The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

J.N.C. and J.D.C., by and through their parents and legal guardians, PAUL Y. CHUNG and IRIS J. CHUNG,

– and –

JOELLE G. CHUNG,

– and –

A.A.B. and A.H.B., by and through their parents and legal guardians, RICHARD D. BOGGESS and JANET L. BOGGESS,

Plaintiffs,

v.

WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION,

Defendant.

No. 3:19-cv-05730-RSM

MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: OCTOBER 30, 2020

ORAL ARGUMENT REQUESTED

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

TABLE OF CONTENTS

Page

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

TABLE OF AUTHORITIES

Page(s)

Cases

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

Constitutional Provisions

Statutes

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

Other Authorities

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

INTRODUCTION

The minimum requirement for compliance with the First Amendment's Religion Clauses is nondiscrimination: State actors can't favor one religion over another or nonreligious reasons over religious ones. Nor can they grant secular exemptions to laws while denying analogous religious exemptions. Defendant Washington Interscholastic Activities Association (WIAA) failed these basic obligations by disregarding Saturday Sabbatarians in its scheduling of interscholastic activities, permitting withdrawals from competition for secular but not religious reasons, and, in some instances, barring students from participating in *any* postseason competition based only on *potential* conflicts with religious exercise.

In discovery, WIAA abandoned many of the rationales it initially advanced to justify its actions. Instead it has retreated to the "classic rejoinder of bureaucrats throughout history": It can't accommodate Plaintiffs' Sabbath observance in scheduling the only activity at issue here (the 2A state tennis tournament), because then it might have to accommodate other requests, too. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). That theory violates the "spirit of practical accommodation" at the heart of religious freedom, *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Alito, J., concurring), and it's been rejected many times over. WIAA has no good reason not to accommodate Plaintiffs, much less a compelling one. Summary judgment is proper.

STATEMENT OF FACTS

Plaintiffs are Joelle Chung, her brothers J.N.C. and J.D.C., and their teammates A.H.B. and A.A.B. (minors collectively, "Student Plaintiffs").[1] Joelle is a 2019 graduate of William F. West High School ("W.F. West"), where she was a member of the girls' tennis team all four years of her high-school career. ECF 5 ¶8. Student Plaintiffs are all currently members of the W.F. West varsity boys' tennis team. Ex.M

[1] Earlier filings refer to Joelle by her initials (J.G.C.). She is no longer a minor.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

109:3-10.[2] Besides avid tennis players, Plaintiffs are also Seventh-day Adventists. Ex.A-1; Ex.P ¶3; Ex.Q ¶3. They each observe the Sabbath from sundown Friday to sundown Saturday every week. Ex.R at 6-8; Ex.L 22:15-24; Ex.Q ¶5. They elected to play tennis over other sports, in part because high-school tennis matches are typically played outside the Sabbath. Ex.G 49:7-15.

Sabbath observance is a central tenet of the Seventh-day Adventist faith: It "encompasses [Seventh-day Adventists'] entire relationship with God." *Sabbath Observance*, Seventh-day Adventist Church (July 9, 1990), https://perma.cc/9J3S-8GKK; *see* Ex.R at 9. During the Sabbath, Plaintiffs dedicate their time to improving their relationship with God, including by spending time in Bible study, prayer, evangelism, and family fellowship. Ex.R at 7-8; Ex.A-1; Ex.Q ¶5. During this time, they rest from work and refrain from competitive sports. Ex.R at 6-7; Ex.L 22:15-24; Ex.Q ¶5. To engage in such activities—and thus to break the Sabbath—would lead "to the distortion and eventual destruction of [their] relationship with God." *Sabbath Observance, supra*.

Defendant WIAA is an organization "authorized under RCW [§] 28A.600.200 to control, supervise and regulate interscholastic activities in the State of Washington." *Jones v. Wash. Interscholastic Activities Ass'n*, No. 07-711, 2007 WL 2193751, at *1 (W.D. Wash. July 26, 2007). WIAA recognizes that "participation in interscholastic activities"—including student athletics—"is an integral part of [a student's] education," Ex.E 12:9-18, as it develops "their sense of working as part of a team" and "helps their academics," Ex.D 12:25-13:12. One of WIAA's primary functions is to organize and host state championship tournaments for sports and activities among its nearly 800 member schools. ECF 34 ¶29; ECF 37 ¶29.

According to the WIAA handbook, the WIAA Executive Board determines all "sites, dates, formats, schedules and rules and regulations for" postseason play for

[2] All Exhibit citations refer to the Declaration of Joseph C. Davis, submitted with this Motion.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

WIAA member schools. Ex.S WIAA1098 (2018-19). But there is no rule, statute, or policy that requires WIAA to schedule *any* state tournaments on Saturdays. Ex.C 161:23-162:9. While WIAA schedules most state tournaments to include Saturday competition, in 2018-19, more than a dozen did not, including some for volleyball, state dance and drill, and boys and girls golf. Ex.T WIAA1371. WIAA does not schedule *any* tournaments on Sundays. Ex.A-74 at 9; ECF 34 ¶98; ECF 37 ¶98.

Each year, based on regular-season play, W.F. West selects the top performers from its boys' and girls' tennis teams to participate in postseason competition culminating in the state championship. Ex.M 42:22-43:7. The postseason involves three sequential stages: sub-district, district, and state. ECF 34 ¶¶44-45; ECF 37 ¶¶44-45. From W.F. West's district, the top three boys' and girls' singles players and doubles teams advance to state. ECF 34 ¶46; ECF 37 ¶46. Under 2018-19 WIAA regulations, if a player advanced from the district tournament, but was "unable to compete" in the state championship, the "next qualified contestant" would serve as a substitute. ECF 34 ¶49; ECF 37 ¶49; *see* Ex.U at 2.

During her junior year (the 2017-18 season), Joelle was selected for postseason play. ECF 5 ¶11. She advanced out of sub-districts, but had to withdraw before the district tournament because it was scheduled for Sabbath play. *Id.* At that time, she and her coach learned that withdrawal from postseason play for religious reasons was barred by WIAA Rules. Rule 22.2.5 provided that, by entering players in postseason competition

> each member school certifies that, barring *injury, illness or unforeseen events*, the team or individuals representing the school will participate in every level of competition through the completion of the state championship event.

