited open  
 13 forum’ as defined in 20 U.S.C. § 4071(b).”).

14 **B. The District’s refusal to recognize FCA because of its speech violates the EAA.**

15 Under the EAA, if a public school creates a limited open forum, it must provide religious student  
 16 groups “equal access” to that forum. 20 U.S.C. § 4071(a). “[T]he guarantee of equal access means that  
 17 religiously oriented student activities of an extracurricular nature would be allowed under the same terms  
 18 and conditions as other extracurricular activities.” *Prince*, 303 F.3d at 1080. If a school provides a slate  
 19 of benefits to ASB-approved student clubs, but denies those same benefits to religious student groups,  
 20 it has violated the EAA. *Id.* at 1084-86 (providing examples of “access to ASB funding, including  
 21 participation in the craft fair, school auction, and fund-raising during the school day”; “free appearance  
 22 in yearbook”; and “use of ... school bulletin boards”). In short, “[t]he Act is about *equal* access.”  
 23 *Ceniceros v. Bd. of Trustees*, 106 F.3d 878, 881 (9th Cir. 1997); *Garnett*, 987 F.2d at 646 (“The students  
 24 have a right under the EAA to meet ... on the same basis as other noncurriculum related clubs.”).

25 Defendants deliberately denied FCA groups access to the benefits available to ASB-approved clubs.  
 26 *Supra* 6-7, 11. Among other benefits, ASB-approved groups were permitted to have ASB accounts and  
 27 to access special ASB funding; were featured in the yearbook; and were listed on Pioneer’s website as  
 28 an approved student club. *Id.* When the District revoked FCA’s ASB approval, these benefits were lost.

1 *Supra* 3-4, 6; Mayhew Tr. 142:5-14; 171:10-13. For the 2021-22 academic year, the District will again  
2 deny student FCA access to the same benefits as ASB-approved student groups. *Supra* 11.

3 The District's denial of equal access is based on the content of FCA's speech. *See Truth*, 542 F.3d at  
4 645. As the Supreme Court has explained, the identity of the messenger affects the content of the  
5 message. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 680 (2010) ("Who speaks" on behalf of a  
6 group "colors what concept is conveyed."). This is especially true for religious groups, as "the content  
7 and credibility of a religion's message depend vitally on the character and conduct of its teachers."  
8 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200-01 (2012) (Alito, J.,  
9 joined by Kagan, J., concurring); *id.* at 201 (describing a group's leaders as the "embodiment of its  
10 message"). And it is certainly true for student FCA chapters. "FCA's student leaders are the primary  
11 embodiment of FCA's faith and Christian message to the campuses where they serve, and their ministry  
12 determines the content of the FCA student groups' message." Lopez Decl. ¶ 15 Indeed, the "core  
13 function" of FCA's student leaders "is to express, message, and model FCA's faith." *Id.* For student  
14 leaders to "attempt to express [FCA's] faith without personally accepting it would compromise" the  
15 group's "mission" and "its message." *Id.*

16 Leadership selection affects the content of a religious group's speech and is therefore protected by  
17 the EAA. *See Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 858 (2d Cir. 1996) ("[W]e  
18 conclude that the decision to allow only Christians to be President, Vice-President, or Music Coordinator  
19 is calculated to make a certain type of speech possible, and will affect the 'religious ... content of the  
20 speech at [the] meetings,' within the meaning of the Equal Access Act."). Likewise the Ninth Circuit in  
21 *Truth* confirmed the connection between leadership selection and the content of a group's speech. 542  
22 F.3d at 647 (quoting *Hsu*, 85 F.3d at 858) (confirming consistency with *Hsu* and noting that, by contrast  
23 to leadership selection, "it is difficult to understand how allowing non-Christians to attend the  
24 meetings ... would change the Club's speech").

25 In addition to restricting FCA's leadership selection, the District is discriminating directly against the  
26 content of FCA's religious message. *Colin*, 83 F. Supp. 2d at 1148-49; *Prince*, 303 F.3d at 1087 (public  
27 schools "may not discriminate among student groups based on the religious content of the expression or  
28 proposed meeting."). In *Colin*, the Court found that evidence of defendants' discriminatory conduct

1 toward the Gay-Straight Alliance constituted content-based discrimination under the EAA. 83 F. Supp.  
 2 2d at 1148-49 (laying out evidence of inflammatory statements, targeted changes in Board policy, and  
 3 extended review of GSA club’s application as evidence of content discrimination).

