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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

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' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS

Hearing Date:	March 3, 2022
Hearing Time:	1:30 PM PT
Courtroom:	Courtroom 8 – 4th Floor
Judge:	Hon. Lucy H. Koh

Third Amended Complaint Filed: 7/15/21

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INTRODUCTION

Defendants' third motion to dismiss strains to keep this Court from reaching the merits of Plaintiffs' long-pending preliminary injunction motion. Defendants' effort is understandable. In repeated rulings over the past few years, federal courts have enjoined similar attempts to punish religious student clubs for asking their student leaders to embrace their faith. And Defendants' conduct here is far more egregious than in those cases. Defendants have called FCA's beliefs "bullshit" and FCA's teenage leaders "collateral damage"; mounted a swift and coordinated campaign to kick FCA off District campuses; deceived the California Department of Education as part of covering their tracks; and resumed intimidating FCA leaders and volunteers *this fall*.

And the ongoing harms from Defendants' actions are clear and concrete. Before Defendants derecognized FCA clubs, stigmatized affiliation with FCA, and intimidated students interested in FCA, there were active FCA clubs on three District campuses. Today, there is only one small group remaining, and Defendants have repeatedly denied recognized status to that group and made it permanently ineligible for recognition under its policies. Further, Defendants have aggressively used their power over students and teachers in the District to snuff out even that small group. As Defendants admit, just this fall they subjected a Pioneer FCA student leader to repeated intimidation, summoning her to the named-defendant principal's office and later exposing her to additional questioning about her role with FCA, despite warnings from the club's faculty advisor that the freshman student felt anxious and stressed about meeting with him given the District's history of hostility toward FCA. Defendants have since coopted the club's faculty advisor into submitting declarations against the club, gagged her from communicating with FCA staff, and sought to depose another teenage student leader of Pioneer FCA. Thus, the need for injunctive relief has only gotten stronger and the already-weak arguments for dismissal even weaker.

First, Plaintiffs have standing. Defendants do not contest that Pioneer FCA has standing, and the facts show it has already met three times this year and plans to continue meeting. Further, *even if* Pioneer FCA lacked leaders or members (it doesn't), FCA would still have both organizational and associational standing. Associational standing because it represents current students in the District who have chosen to affiliate with FCA and who desire to obtain official recognition from the District for an FCA club. *See, e.g.*, *Gay-Straight All. Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1103 (E.D. Cal. 2001)

(holding that the national GSA Network had standing because "its members wish to form a GSA club on the Golden West campus but are afraid to do so for fear of retaliation, humiliation, and further harassment from peers, teachers, administrators and counselors."); *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty.*, 2 F. Supp. 3d 1277, 1281 (M.D. Fla. 2014) (holding unincorporated Gay-Straight Alliance, made up of unnamed minor students, had standing to sue over denial of official club recognition). And organizational standing because Defendants' actions have intimidated students from becoming FCA members and leaders. Indeed, the denial of equal access to eligibility for recognized status is an injury-in-fact that alone supports standing.

Likewise, Plaintiffs' requests for prospective relief are ripe and not moot. Plaintiffs have repeatedly been punished under Defendants' discriminatory policies, are still ineligible for recognized status under those policies, and would have their injuries redressed by both declaratory and injunctive relief. Plaintiffs are not required to further subject themselves to a discriminatory policy to challenge its unconstitutionality—particularly here, where the policy has already been applied to suppress them. And Defendants do not come close to meeting their heavy burden to show otherwise.

Finally, Plaintiffs' requests for relief from the harassment and retaliation they face are not moot. Defendants have not shown it is absolutely clear that their harassment and retaliation will not resume, nor could they because those injuries are ongoing and worsening by the day.

Defendants' motion to dismiss should be denied, and Plaintiffs' preliminary injunction granted.

I. Plaintiffs have standing to seek prospective relief.

FCA National and Pioneer FCA both have standing to seek prospective relief against Defendants. First, FCA National has shown organizational standing. By harassing student FCA representatives, stigmatizing FCA's religious beliefs, denying official status to FCA clubs (run by student FCA representatives), and intimidating students interested in associating with FCA, Defendants have frustrated FCA's mission. As a result, FCA has been forced to divert staff time and financial resources from mission-focused activities to, among other things, protect the safety and morale of student FCA representatives in the District and to educate the District regarding student FCA representatives' rights. And FCA National has shown associational standing because its close relationship with its student representatives confirms

that it has a personal stake in this controversy.