Ex.V WIAA1012 (emphasis added); *see* Ex.M 56:16-58:25; ECF 5 ¶12. Rule 22.2.6 provided the enforcement mechanism, stating that "[a]ny withdrawal or intentional forfeiture shall be considered a violation of WIAA rules and regulations, and shall

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

be subject to penalties as determined by the WIAA Executive Board." Ex.V WIAA1012.

Joelle was again expected to qualify for the postseason her senior year, so the Chung family preemptively asked WIAA for an accommodation. ECF 5 ¶12. In February 2019, the Chungs asked that WIAA "change rule 22.2.5 to allow religious observances as a valid reason to drop out of the tournament" so Sabbatarians "can play as far as they are able until Sabbath becomes an issue." Ex.A-4. They also asked that WIAA "move the 2A state tennis tournament" to weekdays. *Id.*

Joelle, in fact, went undefeated in regular-season league play and thus again qualified for postseason competition. ECF 5 ¶13; Ex.H 63:15-64:8. That year, the sub-district and district tournaments were scheduled outside the Sabbath. ECF 5 ¶¶14-15. But the state tournament was scheduled for a Friday and Saturday. *Id.* ¶16; Ex.T WIAA1372. Thus, if Joelle advanced to the state championship, she would have been religiously obligated not to play the last day. And because Rules 22.2.5 and 22.2.6 generally prohibited players from withdrawing from postseason competition, without an accommodation, the *potential* conflict between the last day of state competition and the Sabbath meant that Joelle could not compete in the postseason *at all*. Ex.S WIAA1134; *see* Ex.B 46:23-47:7.

In April, WIAA rejected Joelle's request. WIAA stated that allowing religious tournament withdrawals would "violate[] specific WIAA rules and cannot be granted." Ex.A-8 (citing Rules 22.2.5 and 22.2.6). According to WIAA, those provisions were "strictly enforced and have not been waived in the past." *Id.* Moreover, WIAA said, religious withdrawals would (1) be "unfair to the athlete who would have qualified" but for the withdrawing athlete; and (2) "create a competitive advantage for the athlete scheduled to play the forfeiting athlete, who now has the luxury of a bye while the other competitors must continue playing." *Id.* Finally, the letter referred to "surveys" WIAA purportedly was conducting about whether future

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

tournaments could be moved to weekdays, but also indicated WIAA's conclusion that "this format change is not possible." *Id.*; *see* Ex.C 19:4-6, 19:18-20:2.

Joelle was thus barred from all postseason play in 2018-19 because of her religious convictions. Without Joelle, W.F. West finished two points shy of first place, ECF 3-1 at 6—the equivalent of victory in a single match, Ex.U at 4. Joelle was devastated she was unable to help her team win state in her final season. ECF 5 ¶19; Ex.H 96:23-97:8, 97:14-18, 97:22-25, 101:9-19; Ex.G 42:1-5; *see also* Ex.M 114:12-14 (if Joelle had played, "we would have at least tied for first" "and possibly won it all").

On August 7, 2019, the Chungs, on behalf of Joelle and J.N.C., filed this suit, seeking compensatory and nominal damages, as well as declaratory and injunctive relief requiring WIAA to permit religious withdrawals under Rule 22.2.5 and to schedule the 2A tennis tournament to accommodate Sabbath observance. ECF 11. After the lawsuit, WIAA amended the Rules to permit withdrawals for "religious observance." ECF 27 ¶5. In December, Plaintiffs (now including J.D.C., A.A.B, and A.H.B.) filed an amended complaint. ECF 34. All future 2A tennis tournaments that are already scheduled include Saturday play. Ex.E 13:6-15.

ARGUMENT

Summary judgment is required where the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The standard is met here. WIAA's actions trigger scrutiny under federal and state religious-freedom protections, and WIAA cannot carry its burden of "com[ing] forward with 'specific facts showing ... a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

I. WIAA's actions violate the Free Exercise Clause.[3]

Under the Free Exercise Clause, state action burdening religious exercise is subject to strict scrutiny if it is not "neutral" or "generally applicable." *Emp't Div. v. Smith*, 494 U.S. 872, 880 (1990).[4] This is plainly satisfied if the action is based on official "hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). "[B]ut the Free Exercise Clause is not confined to actions based on animus"; rather, it "protect[s] the 'free exercise of religion' from unwarranted governmental inhibition whatever its source." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006). Accordingly, "[t]here are … many ways of demonstrating that" state action is not neutral and generally applicable and thus triggers strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

Three are particularly relevant here. First, state action burdening religion isn't neutral and generally applicable if it is undertaken under a system of "individualized governmental assessments." *Smith*, 494 U.S. at 884. Such action—unlike action taken pursuant to "an across-the-board" rule—risks that officials will exercise their discretion to discriminate against particular religious practices, warranting strict scrutiny. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) ("[G]reater discretion in the hands of governmental actors" makes their actions "more, not less, constitutionally suspect.").

Second, a rule burdening religion isn't generally applicable if it "creates a categorical exemption for individuals with … secular [reasons to act] but not for individuals with … religious [reasons]." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *Lukumi*, 508 U.S. at 543.

---

[3] WIAA's policies and scheduling are state action under 42 U.S.C. § 1983. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); ECF 34 ¶30; ECF 37 ¶30.

[4] The Supreme Court granted certiorari in *Fulton v. City of Philadelphia*, No. 19-123, to consider whether *Smith* should be revisited. Oral argument is set for November 4, 2020.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

And third, a party can establish a free-exercise violation by showing that even a facially neutral and generally applicable rule has "been enforced in a discriminatory manner." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208 (3d Cir. 2004); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002).

State action that isn't neutral and generally applicable for these (or other) reasons is subject to strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To survive, it "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546. "That 'stringent standard' is not 'watered down but really means what it says.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020). "[O]nly in rare cases" is it satisfied. *Lukumi*, 508 U.S. at 546.