4 Here too, the record confirms that Defendants opposed and continue to oppose FCA’s presence on  
 5 District campuses because of the perceived message conveyed by FCA’s religious beliefs. *Supra* 5-7,  
 6 11. As explained in detail below, Defendants made inflammatory statements about the content of FCA’s  
 7 message, singled out FCA’s message for official disapproval, and adopted a gerrymandered scheme at  
 8 Pioneer to exclude Pioneer FCA from ASB approval. *Infra* 16-19. Defendants have repeatedly justified  
 9 their actions by reference to the content of FCA’s religious beliefs. *E.g.*, Mayhew Tr. 166:7-14; Espiritu  
 10 Tr. 42:3-6; 30(b)(6) Tr. 229:21-231:3; Espiritu Tr., Ex. 48; *supra* 5-7. Defendants’ actions exclude FCA  
 11 from District campuses on the basis of the “content of” FCA’s speech, independently satisfying this  
 12 requirement of the EAA. 20 U.S.C. § 4071(a). Thus, the EAA requires granting injunctive relief.

## 13 **II. The District’s Refusal to Recognize FCA Violates the Free Exercise Clause.**

14 The District’s refusal to restore recognition to FCA also violates the Free Exercise Clause, which  
 15 “protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws”  
 16 that disfavor religion. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017). To  
 17 avoid strict scrutiny, laws burdening religious practice “must” be both generally applicable and neutral.  
 18 *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993).

### 19 **A. The Policy and its enforcement are not generally applicable.**

20 A law is not generally applicable if it “prohibits religious conduct while permitting secular conduct  
 21 that undermines the government’s asserted interests in a similar way.” *Fulton v. City of Philadelphia*,  
 22 141 S. Ct. 1868, 1877 (2021). The Policy purports to require ASB-approved clubs to open leadership  
 23 and membership to “any currently enrolled student.” Espiritu Tr., Ex. 57 at 3. The District’s stated  
 24 purpose is to ensure that “all of our campus communities” are open “to all students.” *Id.* at 2; McMahon  
 25 Tr. 207:4-11 (Policy requires that “whatever the club does, all students are welcome to participate in it,  
 26 whether that’s membership, leadership, activities, [or] fundraisers”); 30(b)(6) Tr. 195:1-3 (Policy “goal  
 27 [is] ensuring equal access for all students in all programs”). But the District in practice violates this  
 28 purported “All Comers” Policy in several important ways such that the Policy is not generally applicable.

1        *First*, the District allows student clubs and District programs to exclude students from leadership *and*  
2 membership on the basis of criteria (like club attendance and participation, athletic and choral ability,  
3 and competitive skill) that the District acknowledges are important to the success of these clubs and  
4 programs. *See* *Espiritu Tr.*, Ex. 57 at 3 (permitting restrictions based on “regular attendance”); *id.* at Ex.  
5 43 (BP 5145.3, incorporated into the Policy by reference) (“Eligibility for choral and cheerleading  
6 groups shall be determined solely on the basis of objective competencies.”). At the same time, however,  
7 the District prevents religious groups from requiring that their leaders agree with the groups’ religious  
8 beliefs—arguably the *most* important criteria necessary for the success of a religious student group.

9        Similarly, the District has favored certain secular criteria important to the success of student clubs  
10 and District programs—like competitive skill and singing ability—over comparable criteria necessary  
11 for the success of religious clubs. These criteria are comparable because they both undermine the  
12 District’s stated purpose in enacting an “All Comers” Policy: to ensure equal, undifferentiated access to  
13 student clubs and District programs to all students. *Supra* 7-8; *Tandon v. Newsom*, 141 S. Ct. 1294, 1296  
14 (2021) (“[W]hether two activities are comparable for purposes of the Free Exercise Clause must be  
15 judged against the asserted government interest that justifies the regulation at issue.”). This disparate  
16 treatment triggers strict scrutiny. *Id.* (strict scrutiny applies “whenever [regulations] treat *any*  
17 comparable secular activity more favorably than religious exercise”).