Second, Defendants do not challenge Pioneer FCA's associational or organizational standing. Instead, they simply pretend the club doesn't exist, despite acknowledging that it has met on campus twice this semester. As explained below, this argument (better characterized as a mootness argument) misses the mark. *Infra* Section II.B. But Defendants' silence regarding Pioneer FCA's standing *is* telling. Indeed, Defendants have no response to the binding precedent confirming that a student group—like Pioneer FCA—excluded from recognized status has standing to challenge that exclusion.

A. FCA National has organizational standing.

"An organization suing on its own behalf can establish an injury when it suffered both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (cleaned up). As applicable here, religious ministries can have organizational standing when government actors deter attendance or participation in the ministries' activities. *See, e.g.*, *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521-22 (9th Cir. 1989) (finding organizational standing for churches when "members have withdrawn from active participation in the churches, a bible study group has been canceled for lack of participation, clergy time has been diverted from regular pastoral duties, [and] support for the churches has declined"). In assessing organizational standing, courts must defer to an organization's determination of what actions frustrate its mission. *Democratic Party of United States v. Wis. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981); *accord Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

1. Defendants have frustrated FCA's mission.

To show mission frustration, an organization need not be directly subject to the law it is challenging. Rather, the standard is that organizations may challenge illegal actions that impair or impede the organization's ability to advance its mission.

For instance, organizations dedicated to assisting asylum applicants had standing where they challenged a rule that "frustrated their mission of providing legal aid 'to affirmative asylum applicants who have entered' the United States between ports of entry, because the Rule significantly discourages a large number of those individuals from seeking asylum given their ineligibility." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766 (9th Cir. 2018). Similarly, *El Rescate Legal Services v. Executive*

Office of Immigration Review held that organizations working with Central American refugees had standing to challenge a government policy of using incompetent translators at immigration proceedings because that policy "frustrate[d] [the organizations'] goals and require[d] the organizations to expend resources in representing clients they otherwise would spend in other ways." 959 F.2d 742, 748 (9th Cir. 1991). And in *Presbyterian Church*, the Ninth Circuit held that a "demonstrable decrease in attendance at … worship activities" as a result of government surveillance of the church's congregants constituted a "distinct and palpable" injury sufficient for the church to have organizational standing "because its ability to carry out its ministries has been impaired." 870 F.2d at 522.[1]

These organizations were not themselves subject to the challenged policies or illegal government action; nonetheless, the policies and illegal actions frustrated their mission sufficiently to create organizational standing. This is why, in the student group context, a national organization can have standing to challenge a school district's treatment of student clubs *even if* it does not currently have a student club in that district (which FCA does), so long as its mission is frustrated. *See Gay-Straight All.*, 262 F. Supp. 2d at 1105-06 (rejecting school district's argument that "before GSA Network can have direct standing, it must first form a club on a [district] campus").

FCA's Mission. FCA's mission is "[t]o lead every coach and athlete into a growing relationship with Jesus Christ and His church." Williams I Decl., ECF No. 64-3, Ex. A at 12. This mission includes promoting its religious message to students through student-led and student-initiated student clubs ("Huddles") that choose to affiliate with FCA. ECF No. 64-3 ¶¶ 3-7 & Ex. A at 17 (Huddle Ministry "key

[1] *See also Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (voter registration organization can challenge policy of delaying individuals' voter registrations); *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (organizations working with unauthorized aliens had standing to challenge laws pertaining to unauthorized aliens); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (organization promoting fair housing had standing to challenge website's roommate practice as violative of Fair Housing Act); *Comite de Jornoleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943-44 (9th Cir. 2011) (organization with mission "to strengthen and expand the work of local day laborer organizing groups" had organizational standing to challenge ordinance that "discouraged both employees and employers from participating in hiring transactions"); *Smith v. Pac. Props & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (organization with "purpose of helping to eliminate discrimination against individuals with disabilities … [by] ensuring an adequate stock of accessible housing for those who are freed to leave the nursing homes" had standing to challenge violations of the Fair Housing Amendments Act).