A. WIAA's scheduling of the 2A tennis tournament on Plaintiffs' Sabbath violates the Free Exercise Clause.

1. WIAA's scheduling decision triggers strict scrutiny.

WIAA's decision to schedule the 2A tennis tournament on Plaintiffs' Sabbath triggers strict scrutiny because WIAA schedules interscholastic activities pursuant to a system of "individualized governmental assessment[s]." *Smith*, 494 U.S. at 884. As WIAA's handbook indicates, it exercises broad discretion to determine *all* "sites, dates, formats, schedules, and rules and regulations for" postseason play on a case-by-case basis. Ex.S WIAA1098. But the handbook identifies no "particularized, objective criteria" by which it decides whether to schedule postseason play on weekdays or weekends. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081-82 (9th Cir. 2015). And as WIAA concedes, there is no handbook rule, statute, or policy—let alone a *neutral* and *generally applicable* one—that requires it to schedule *any* state tournaments on Saturdays. Ex.C 161:23-162:9. WIAA thus exercises "unfettered discretion" in its scheduling decisions. *Stormans*, 794 F.3d at 1082.

WIAA's plenary discretion over where and when to schedule postseason competition bears out in practice. For example, WIAA scheduled postseason competition

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

to be held in approximately 20 cities for the 2020-21 academic year, and competitions were scheduled to last anywhere from one day (*e.g.*, cross country) to four (*e.g.*, basketball). Ex.W. Most importantly, while some tournaments were scheduled to include Saturday competition and more than a dozen others scheduled to take place entirely during the week, *id.*, no state tournaments—zero—were scheduled to include Sunday competition. Ex.A-74 at 9 (explaining that WIAA does "[n]ot schedul[e] state championship events on Sundays" to "preserve one day each week on which school activities are not scheduled").

And WIAA has previously exercised (or been prepared to exercise) its discretion to accommodate religion. In 2015, WIAA exercised this discretion after Jewish and Seventh-day Adventist girls' volleyball players sued WIAA in state court for scheduling championship play on Saturdays. WIAA initially resisted, asserting, among other things, that weekday play would harm ticket sales. Ex.X. But after trial, WIAA settled, rescheduling to avoid Sabbath conflicts. Ex.Y; Ex.A-82 WIAA12606. Moreover, "[a]ccommodations have been made in basketball for the Saturday Sabbath schools at the league, district and state level since 2011." Ex.A-90 WIAA2152. And WIAA maintains it is likewise prepared to grant scheduling accommodations to soccer and baseball teams from Seventh-day Adventist schools, but no team has advanced far enough yet. Ex.E 63:6-24; *see* Ex.A-83; Ex.A-82 WIAA12606.

WIAA states that "several factors ... *can* affect" its scheduling decisions, including (1) missed school time for faculty and students, (2) the decision's impact on revenues and costs, and (3) the ability of friends and family to attend "at least some of the competition." Ex.A-74 at 7-8. But WIAA's application of these factors only reinforces the broad scope of its discretion and the need for strict scrutiny. For example, WIAA schedules some state championships for *exclusively* weekday competition and *never* schedules multi-day tournaments to include Sunday competition—though both *increase* missed school time. *See* Ex.E 36:10-14. And despite its interest in

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

maximizing revenues, WIAA has granted (or been prepared to grant) religious accommodations for volleyball, basketball, baseball, and soccer (revenue-generating sports) but not tennis (non-revenue-generating). Ex.Z WIAA3705. Finally, it never schedules Saturday/Sunday competition, notwithstanding its stated goal of enabling more friends and family to attend portions of the competition, which (according to its own rationale) would likely be *furthered* by weekend scheduling. Ex.C 165:14-18. These factors do not suffice to supply any "particularized, objective criteria" that restrains WIAA's broad discretion. *Stormans*, 794 F.3d at 1081-82.

Such broad discretion renders WIAA's scheduling decisions "more, not less, constitutionally suspect." *Axson-Flynn*, 356 F.3d at 1299; *cf. Ward v. Polite*, 667 F.3d 727, 738-39 (6th Cir. 2012) (problem with facially neutral and generally applicable policy was its implementation; defendants could not "point to *any* written policy that barred [plaintiff] from requesting this [exception]"). Because WIAA fails to exercise its discretion "in an even-handed, much less a faith-neutral, manner[,]" it must therefore "run the gauntlet of strict scrutiny." *Ward*, 667 F.3d at 739-40.

2. WIAA cannot satisfy strict scrutiny.

To survive strict scrutiny, WIAA must show its actions are "narrowly tailored to achieve a compelling interest." *Duncan v. Becerra*, 970 F.3d 1133, 1164 (9th Cir. 2020) (cleaned up); *accord Lukumi*, 508 U.S. at 546. It can't do so here.

At the outset, WIAA argues it makes this showing by establishing the harms it would suffer if *all* tournaments were moved off their current schedule. ECF 45-1. But this theory makes no sense even on its own terms: WIAA *already* accommodates Sabbath observance in numerous sports, so there's not even a speculative connection between this lawsuit and those predicted, all-sport harms. Ex.A-82; Ex.E 63:6-64:23.

More importantly, WIAA's course is barred by Supreme Court precedent. In conducting strict scrutiny, the state's interest in undertaking the challenged action "in the generality of cases" is irrelevant; what matters is "the impediment … that would

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

flow" directly from "the claimed … exemption." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Reviewing courts thus focus not on "'broadly formulated interests'" but on the state's "marginal interest" in pursuing the challenged action. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014) (quoting *O Centro*, 546 U.S. at 431).[5] Here, then, the question is whether WIAA has a compelling interest in refusing to accommodate *Student Plaintiffs* in the sport *they* play—2A tennis. For many reasons, it does not.