18        *Second*, the Policy is not generally applicable because it gives District officials discretion to allow  
19 any club to exclude members and leaders on any basis the officials deem “non-discriminatory.” This  
20 undefined, discretionary exception violates the general applicability requirement in two ways. For one,  
21 it provides a mechanism for the principal of each District school to determine what criteria are  
22 considered “non-discriminatory” on a case-by-case basis. This system of individualized exemptions  
23 confirms that the Policy is not generally applicable. *See Fulton*, 141 U.S. at 1877 (“A law is not generally  
24 applicable if it ... provide[s] a mechanism for individualized exemptions.”) (cleaned up); *InterVarsity*  
25 *Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 981 (S.D. Iowa 2019) (“individualized  
26 exemptions” show lack of general applicability).

27        For another, each criterion the District *has* already identified as falling under this “non-  
28 discriminatory” umbrella creates a secular categorical exemption that would detract from the Policy’s

1 stated goal of opening all clubs to “any currently enrolled student” as much as, if not more than, an  
2 exemption for FCA. *Espiritu Tr.*, Ex. 57 at 3 (allowing discrimination based on “regular attendance ... ,  
3 participation in group events ... [or] for a minimum period of time, or participation in orientation or  
4 training activities”). Indeed, exemptions such as that for the National Honor Society’s GPA standards  
5 exclude students from *membership* and prevent students from getting access to academic and scholarship  
6 benefits. *Espiritu Tr.* 163:2-9. By contrast, FCA only limits students from a few leadership positions that  
7 are solely concerned with religious functions, not academic or financial benefits. These categorical  
8 exemptions further show lack of general applicability. *See Tandon*, 141 S. Ct. at 1296; *see also Lukumi*,  
9 508 U.S. at 543 (law is not generally applicable when it “selective[ly]” exempts non-religious conduct).

10 *Third*, the District selectively enforces its Policy. The District employees charged with implementing  
11 the Policy confirmed that they will grant exemptions that allow ASB approval for girls-only clubs. *See*,  
12 *e.g.*, *Mayhew Tr.* 154:15-22 (Girls Who Code and Girls’ Circle will be able to “still limit their  
13 membership to students who identify as female” under the Policy in 2021-22). Numerous other student-  
14 driven groups and activities are also allowed to discriminate in violation of the Policy. *See, e.g.*, *Mayhew*  
15 *Tr.*, Ex. 85 (“The district may provide single-gender [athletics] teams where selection for teams is based  
16 on competitive skills.”); *Blomberg Decl.*, Ex. DD ¶ 24-28. And District-operated programs—governed  
17 by the same non-discrimination standards on which the Policy is based, *see Espiritu Tr.*, Ex. 57 (citing  
18 BP 0410 (*Espiritu Tr.*, Ex. 42), BP 5145.3 (*Espiritu Tr.*, Ex. 43), and BP 5145.9 (*Blomberg Decl.*, Ex.  
19 A))—are permitted to make distinctions and grant preferences based on race, sex, marital status, and  
20 parental status. *See, e.g.*, 30(b)(6) *Tr.* 112:9-16, 113:17-114:14 (explaining that the District “identif[ies]  
21 systemic issues” on the basis of, *inter alia*, race and gender, and tailors specific programs to address  
22 those specific racial and gendered groups); 126:7-9 (District programs to mentor Latino males); 135:10-  
23 21 (District programs specifically for students who are parents). These exemptions—made because  
24 District officials believe there are “good reasons” to have gender- or ethnic-specific clubs and  
25 programs—show the Policy is selectively enforced. While there *are* good reasons to allow selectivity  
26 for those clubs and programs to accomplish their purposes, refusing a similar accommodation for FCA  
27 to accomplish its religious purpose triggers strict scrutiny.

28 *Fourth*, the District doubles down on its selective enforcement of its Policy by relying on complaint-

1 driven enforcement to punish violations, despite knowing that this results in uneven application of the  
2 Policy. *See, e.g.*, Espiritu Tr. 145:3-146:3 (despite knowing a club’s membership policies violated the  
3 Policy, the principal would not derecognize the club unless a student complained first); Mayhew Tr.  
4 102:8-21 (activities director did not investigate clubs other than FCA for discriminatory membership  
5 criteria because no one complained); 30(b)(6) Tr. 66:32-67:10 (the District only gets involved in club  
6 recognition “if there’s a problem”). Wholly complaint-driven enforcement is itself another form of  
7 selective enforcement, as such systems are both arbitrary and likely to target unpopular or minority  
8 groups. *Ctr. for Bio-Ethical Reform v. L.A. Cnty. Sheriff Dept.*, 533 F.3d 780, 787-88 (9th Cir. 2008)  
9 (“students’ reactions to Plaintiffs’ message” cannot serve as the basis to restrict speech; unconstitutional  
10 to give discretion to “allow or disallow speech depending on the reaction of the audience”).