portion" of FCA's religious mission); Klarke I Decl., ECF No. 64-4 ¶¶ 9-10; Sinclair Decl., ECF No. 64-5 ¶ 8. It is through these Huddles that FCA seeks to "build Christian student-athletes in their faith and equip them as followers of Christ." ECF No. 64-3, Ex. A at 17. And "[i]t is FCA's objective to Engage, Equip and Empower, and encourage student-athletes to impact and influence their campus for Christ." *Id*. This is also why Huddle leaders are themselves FCA representatives, the same designation FCA gives its directors, officers, and staff. ECF No. 64-3 ¶ 7 & Ex. A at 7, 49. Because these leaders are "a principal means of transmitting FCA's beliefs and values to the members of its student groups and to the student body as a whole," they must affirm agreement with FCA's Statement of Faith so that its religious message is fully conveyed. TAC, ECF No. 92 at 15; ECF No. 64-3 ¶ 6 & Ex. A at 17; ECF No. 64-5 ¶ 8 ("[A]s an FCA Representative … one of my responsibilities was to spread FCA's religious message on campus.").

FCA's Huddle Playbook explains that "[t]he Huddle Ministry is initiated and led by student-athletes and coaches on junior high, high school, and college campuses." ECF No. 64-3 ¶¶ 3-4 & Ex. A at 17. Through these students who voluntarily join and lead within FCA's ministry, FCA's Huddle Ministry has a "mission of reaching out to every person with the Gospel" and FCA is "compelled to focus on making every effort to reach [students] with the Gospel." *Id*. FCA views its work on school campuses as "strategic" and seeks to ensure that "Christ is lifted up among the millions of students in our nation." *Id.*

Defendants' frustration of FCA's Mission. Interference with the ability of an organization to advance its mission is the definition of mission frustration, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), and FCA has shown interference in spades. The District has made it significantly more difficult for FCA to accomplish its mission in at least three ways: excluding FCA clubs from ASB approval and erecting barriers to ASB approval, stigmatizing association with FCA and discouraging students from becoming FCA student leaders, and harassing current students interested in associating with FCA.

(*1) Revoking and preventing ASB approval of FCA clubs*: Defendants' made-for-FCA policy is clear—student clubs (like those affiliated with FCA) that require their leaders to uphold their faith need not apply. *Infra* Section II.B. This categorical exclusion of all FCA clubs in the District has frustrated FCA's mission. Lopez II Decl., ECF No. 115-6 ¶ 10 (loss of ASB-approval made it more difficult to recruit and retain future student FCA leaders); L.W. Decl., ECF No. 64-6 ¶ 11 (similar). *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) ("inability to compete on an equal footing" was a

sufficient injury for church to have standing). Without affiliated clubs, FCA cannot reach nearly as many students in the District. *See* ECF No. 115-6 ¶ 13 (clubs rely on existing student FCA representatives to identify and recruit new student leaders); Williams II Decl. ¶ 10. ASB approval gives student clubs access to resources, a faculty advisor, and means of communication and funding that are not available to non-ASB approved student groups. *See Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1140 (C.D. Cal. 2000) (GSA club had standing to seek recognition because denial of official club status and accompanying benefits "frustrated" its mission); *InterVarsity v. Univ. of Iowa*, 408 F. Supp. 3d 960, 967 (S.D. Iowa 2019), *aff'd*, 5 F.4th 855 (8th Cir. 2021) (recognized status "carries with it many benefits"; loss of official recognition significantly harms a student club); *BLinC v. Univ. of Iowa*, 360 F. Supp. 3d 885, 907 (S.D. Iowa 2019) (same). In addition, ASB approval encourages students to join clubs; exclusion from the campus community discourages students from joining FCA clubs and thus discourages students from becoming student FCA representatives and club leaders. *See* ECF No. 64-3 ¶ 8. These harms were caused, and are still being caused, by Defendants' illegal actions. Lopez I Decl., ECF No. 64-2 ¶¶ 8-11.

(2) Stigmatizing affiliation with FCA: Defendants' actions have also stigmatized association with FCA, thus discouraging current and prospective student representatives from affiliating with FCA, from leading FCA clubs in the District, and from advancing FCA's mission at District schools. ECF No. 64-5 ¶ 6 (Defendants caused FCA student representative to feel "stigmatized," "like an outsider," and "unsafe"); ECF No. 64-6 ¶ 11 (similar). As Rigo Lopez, FCA's Metro Director, explained, the District's "hostility" to FCA "intimidated students and made it much harder for existing student leaders and members to recruit new members and leaders." Blomberg Decl. Ex. A ¶¶ 5, 9, 17; ECF No. 115-6 ¶¶ 8-12 (explaining how potential FCA representatives are aware of and intimidated by the discrimination suffered by FCA's student representatives); Williams II Decl. ¶ 10 (Defendants are "stigmatizing" affiliation with FCA "by directly speaking out against FCA's religious beliefs, encouraging students to start other groups that do not share FCA's religious beliefs, and targeting and otherwise discouraging teachers and students from associating with or assisting FCA."). Lopez further explained that "[i]n the 15 years I have served within FCA in the Bay Area, I have never seen FCA huddles struggle or disappear like they have within the District." Blomberg Decl. Ex. A ¶ 5. This stigma led to protests against Pioneer FCA and to uniformly negative coverage in the student newspaper and on social media that disparaged FCA's religious beliefs