First, WIAA has identified its interest as minimizing student time out of school. Ex.E 16:14-16. But WIAA can't show that any marginal interest in preventing some 2A tennis players from missing *one or two additional days* of high school, *once a year*, is "paramount." *Yoder*, 406 U.S. at 213; *see Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011) ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced."). WIAA concedes it has no empirical data or scholarly studies suggesting a correlation between each school day missed and academic performance. Ex.E 36:17-37:11. *Cf. Hobby Lobby*, 573 U.S. at 732-33 (state actor can't prevail where "no effort [is made] to substantiate th[e] prediction"). And WIAA already schedules more than a dozen state championship competitions *exclusively* on weekdays, and when it schedules three- or four-day state tournaments—*e.g.*, in bowling, gymnastics, track, or basketball—it adds *more* weekdays (rather than adding Sunday or a later weekend). Ex.T WIAA1371. This "underinclusiveness … undermine[s]" any argument that WIAA's scheduling of the 2A tennis tournament on a Saturday advances a compelling interest. *Carey v. Brown*, 447 U.S. 455, 465 (1980); *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir.

[5] *Hobby Lobby* and *O Centro* were decided under the Religious Freedom Restoration Act, but RFRA "expressly adopted the compelling interest test 'as set forth in'" the Free Exercise Clause cases of *Sherbert* and *Yoder*. *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb(b)(1)); *see also Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (same for RFRA's sister statute, RLUIPA). That is the same test that continues to apply under the Free Exercise Clause to state action that is not neutral and generally applicable. *Espinoza*, 140 S. Ct. at 2260-61; *Lukumi*, 508 U.S. at 546.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

2014) (such "underinclusiveness" "raise[s] with it the inference that [WIAA]'s claimed interest isn't actually so compelling after all").

Second, WIAA suggests the problem with accommodating Student Plaintiffs is the increased cost for schools. Ex.A-74 at 18. But the only on-point record evidence—the survey—suggests the impact would be minimal to nonexistent. Exs. A-21, A-100, A-106. The survey focused on costs schools might suffer from moving the tournament, yet (as WIAA officials conceded) the responses provided no "information" indicating schools would in fact "incur increased costs from moving the tournament" to weekdays. Ex.D 154:14-155:12; *see also id.* 130:18-25, 133:4-7, 137:3-21, 152:5-12 (little-to-no cost difference for travel, lodging, food, or busing expenses). That WIAA's attempt at "due diligence" (Ex.B 160:13-21) resulted in data showing no significant impact only underscores that WIAA *should* move the tournament.

Third, WIAA proposes to offer expert testimony showing that moving events off Saturday will hurt ticket sales, reducing WIAA's revenue. ECF 45-1. There's an obvious problem with this alleged interest: The only tournament at issue—the 2A tennis tournament—doesn't sell tickets. Ex.AA; *see also* Ex.D 160:12-162:15 (only revenues from tennis are per-participant fee not sensitive to date and insignificant merchandise sales). WIAA's theory is that if it accommodates Student Plaintiffs, it will have to accommodate other students' religious exercise, too. But again, this overlooks that WIAA *already* accommodates Sabbath observance in revenue-generating sports, so accommodation going forward couldn't possibly impact revenue in these sports. *Compare, e.g.*, ECF 45-1 at 10 ("basketball alone generat[es] over 40% of total ticket revenue") *with* Ex.A-90 WIAA2152 (accommodations made in basketball since 2011). And regardless, such slippery-slope theories are inconsistent with strict scrutiny's focus on the state actor's "marginal interest," *Hobby Lobby*, 573 U.S. at 727, and have been repeatedly rejected by the Supreme Court, *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (citing cases). Indeed, they've been denigrated as the "classic

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436.

Fourth, WIAA asserts that moving tournaments off Saturday will reduce attendance. Ex.A-74 at 18. But the 2A tennis tournament often has only "five ... to 50" spectators per match, Ex.D 177:18-25, mostly players' family and friends, Ex.A-92b PlsExpDiscl9-10. Spectators like these, WIAA concedes, will "make greater efforts" to attend "than a casual fan," no matter the day. Ex.C 167:1-11. And WIAA data further suggests that moving the tournament would hardly impact attendance, if at all. In 2017, when WIAA moved the 1B and 2B volleyball tournaments from Friday/Saturday to Thursday/Friday, the impact was negligible (attendance actually *increased* in 2018). Ex.E 38:18-45:22; *see* Ex.A-81; *see also* Ex.M 119:10-120:1 (in 47 years of coaching, no "significant difference" in tournament attendance depending on the day). Strict scrutiny doesn't permit WIAA to "hinder[]" Plaintiffs' "religious practices … to further a goal that history demonstrates is achievable even when" accommodations are made. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 477 (5th Cir. 2014) (citation omitted).

Fifth, WIAA speculates that moving the tournament would make it difficult to find a venue. *Compare* Ex.E 21:2-5 *with* Ex.A-74 at 19. But WIAA has offered no evidence that this is in fact true. It has never asked whether the current venue—Seattle's Nordstrom Center—is available on weekdays for any future year. Ex.D 57:23-58:1. It has never asked about the availability of any of the four other venues it has identified as suitable for the tournament. Ex.A-74 at 10-11; *see* Ex.D 27:20-23. And although WIAA acknowledges there may be other venues that "meet all of [its] qualifications" other than its amorphous criteria of having "the feel of a state tournament," it has never inquired about their availability either. Ex.D 165:8-11. To survive strict scrutiny, the government must "prove[]" an "actual problem," not just present "supposition." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803,

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

822 (2000). If a suitable venue "is available, [WIAA] must use it." *Id.* at 815.

Finally, even if WIAA could establish a compelling interest in not moving the 2A tournament to weekdays, strict scrutiny also requires showing there are no other "ways [for it] to achieve" that interest besides denying the accommodation. *Duncan*, 970 F.3d at 1164 (internal quotation marks omitted). WIAA hasn't done so.