11 This system is arbitrary—and discretionary—because District administrators have to assess when and  
12 whether to enforce the policy in response to student or faculty comments or complaints. Here, as the  
13 District admitted, *no* student complained that he or she was denied an opportunity to lead FCA. Espiritu  
14 Tr. 191:13-21; 30(b)(6) Tr. 225:21-24. The complaint was against FCA’s religious beliefs as such.  
15 Complaint-driven enforcement also exacerbates the Policy’s discrimination because, as this case  
16 demonstrates, complaints are far more likely to be filed against unpopular or minority viewpoints.  
17 *Compare* Espiritu Tr. 140:6-7, 20-22 *with id.* at 145:14-22; *see also Tenaflly Eruv Ass’n, Inc. v. Borough*  
18 *of Tenaflly*, 309 F.3d 14, 151-154 (3d Cir. 2002) (finding unlawful selective enforcement when an  
19 ordinance was enforced against an Orthodox Jewish community in response to “vehement objections”  
20 from neighbors); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (striking down an  
21 ordinance that was enforced in response to the “negative attitude[s]” and “fear” of neighbors).

22 Numerous student clubs impose leadership (and *membership*) requirements that violate the Policy as  
23 much as or more than FCA’s leadership requirement. And that’s long been the case. But there have been  
24 no newspaper campaigns against Big Sisters/Little Sisters’ gender-identity discrimination; no weekly  
25 protests against the boys basketball team’s exclusion of female-identifying students; and no teacher  
26 ostracizing the National Honor Society club or using vulgarity to attack its membership requirements.  
27 This lack of complaints means that—under the District’s enforcement scheme—all those clubs will be  
28 recognized under the Policy for the 2021-22 school year. Not so for FCA.

1 The District continues to use its complaint-driven enforcement scheme to permit socially acceptable  
2 “discrimination” (such as having gender-segregated sports teams) while excluding FCA because some  
3 students and faculty find the group too controversial. This approach unconstitutionally “empower[s] a  
4 majority to silence dissidents” via a heckler’s veto. *Cohen v. California*, 403 U.S. 15, 21 (1971); *Ctr.*  
5 *for Bio-Ethical Reform*, 533 F.3d at 787-88 (complaint-driven enforcement is “heckler’s veto”); *Good*  
6 *News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (rejecting a “modified heckler’s veto” that  
7 targets religious speech). This form of discretionary exemptions separately triggers strict scrutiny.

8 **B. The Policy and its enforcement are not neutral.**

9 The “minimum requirement of neutrality is that a law not discriminate on its face.” *Lukumi*, 508 U.S.  
10 at 533. But mere “[f]acial neutrality” is not enough. *Id.* at 534. Rather, the Free Exercise Clause forbids  
11 “covert suppression” of religion and “subtle departures from neutrality”; government hostility that is  
12 “masked” as well as “overt.” *Id.* “[E]ven slight suspicion” that state action against religious conduct  
13 “stem[s] from animosity to religion or distrust of its practices” is enough to require government officials  
14 to reconsider. *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1731 (2018).

15 Here, there’s far more than “slight suspicion.” District employees called FCA’s religious beliefs  
16 “bullshit,” Blomberg Decl., Ex. Q, and a “hurtful message and problem,” Espiritu Tr., Ex. 48, and  
17 accused FCA of being “charlatans,” Blomberg Decl., Ex. K. They also stated that FCA will not be  
18 granted ASB recognition this year because of those beliefs and their perceived offensiveness to students.  
19 Espiritu Tr. 64:3-5; 192:5-14; 30(b)(6) Tr. 223:13-224:14. The District cannot base its “rationale for the  
20 difference in treatment” of FCA versus other clubs with selective leadership policies on its “assessment  
21 of offensiveness.” *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Nor can the District effectuate a “religious  
22 gerrymander” of FCA, relegating them alone to a disfavored “student interest group” status. *Lukumi*,  
23 508 U.S. at 536; Mayhew Tr. 48:3-8 (FCA is the first and only “student interest group” at Pioneer).