First, even assuming WIAA's interests required the tournament to be scheduled on at least one weekend day (*e.g.*, to minimize missed school days), the tournament could be played on Sunday/Monday. WIAA objects to this alternative because it would burden those "who … honor religion on Sunday." Ex.E 118:22-119:15. But that only proves Plaintiffs' point: WIAA's *current* practice "prefer[s]" some "religious denomination[s] … over" others—an independent constitutional violation. *Larson v. Valente*, 456 U.S. 228, 244-45 (1982). WIAA can, and should, accommodate both.[6]

Second, even if WIAA's interests required the tournament to generally be scheduled Friday/Saturday, WIAA still could accommodate Student Plaintiffs by implementing a contingency plan allowing the tournament to be rescheduled (*e.g.*, to Thursday/Friday) *if* they advance out of the district tournament (usually played in October). Ex.E 115:10-24. WIAA already has such plans for severe weather, *id.* 113:22-115:9, and it's used them at least 11 times since 2008 to reschedule tournaments *within a week*, Ex.A-74 App'x C. Far from "show[ing] with … particularity" why it can't use this approach, *Yoder*, 406 U.S. at 236, WIAA concedes it "might be possible." Ex.E 115:10-24.

Because WIAA has failed to demonstrate "that no alternative" accommodating Student Plaintiffs' exercise would be feasible, *Sherbert*, 374 U.S. at 407, its

[6] WIAA's longstanding preference for Sunday Sabbatarians also violates Equal Protection. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("similarly situated" persons must be treated "alike"). Because this preference "impinge[s] … a 'fundamental right,'" it must be "precisely tailored" to serve a compelling interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Johnson v. Robinson*, 415 U.S. 361, 375 & n.14 (1974) (free exercise "[u]nquestionably" "a fundamental constitutional right"). For the reasons set forth in this Part I.A.2, WIAA cannot meet this high standard.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

scheduling of the 2A tournament violates the Free Exercise Clause.

B. WIAA violated the Free Exercise Clause when it prohibited Joelle's religiously motivated postseason withdrawal.

WIAA's application of the former Rules 22.2.5 and 22.2.6 to Joelle likewise violated the Free Exercise Clause. Barring Joelle from withdrawing for religious reasons but permitting withdrawals for secular reasons, like "injury, illness or unforeseen events," rendered the rule non-neutral and non-generally applicable. WIAA cannot satisfy strict scrutiny.

1. Applying Rule 22.2.5 to Joelle triggered strict scrutiny.

First, the former Rule 22.2.5 wasn't neutral and generally applicable because it included "categorical exemption[s] for individuals with … secular [reasons to act] but not for individuals with … religious [reasons]." *Fraternal Order*, 170 F.3d at 365. The Rule permitted players to withdraw from postseason competition if they couldn't continue because of "injury" or "illness." Yet the Rule did not permit players to withdraw if they were unable to play for a religious reason—*e.g.*, the Sabbath. The Rule thus "protect[ed] secular activities more than comparable religious ones," triggering strict scrutiny. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020); *Fraternal Order*, 170 F.3d at 360, 365-66 (exception "allow[ing] officers to wear beards for medical reasons" revealed "a value judgment that secular (*i.e.*, medical) motivations for wearing a beard [we]re important enough to overcome its general interest in uniformity but that religious motivations [we]re not").

WIAA's asserted interests in preventing withdrawals are undermined just as much by "injury, illness or unforeseen events" withdrawals as by religious ones—as WIAA officials concede. Ex.C 26:16-22 ("same effect"), 99:12-21 (impacts are "same regardless of the reason"); Ex.D 222:4-14 ("for the functioning of the tournament there is no difference based on the reason[]"). The Rule therefore "fail[ed] to include in its prohibitions substantial, comparable secular conduct that would similarly

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

threaten the government's interest," making it not "generally applicable." *Stormans*, 794 F.3d at 1079.

Moreover, the categorical exceptions for injury and illness reveal a "value judgment"—that physical constraints on participation are more serious than spiritual ones. *Fraternal Order*, 170 F.3d at 366. WIAA officials have conceded this, too, stating their view that while players who are hurt or sick "*really are* unable to participate," players whose faith forbids them from playing are in fact merely making a "*choice* to their religious observance." Ex.C 27:11-28:22 (emphasis added); *accord* Ex.E 77:19-79:3, 132:18-22. That is precisely the sort of "devalu[ing] [of] religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons" that presumptively violates the First Amendment. *Lukumi*, 508 U.S. at 537; *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1140 (1990) (person whose religion forbids him from using a public benefit is "excluded … on account of his 'difference,' as surely as the wheelchair-bound person is from a rampless building").

Second, even if the former Rule 22.2.5 were facially neutral and generally applicable, WIAA's "selective, discretionary application of" it against Joelle violated the Free Exercise Clause. *Tenafly*, 309 F.3d at 168; *see also Blackhawk*, 381 F.3d at 209 (free-exercise violation established where facially neutral and generally applicable rule has "been enforced in a discriminatory manner"). In *Tenafly*, for example, a local ordinance banned the placement of any signs or other materials on public utility poles. 309 F.3d at 151. In practice, the government didn't enforce the ordinance against many posted signs, including lost animal signs, house number signs, and directional signs. But after "vehement objections" by residents, the government enforced the ordinance against Orthodox Jewish *lechis*—religious items that were no more obtrusive. *Id.* at 151-53. Though the ordinance was facially neutral and generally applicable, the court held this "selective, discretionary application"

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

unconstitutional. *Id.* at 168 (citing *Lukumi*, 508 U.S. at 537); *see also Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804-05 (9th Cir. 2011) (strict scrutiny would apply if policy enforced selectively against religious groups).