24 Further, the Policy facially discriminates against religion by permitting the use of secular criteria that  
25 are key to protecting the health or success of a secular group (such as participation) while banning  
26 religious criteria (such as ability to lead prayer or worship) which are *religiously* crucial. 30(b)(6) Tr.  
27 210:18-211:22; Espiritu Tr., Ex. 57; Blomberg Decl., Ex. A (BP 6145). And in practice,  
28 accommodations that the District favors, such as preferences for sex-selective clubs and programs, are

1 exempted from the Policy, but religious groups are not permitted to choose leaders consistent with their  
 2 faith. *See supra* at 8-10. This selective enforcement targets disfavored viewpoints, while giving favored  
 3 viewpoints a pass. *Cf. Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803-04 (9th Cir. 2011)  
 4 (all-comers policy “may still be unconstitutional if not applied uniformly”); *InterVarsity-Iowa*, 408 F.  
 5 Supp. 3d at 983 (“the University has made a value judgment that its secular reasons for deviating from  
 6 the Human Rights Policy are more important than InterVarsity’s religious reasons for the deviation it  
 7 seeks,” so the “decision to deregister InterVarsity is subject to strict scrutiny”).

8 In sum, the Policy is riddled with both categorical and individual exemptions and, based on the  
 9 testimony of implementing District employees, will be selectively enforced in a manner that targets  
 10 religion. Because the Policy is neither neutral nor generally applicable, strict scrutiny applies.

### 11 **III. The District’s Actions Violate the Free Speech and Assembly Clauses.**

#### 12 **A. The District’s exclusion of FCA violates free speech rights.**

13 The District is violating the Free Speech Clause by excluding FCA from a limited public forum based  
 14 on its religious speech. When the District chose to grant student clubs access to ASB-approval benefits,  
 15 it created a limited public forum that is governed by the First Amendment. *Martinez*, 561 U.S. at 679 (a  
 16 program for recognizing school clubs and providing benefits thereunder created a “limited public  
 17 forum”); *accord Prince*, 303 F.3d at 1091 (a high school ASB recognition program “created a limited  
 18 public forum”). A public school “generally may not withhold benefits from student groups because of  
 19 their religious outlook.” *Martinez*, 561 U.S. at 685. Yet absent injunctive relief, the District will do just  
 20 that to FCA this school year. *See* *Espiritu Tr.* 192:4-14; *see also* 30(b)(6) *Tr.* 175:4-21.

21 While “some content- and speaker-based restrictions may be allowed,” *Matal v. Tam*, 137 S. Ct. 1744,  
 22 1763 (2017), public schools may neither: (1) “exclude speech where [doing so] is not ‘reasonable in  
 23 light of the purpose served by the forum,’” or (2) “discriminate against speech on the basis of its  
 24 viewpoint.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

#### 25 **1. The District’s exclusion of FCA is unreasonable.**

26 A content-based limitation “may” be reasonable if it “preserves the purposes of th[e] limited forum,”  
 27 but only if it “respect[s] the lawful boundaries it has itself set.” *Rosenberger*, 515 U.S. at 829-30. For  
 28 example, a forum dedicated to the exchange of *students’* ideas about *art* can reasonably exclude *non-*

1 student speech about *science*, but it could not make “other content-based judgments” that disrespect the  
2 forum’s own boundaries. *Martinez*, 561 U.S. at 703 (Kennedy, J., concurring).

3 The purpose of the ASB program is to “really engage students” with their school and help them “feel  
4 connected to other students that are like them, to staff, who are also like them, who have similar  
5 interests.” *Mayhew Tr.* 35:15-36:4; *see also Prince*, 303 F.3d at 1091-92 (“The purpose of the ASB  
6 forum ... is broad, recognizing groups that engage in any lawful activity which promotes the academic,  
7 vocational, personal, or social/civil/cultural growth of students.”) (cleaned up).

8 The forum recognizes that ASB-recognized clubs have First Amendment “rights to express ideas and  
9 opinions, take stands on issues, and support causes, even when such speech is controversial or  
10 unpopular,” and mandates that no student shall be disciplined “solely on the basis of speech ... that  
11 would be constitutionally protected when engaged in outside of school.” *Blomberg Decl., Ex. A* (BP  
12 5145.2); *see also Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021) (a school’s  
13 protection of student expression “must include the protection of unpopular ideas, for popular ideas have  
14 less need for protection”). This recognition led the District to think it should accommodate protests  
15 *against* FCA by other clubs, and to approve The Satanic Temple Club despite acknowledging that it  
16 could be considered controversial. *Espiritu Tr.* 84:11-20.