Here, too, undisputed evidence shows that WIAA selectively enforced the former Rule 22.2.5. Indeed, WIAA hardly enforced it at all, except against Joelle. *Cf.* Ex.C 150:24-153:11 (recalling one other application). Between 2014 and 2019, at least four athletes withdrew from postseason competition without giving any reason, and at least five others withdrew for reasons not facially permissible under Rule 22.2.5 (*e.g.*, a choir concert, "band," a "personal conflict"). Ex.A-102; *see* Exs.A-12-A-18, A-77, A-105; Ex.BB. Although WIAA Assistant Executive Directors were "expected to inquire about reasons for postseason withdrawals," Ex.B 140:17-141:5, WIAA officials never investigated the circumstances of any of these withdrawals to determine if they were consistent with the Rules, and none of these schools were penalized. Ex.A-102; *see also* Ex.A-78 (trip to Alaska); Ex.M 56:24-57:2 (to get "nails done" before "prom").[7]

Moreover, WIAA didn't just shut its eyes to noncompliance with Rule 22.2.5 generally—it affirmatively condoned certain instances of noncompliance that it favored. In 2014, for example, WIAA granted a "waiver" from Rule 22.2.5 (then 25.2.5) so Sabbath-observing volleyball teams could do precisely what Joelle sought to do in 2019—enter the postseason despite knowing they would need to withdraw if they qualified for the state tournament. Ex.A-71; *see* Ex.C 114:2-15. And in 2019, WIAA "accommodat[ed]" tennis players who forfeited matches at the state tournament so they could take IB tests—which (WIAA itself concluded) *isn't* a permissible reason under Rules 22.2.5 and 22.2.6. Ex.A-68 WIAA12440; *see also* Ex.D 203:9-22; Ex.A-73. Given all this, WIAA's statement (at Ex.A-8) that it couldn't accommodate Joelle

[7] According to local media, one of the athletes who withdrew from the postseason without giving a reason in fact did so to attend her *quinceañera* —a religious and family event she "knew from the first" would conflict with the state tournament. Ex.A-105; *see* Ex.A-17.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

because Rules 22.2.5 and 22.2.6 have been "strictly enforced" and "not … waived in the past" is simply false. In practice, WIAA has permitted withdrawals for "secular—indeed mundane—reasons," so its refusal to allow Joelle to withdraw for "faith-based reasons" triggers strict scrutiny. *Ward*, 667 F.3d at 739.

Third, the former Rule 22.2.5 isn't neutral and generally applicable because its open-ended exception for "unforeseen events" renders it a system of "individualized exemptions." *Lukumi*, 508 U.S. at 537-58. When a rule has a broad exception giving officials discretion to make "individualized … assessment[s] of the reasons for the relevant conduct," refusal to make religious exceptions is subject to strict scrutiny. *Smith*, 494 U.S. at 884. The "*opportunity*" for "disparate treatment" of religion created by "open-ended" exceptions suffices to trigger heightened review. *Blackhawk*, 381 F.3d at 208, 210 (emphasis added).

Sherbert is instructive. There, the state denied unemployment compensation to a Seventh-day Adventist who wouldn't work on the Sabbath under a statute that allowed the state to award benefits to applicants who had refused work for "good cause." 374 U.S. at 399-401. This open-ended exception gave the state discretion to prefer secular claims of good cause to religious ones, triggering strict scrutiny. *Smith*, 494 U.S. at 888; *see also Lukumi*, 508 U.S. at 537-38 (exception permitting "necessary" animal killings); *Blackhawk*, 381 F.3d at 209-10 (exception permitting keeping animals for reasons "'consistent with sound game or wildlife … activities'").

So too here. WIAA officials were unable to identify a clear rationale for determining what constitutes an "unforeseen event" under Rule 22.2.5. *E.g.*, Ex.B 41:18-42:8 ("surprise tests, are just part of the educational system" and thus not unforeseen); *id.* 39:16-40:5 (death in family *might* qualify depending on "timing" and "the facts"); Ex.C 146:8-18 (out-of-state travel "could be unforeseen"). But they agreed that WIAA retained broad discretion to evaluate withdrawal requests for "unforeseen events" on a "[c]ase by case" basis," Ex.B 50:2-14—so its refusal to make an

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

exception for Joelle's "'religious hardship'" requires a "compelling reason," *Smith*, 494 U.S. at 884; *see also* Ex.C 51:22-52:9 (WIAA "ha[d] discretion to waive rules when appropriate").

And indeed, WIAA's past interpretation of "unforeseen events" underscores the problem. For example, in 2016, a student was permitted to withdraw from the golf tournament to compete in the baseball tournament because "it was unforeseen" at the time he entered the postseason "that his baseball team [would] qualify" for state. Ex.D 90:15-95:12; *see* Ex.C 128:25-129:10. Yet WIAA denied an exception for Joelle—though it now admits that for her (as for the baseball player) it was "unforeseen" at the time she requested the accommodation whether *she* would qualify for state. Ex.D 90:15-95:12. "A double standard is not a neutral standard." *Ward*, 667 F.3d at 740. WIAA's refusal to accommodate Joelle under Rules 22.2.5 and 22.2.6 is subject to strict scrutiny. *Smith*, 494 U.S. at 884.[8]

2. WIAA cannot satisfy strict scrutiny.

WIAA's own actions demonstrate that its refusal to permit religious withdrawals can't satisfy strict scrutiny. As shown, WIAA officials have in practice made no effort to determine the reason for postseason withdrawals, instead simply "assum[ing] … that people are following the rules." Ex.C 135:25-136:2. A state actor can't have an "'interest[] of the highest order'" in a rule it can't even be bothered to enforce. *Lukumi*, 508 U.S. at 546.

This aside, the former Rule 22.2.5 still can't satisfy strict scrutiny. First, WIAA's alleged interests aren't implicated *at all* for withdrawals occurring between stages

[8] Tellingly, WIAA officials provided inconsistent explanations as to whether the student's withdrawal in this case was an "unforeseen event" under Rule 22.2.5. Mr. Colbrese, former WIAA Executive Director, originally testified that the student's withdrawal violated the rule, but later completely reversed his testimony to say that qualifying for two state championship events could be unforeseen. Ex.B 136:21; Ex.B Correction Sheet. Both Mr. Hoffman, current WIAA Executive Director, and Mr. Barnes, Assistant Executive Director, testified that the withdrawal could be considered unforeseen under the rule. Ex.C 128:25-129:10; Ex.D 90:15-95:12. Yet Ms. Adsit, Assistant Executive Director, testified that such a withdrawal would violate the rule. Ex.E 122:16-123:11.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

of postseason play. Per WIAA, the harms caused by religious withdrawals are (1) "competitive advantage" for the player who would have faced the withdrawing player but instead gets a bye; and (2) alleged unfairness for the player who would have advanced but for the withdrawing player. Ex.A-8. But WIAA's regulations *already provided* a mechanism to avoid these alleged harms when a player advances through district but "is unable to compete" at state: "the next qualified contestant" takes his or her place. Ex.U at 2. WIAA's prohibition on inter-tournament Sabbath withdrawals thus fails even to satisfy rational-basis review, much less strict scrutiny. *See Merrifield v. Lockyer*, 547 F.3d 978, 986, 988-91 (9th Cir. 2008); *Stormans*, 794 F.3d at 1075-76.

Resisting this point, WIAA claims that allowing inter-tournament religious withdrawals is still unfair because a player defeated by the withdrawing player might not end up as the alternate. Ex.C 32:17-33:3. But this is the same situation WIAA has always tolerated for withdrawals for injury, illness, or unforeseen events. And in any event, it doesn't rise to the level of a compelling interest. "If [it] is unfair at all (rather than merely a consequence" of a player failing to advance because he lost), it's "less unfair" than excluding Sabbath observers from the postseason altogether, depriving them of the chance to advance no matter their abilities. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *see also Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 882-83 (9th Cir. 1987) ("only the gravest abuses" give rise to compelling interest; "[o]ffense to someone's sensibilities resulting from religious conduct" doesn't count (cleaned up)).

Second, even for withdrawals *within* a tournament rather than between stages, the former Rule 22.2.5's exceptions demonstrate that WIAA lacks a compelling interest in prohibiting religious withdrawals. Intra-tournament withdrawals for "injury, illness or unforeseen events" create precisely the same alleged harms (byes, "unfairness" to losing players) as religious withdrawals—yet the former Rules

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

expressly allowed them. *Cf.* Ex.I 35:16-36:23; Ex.M 50:14-51:14 (player and W.F. West's coach questioning whether byes are always advantageous). When a rule restricts religious conduct but not "other conduct producing substantial harm or alleged harm of the same sort, the [asserted] interest … is not compelling." *Lukumi*, 508 U.S. at 546-47.

Even if these interests were compelling, barring religious withdrawals isn't the only means of satisfying them. Rather, WIAA could have simply extended the substitution procedure to intra-tournament withdrawals, allowing the last player the withdrawing player defeated to advance instead of the withdrawing player—thus avoiding both allegedly unfair byes and the alleged harm to the player who loses to the withdrawing player. Courts must "not assume a plausible, less restrictive alternative would be ineffective"; the state actor must *prove* as much. *Playboy Entm't*, 529 U.S. at 824; *see also IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) ("*the state* must show" its action is "narrowly tailored" to the compelling end (emphasis added; internal quotation marks omitted)). Here, WIAA hasn't offered a sufficient rationale why this commonsense solution wouldn't suffice to address the harms it has identified—at least to the same degree its current practices address these harms. Ex.C 44:2-22; *see id.* 40:16-41:1.

II. WIAA's actions violate Washington's free-exercise provision.

Plaintiffs' claims under Washington's free exercise provision, Wash. Const. art. 1, § 11, are even more straightforward. In interpreting that provision, Washington has "eschew[ed]" *Smith*'s neutrality and general applicability standard. *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992). Instead, the provision extends "broader protection than the first amendment" as interpreted in *Smith*. *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009) (citation omitted). A four-prong analysis applies to state free-exercise claims: Once the plaintiff shows that (1) his sincere religious beliefs are (2) substantially

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

burdened, the state must show that it (3) has a compelling interest and (4) is using the least restrictive means to achieve that interest. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1233 (Wash. 2019). Under this test, Plaintiffs must prevail.

A. WIAA's scheduling on the Sabbath violates art. 1, § 11.

There's no question that Student Plaintiffs' "religious convictions are sincere and central to their beliefs." *Munns v. Martin*, 930 P.2d 318, 321 (Wash. 1997). Joelle abstained from the 2018-19 postseason to keep her Sabbath, and Student Plaintiffs would do the same if put to the choice. Ex.R at 6-7; Ex.L 22:15-24; Ex.Q ¶¶8-9. WIAA's scheduling thus substantially burdens their sincere Sabbath observance, because it "compel[s] or pressure[s]" them to "violate a tenet of [their] religious belief," *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1123 (Wash. 1989), by conditioning their access to an important benefit—competing" on "equal footing" for the championship, *see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017)—on violating their beliefs. That is a substantial burden under art. 1, § 11.

In related contexts, the Ninth Circuit and others have agreed that conditioning participation in school activities on forgoing religious exercise creates a substantial burden. *Cheema v. Thompson*, 67 F.3d 883, 884-85 (9th Cir. 1995) ("unquestionably" a substantial burden when students "exclu[ded] from the classroom" because they wouldn't leave articles of faith at home); *Gonzales v. Mathis Indep. Sch. Dist.*, No. 18-43, 2018 WL 6804595, at *1, 5 (S.D. Tex. Dec. 27, 2018) (substantial burden when students "bann[ed] from participation in … extra-curricular activities" because of religiously motivated long hair); *cf. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004) ("the chance to be champions" is "fundamental to the experience of sports"). Here too, WIAA's actions bar Plaintiffs from fully participating in a school activity that, as WIAA emphasizes, is "an integral part of education," Ex.E 12:9-18, and "an essential part of our culture." Ex.B 16:24-17:5.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

WIAA fails to show a compelling interest. Consistent with art. 1, § 11's provision that the state can override religious practices only if "inconsistent" with "peace and safety," the Washington Supreme Court interprets the compelling-interest requirement strictly: State action must "prevent[] a clear and present, grave and immediate danger to public health, peace, and welfare." *First Covenant*, 840 P.2d at 187 (cleaned up); *id.* at 185 (preservation "further[s] cultural and esthetic interests" but "do[es] not protect public health or safety"). For the reasons discussed above, *supra* part I.A.2, WIAA fails to assert an interest in scheduling the tournament on a Saturday sufficient "to outweigh the free exercise of religion." *Id.* at 188 (cleaned up).