17 Having created a limited public forum with the express purpose of allowing like-minded students to  
18 organize around shared interests, including First Amendment-protected speech and beliefs that are  
19 “controversial or unpopular,” *Blomberg Decl., Ex. A* (BP 5145.2), the District’s refusal to recognize  
20 student FCA groups in the coming school year because FCA requires its leaders to share its religious  
21 beliefs is not reasonable. Students cannot associate around hidden beliefs, and an organization—  
22 especially a religious one—cannot survive without leaders who agree with and promote those beliefs.  
23 *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring) (“A religion cannot depend  
24 on someone to be an effective advocate for its religious vision if that person’s conduct fails to live up to  
25 the religious precepts that he or she espouses.”); 30(b)(6) *Tr.* 71:10-21; *Lopez Decl.* ¶¶ 15, 16, 20.  
26 Refusing to let groups select mission-aligned leaders would undermine the District’s purpose of  
27 allowing students to “feel connected to other students that are *like them*.” *Mayhew Tr.* 35:15-36:4  
28 (emphasis added). This is why the District allows many other groups to select leaders with the skill and

1 ability to advance the groups' purposes. Denying student FCA groups recognition is not reasonably  
2 related to the purpose of the ASB program, triggering strict scrutiny.

3 **2. The District's exclusion of FCA discriminates on the basis of viewpoint.**

4 The District's refusal to recognize FCA also discriminates against FCA on the basis of its religious  
5 viewpoint. Public schools engage in forbidden viewpoint discrimination when their actions stem from  
6 the "ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829.

7 The District permits student groups to restrict leadership on the basis of several different categories,  
8 including the amorphous "non-discriminatory criteria" exception. *Supra* 8-10. But while the District  
9 thinks it is non-discriminatory for a cheer group to exclude students based on their ability to lead cheers,  
10 or a choral group to exclude students based on their ability to lead songs, it considers it discriminatory  
11 for a religious group to select leaders based on their ability to lead prayers. This is viewpoint  
12 discrimination. *See Bus. Leaders In Christ v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021) ("*BLinC*") ("A  
13 nondiscrimination policy neutral on its face violates a student group's rights to free speech and  
14 expressive association if not applied in a viewpoint-neutral manner."); *accord InterVarsity Christian*  
15 *Fellowship/USA v. Wayne State Univ.*, 2021 WL 1387787, at \*22-24 (E.D. Mich. Apr. 13, 2021).

16 Moreover, many of the expressly protected categories in the Policy are disregarded when District  
17 officials wish to approve of groups or programs that discriminate in membership or leadership on the  
18 basis of sex or ethnicity, or to accommodate more popular activities, such as sports. *Supra* 8-10. But no  
19 exception will be made for FCA. It is undisputed that this is because of FCA's religious views. Mayhew  
20 Tr. 204:11-14 (the "concern [was] that students had to share the beliefs stated in the statement of faith");  
21 *see also* Espiritu Tr. 200:6-201:2, 192:4-14 ("just the simple fact" that FCA "believes in the sexual  
22 purity statement" was "enough to deny the affiliation," and having the same belief now means FCA  
23 "would be denied"); 30(b)(6) Tr. 223:13-22 (if FCA removed the requirement for leaders to adhere to  
24 the sexual purity statement, FCA would be "eligible for ... official recognition"). The District's  
25 discrimination toward FCA and its targeted rationales for continued selective enforcement prove that its  
26 refusal to grant FCA ASB recognition in the coming school year is based in viewpoint discrimination.

27 These characteristics set FCA's speech and association claims apart from those in *Martinez*. Despite  
28 its name, the Policy does not require "*all* student groups to accept *all* comers." *Martinez*, 561 U.S. at

1 694 (emphases in original). Instead, it is much more like the situation in *Healy v. James*: here, the District  
 2 is denying FCA recognition in the 2021-22 school year “because of the group’s viewpoint.” *Martinez*,  
 3 561 U.S. at 684 n.15 (citing *Healy v. James*, 408 U.S. 169, 187 (1972)). Unlike in *Martinez*, broadly  
 4 permitting District student groups and programs to select members and leaders based on various criteria,  
 5 but penalizing FCA for doing the same, “denie[s] benefits based on the organization’s message.” *Ams.*  
 6 *for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (citing *Healy*).