B. WIAA violated art. 1, § 11 by prohibiting Joelle's withdrawal.

WIAA likewise violated art. 1, § 11 by applying former Rule 22.2.5 to bar Sabbath observers—like Joelle—from participating in any postseason play unless they agreed to violate their beliefs in case of a conflict. This burden on Joelle's religious exercise was substantial: Without the rule, Joelle could have competed postseason at least until the Sabbath posed a conflict; with it, she couldn't compete *at all*.

Second, WIAA's asserted interests in prohibiting religious withdrawals—byes, "unfairness" to losing players—hardly rise to the level of a "grave and immediate danger to public health, peace and welfare." *First Covenant*, 840 P.2d at 187 (cleaned up). Thus, for the reasons discussed above, *see supra* part I.B.2, WIAA lacks any compelling interest for its interpretation of the former Rule 22.2.5.

III. WIAA's actions violate Wash. Rev. Code § 28A.600.200.

Washington Revised Code § 28A.600.200 prohibits WIAA from discriminating based on "creed" in "any function it performs." Washington courts haven't yet had occasion to construe "creed" discrimination, but two other state statutes also prohibit it. Wash. Rev. Code § 49.60.180(3) (employment); *id.* § 28A.642.010 (schools). Washington understands both to require defendants to "reasonably accommodate … religious practices," absent "undue hardship." *Kumar v. Gate Gourmet, Inc.*,

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

325 P.3d 193, 203-04 (Wash. 2014).[9] Statutes "relating to the same subject matter" are read "in pari materia," *In re Yim*, 989 P.2d 512, 517-18 (Wash. 1999), so the Washington Supreme Court would likely interpret § 28A.600.200 to contain the same requirement. *See Matsuura v. Alston & Bird*, 166 F.3d 1006, 1008 n.3 (9th Cir. 1999) ("[A]bsen[t] a [state] Supreme Court decision on point, we must predict how the Court will decide the issue[.]").

Applied here, WIAA's actions violate § 28A.600.200. For reasons already given, it would not cause "undue hardship" to schedule the 2A tennis championship to avoid the Sabbath. Foreclosing WIAA's primary theory, "[t]he mere possibility that there would be an unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship." *Opuku-Boateng v. State of California*, 95 F.3d 1461, 1474 (9th Cir. 1996). Moreover, WIAA *already* schedules more than a dozen championships for weekdays only, and state tennis is unticketed (so no lost revenue). And WIAA has made no showing that the current (or an alternate) venue is unavailable. *See Nakashima v. Or. State Bd. of Educ.*, 185 P.3d 429, 431-32 (Or. 2008) (reversing judgment for Oregon athletics association after basketball scheduled on Sabbath; "the foremost objective of the tournament is to give students the opportunity to *participate*"). Nor would it have caused undue hardship to let Joelle withdraw from the postseason if a conflict arose. Any harm from religious withdrawals is the same harm already tolerated for withdrawals due to "injury, illness or unforeseen events." And as already explained, WIAA hasn't adequately shown that religious withdrawals would result in *any* cognizable harm.

IV. Plaintiffs are entitled to retrospective and prospective relief.

Because WIAA's application of the former Rule 22.2.5 violated Joelle's rights, she is entitled to compensatory damages. Under § 1983, "mental and emotional distress"

[9] *See also Prohibiting Discrimination in Washington Public Schools: Guidelines for School Districts*, Office of Superintendent (2012), https://perma.cc/JT7R-HCMH (schools).

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

from a constitutional violation "is compensable." *Anderson v. Cent. Point Sch. Dist.*, 746 F.2d 505, 508 (9th Cir. 1984). WIAA caused such distress by forcing Joelle to choose between her faith and the chance to compete in the postseason her senior year. Ex.H 96:23-97:8, 97:14-18, 97:22-25, 101:9-19 (denied "once-in-a-lifetime expe-rience"; "heavy disappointment" that she couldn't help teammates; "painful" miss-ing "last chance"; felt "WIAA [did]n't respect [her] religious beliefs"); Ex.G 42:1-5 ("great disappointment," "sadness" because unable to "compete … and help her teammates win"). Joelle is likewise entitled to $100 in nominal damages, even "with-out proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Hazle v. Crofoot*, 727 F.3d 983, 991-92 & n.6 (9th Cir. 2013) (courts have no "discretion in this matter" (cleaned up)).

Student Plaintiffs, meanwhile, are entitled to declaratory and injunctive relief. First, in "case[s] of actual controversy" like here, federal courts "may declare the rights and other legal relations of an[] interested party … whether or not further relief is … sought." 28 U.S.C. § 2201(a). And regarding injunctive relief, all factors are met. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). It's "well established that the deprivation of constitutional rights unquestionably con-stitutes irreparable injury." *Arevalo v. Hennessy*, 882 F.3d 763, 766-67 (9th Cir. 2018) (cleaned up). The "public interest" supports "upholding First Amendment principles." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (cleaned up). And WIAA has no countervailing compelling interest in refusing to accommodate Student Plaintiffs.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion; award Joelle com-pensatory damages and $100 in nominal damages; declare Plaintiffs' First Amend-ment rights; and enjoin WIAA from holding on Student Plaintiffs' Sabbath any 2A Boys State Tennis match for which any of them qualifies.

THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE. NW, SUITE 700
WASHINGTON, DC 20036
TELEPHONE (202) 955-0095

Respectfully submitted this 29th day of September, 2020.

/s/ *Joseph C. Davis*

CHARLES R. STEINBERG, WSBA #23980
The Steinberg Law Firm, P.S.
323 N. Miller Street
Wenatchee, WA 98801
(509) 662-3202
charles@ncwlaw.com

ERIC S. BAXTER (*Pro Hac Vice)*
JOSEPH C. DAVIS (*Pro Hac Vice)*
The Becket Fund for Religious Liberty
1200 New Hampshire Ave, N.W.
Suite 700
Washington, DC 20036
(202) 955-0095
jdavis@becketlaw.org

Attorneys for Plaintiffs