7 **B. The District’s exclusion of FCA violates expressive association rights.**

8 Absent compelling reason, the Free Speech and Assembly Clauses do not allow groups to be  
 9 penalized for selecting their leaders in a manner calculated to further their expression. *See, e.g., Hurley*  
 10 *v. Irish-Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 570 (1995); *BLinC*, 991 F.3d at 985  
 11 (university cannot exclude religious group for requiring leaders to share their beliefs on marriage);  
 12 *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 864 (7th Cir. 2006) (same); *Apilado v. N. Am. Gay*  
 13 *Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1161-62 (W.D. Wash. 2011) (non-discrimination law  
 14 cannot punish gay softball league for excluding straight players). FCA qualifies as an expressive  
 15 association because it promotes a core set of religious beliefs. Being forced to accept as leaders students  
 16 who reject FCA’s religious beliefs would force FCA “to propound a point of view contrary to its beliefs,”  
 17 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000), which burdens its expression and triggers scrutiny.

18 **IV. The District’s Refusal to Recognize FCA Fails Strict Scrutiny.**

19 The District’s actions must survive the “strictest scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2019. This  
 20 means they “must be narrowly tailored to serve a compelling state interest,” *Calvary Chapel v. Sisolak*,  
 21 982 F.3d 1228, 1234 (9th Cir. 2020) (cleaned up), which can only be done by showing they were “the  
 22 least restrictive means” of achieving that interest, *Gateway City Church v. Newsom*, 2021 WL 308606,  
 23 at \*10 (N.D. Cal. Jan. 29, 2021). “[S]o long as the government can achieve its interests in a manner that  
 24 does not burden religion, it must do so.” *Fulton*, 141 S. Ct. at 1881.

25 **Compelling Interest.** “[O]nly the gravest abuses, endangering paramount interest, give occasion for  
 26 permissible limitation” on a “First Amendment right.” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).  
 27 But the District’s interest is a generalized interest in non-discrimination. *Espiritu Tr.* 110:3-13. That is  
 28 insufficient. First, the District cannot “rely on ‘broadly formulated interests’” such as a general interest

1 in non-discrimination; it must show specific harms will result if it “grant[s] specific exemptions to  
2 particular religious claimants.” *Fulton*, 141 S. Ct. at 1881 (quoting *Gonzales v. O Centro*, 546 U.S. 418,  
3 431 (2006)). Second, the desire to express disagreement with speech is not a constitutionally valid reason  
4 for censoring it. *See Dale*, 530 U.S. at 651 (governments cannot “reject a group’s expressed values  
5 because they disagree with those values”). And third, the District frequently undermines its interest in  
6 enforcing the Policy by applying it in an arbitrary and selective manner. “The creation of a system of  
7 exceptions ... undermines the [District’s] contention that its non-discrimination policies can brook no  
8 departures.” *Fulton*, 141 S. Ct. at 1882; *InterVarsity-Iowa*, 408 F. Supp. 3d at 984.

9 FCA understands the District believes there are good reasons for the reasonable accommodations that  
10 it grants to its own programs, sports teams, and various other student groups. But the District cannot  
11 claim a compelling interest in enforcing a Policy against FCA that it does not follow itself, allows other  
12 groups to ignore, and regularly departs from at its discretion. *Lukumi*, 508 U.S. at 547.

13 ***Least Restrictive Means.*** The District also cannot satisfy the least-restrictive means test. If a less  
14 restrictive alternative would serve the government’s purpose, the government “must use that  
15 alternative.” *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000); *Callahan v. Woods*, 736 F.2d  
16 1269, 1272-73 (9th Cir. 1984). But the District has long managed to accommodate its own programs,  
17 sports teams, and the missions of other student groups, without sacrificing the interests promoted by the  
18 Policy. Indeed, instead of narrow tailoring, the District sought the “easy way out”: “suppress[ing] private  
19 speech.” *Hedges v. Wauconda Cmty. Unit Sch. Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993) (the better way  
20 is “educating the students in the meaning of the Constitution and the distinction between private speech  
21 and public endorsement”).

## 22 **V. The District’s Refusal to Recognize FCA Violates the Religion Clauses.**

23 Inserting District officials into religious leadership decisions violates FCA’s right to internal religious  
24 autonomy. *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (the  
25 First Amendment “protects [religious institutions’] autonomy with respect to internal management  
26 decisions”); *Wayne State*, 2021 WL 1387787, at \*9, \*15 (relying on “right to internal religious  
27 management” to hold that “[n]o religious group can constitutionally be made an outsider, excluded from  
28 equal access to public or university life, simply because it insists on religious leaders who believe in its

1 cause”). *Martinez* likewise suggested that the First Amendment did not permit bans on religious groups  
 2 selecting religious leadership. *See, e.g.*, 561 U.S. at 692-93 (noting that a member hostile to the views  
 3 of the group would likely not be able to become an officer); *id.* at 706 (Kennedy, J., concurring)  
 4 (“[P]etitioner also would have a substantial case on the merits if it were shown that the all-comers policy  
 5 was either designed or used to ... challenge its leadership in order to stifle its views.”). Under the  
 6 Religion Clauses, selecting religious leadership is an internal issue for FCA to decide, not the District.

#### 7 **VI. The Remaining Preliminary Injunction Factors Favor Granting Injunctive Relief.**

8 The other preliminary injunction factors favor an injunction. They are on a “sliding scale,” on which  
 9 “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff  
 10 can support issuance of a preliminary injunction.” *All. for the Wild Rockies*, 632 F.3d at 1134-35.

11 Irreparable harm is “relatively easy to establish” in the First Amendment context. *CTIA – the Wireless*  
 12 *Ass’n v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019). “The loss of First Amendment freedoms,  
 13 for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic*  
 14 *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). So too for EAA violations. *Hsu*, 85 F.3d at  
 15 872; *Colin*, 83 F.Supp.2d at 1149. FCA will also suffer irreparable injury as it is unable to access ASB  
 16 benefits. *Bible Club*, 573 F. Supp. 2d at 1300; *Walker*, 453 F.3d at 867. And “discrimination is by itself  
 17 an irreparable harm.” *Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016).

18 The balance of equities and the public interest “merge” when, like here, the government is the  
 19 defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both factors are strongly in FCA’s favor. “The  
 20 fact that Plaintiffs have raised serious First Amendment questions” alone “*compels* a finding that the  
 21 balance of hardships tips sharply in Plaintiffs’ favor.” *Am. Beverage Ass’n v. City & County of S.F.*, 916  
 22 F.3d 749, 758 (9th Cir. 2019) (cleaned up, emphasis added). And “it is always in the public interest to  
 23 prevent the violation of a party’s constitutional rights.” *Id.* (cleaned up). By contrast, there will be no  
 24 harm to the District, which permitted FCA chapters to operate for years without incident.

#### 25 **CONCLUSION**

26 For these reasons, the Court should grant FCA’s motion for a preliminary injunction.  
 27  
 28

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Respectfully submitted,

2 By: /s/ Daniel H. Blomberg

3 Daniel H. Blomberg (DC BN 1032624)\*

4 Eric S. Baxter (DC BN 479221)\*

Nicholas R. Reaves (DC BN 1044454)\*

5 Kayla A. Toney (DC BN 1644219)\*

6 Abigail E. Smith (CA SBN 330347)

THE BECKET FUND FOR RELIGIOUS LIBERTY

1919 Pennsylvania Ave., Suite 400

7 Washington, DC 20006

202-955-0095

8 ebaxter@becketlaw.org / dblomberg@becketlaw.org

9 Reed N. Smith (VA SBN 77334)\*

10 Kimberlee Wood Colby (DC BN 358024)\*

CENTER FOR LAW & RELIGIOUS FREEDOM

11 8001 Braddock Road, Suite 302

12 703-642-1070 tel / 703-642-1075 fax

rsmith@clsnet.org / kcolby@clsnet.org

13 Stephen C. Seto (CA SBN 175458)

14 Steven N.H. Wood (CA SBN 161291)

15 Christopher J. Schweickert (CA SBN 225942)

SETO WOOD & SCHWEICKERT LLP

16 2300 Contra Costa Boulevard, Suite 310

Pleasant Hill, CA 94523

17 925-938-6100 tel / 925-262-2318 fax

sseto@wcjuris.com / cjs@wcjuris.com

18 *Attorneys for Plaintiffs*

19 (\*admitted *pro hac vice*)