and called for the group to be removed from campus. Smith Decl., ECF No. 64-1 ¶ 4 & Ex. B; ECF No. 64-4 ¶ 5; ECF No. 64-5 ¶¶ 4-6; Blomberg Decl. Ex. B.

As Defendants acknowledge, FCA's club ministry has withered in the District—dropping from three active clubs before Defendants' actions to one small, derecognized club today. Indeed, the FCA Huddle at Willow Glen expressly disaffiliated with FCA and continued under a different name *because* of the "restriction [against] being an FCA" club imposed by the District. *See* Lopez IV Decl. Ex. F.[2] This means that fewer students are able to hear FCA's message and engage with its ministry representatives—precisely as the District intended. *See* ECF No. 115-6 ¶¶ 6 & 8-11 ("The loss of ASB-approved student FCA huddles at both Willow Glen and Leland High Schools was a direct result of the District's discrimination and hostility to the student FCA huddles' religious beliefs and speech."). Indeed, Defendant Glasser stated explicitly that exclusion of FCA from campus was necessary to "keep up our defense of Pioneer's community values," going so far as to argue that FCA's religious beliefs might be *de facto* sexual harassment. Glasser Tr., ECF No. 115-1 at 217-18.

(3) Ongoing stigmatization and harassment: Current student FCA representatives in the District still face made-for-FCA hurdles and fear further harassment from Defendants when they seek to advance FCA's mission. ECF No. 115-6 ¶¶ 16-18 (explaining how current students are "intimidated" and "fearful" of "what the District will do to them and to their club if they seek ASB recognition"). For example, the incoming president of Pioneer FCA (a student FCA representative and a freshman girl) was required to meet with Principal Espiritu—a defendant in this case whose disapproval of FCA's religious beliefs has been openly expressed to the school community—before Pioneer FCA was allowed to attend Club Rush. Blomberg Decl. Ex. A ¶¶ 15-17. No other club was required to jump through these hoops or justify its existence in this way. *See id.* ¶ 19 (explaining that student FCA representative was "afraid" and suffered from "overwhelming anxiety" after meeting with Principal Espiritu). This ongoing stigmatization and fear of further adverse action continues to impair FCA's mission.

[2] The FCA club at Leland High School was similarly extinguished when Leland's principal said FCA could not ask its student leaders to embrace its faith, warned that the protests that were occurring at Pioneer could happen at Leland, and made it harder to hold larger events. ECF No. 127-5 at 4-7. While the club met briefly under these stifling conditions, within a year of the District's actions, the club died.

Each type of interference is sufficient on its own to pass muster. Taken together, they overwhelmingly show the kind of discouraging and deterring of individuals from associating with an organization that plainly constitutes mission frustration. *E. Bay Sanctuary*, 932 F.3d at 766. And the Supreme Court has confirmed that a student club's loss of official recognition frustrates the club's ability to "pursue its stated purposes" and advance its mission. *Healy v. James*, 408 U.S. 169, 181 (1972) (an organization cannot "remain a viable entity in a campus community in which new students enter on a regular basis" without access to the benefits of an officially recognized club). Defendants' claim that "nothing SJUSD has done or now does frustrates [FCA's] stated mission" is beyond belief. Mot.23.

2. Ninth Circuit precedent squarely precludes Defendants' contrary arguments.

Defendants respond that FCA's mission has not been *completely* frustrated because it is still possible to "attempt to reach others for Christ" despite Defendants' actions. Mot.24. But this argument has long been rejected by the Ninth Circuit. Complete frustration isn't the standard; all that is required is that defendants' actions counteract the mission of the organization and make that mission more difficult to accomplish. *See, e.g.*, *Smith*, 358 F.3d at 1105 ("[a]ny violation" of the FHAA constitutes mission frustration); *E. Bay Sanctuary*, 932 F.3d at 766 (decrease in number of asylum seekers constitutes mission frustration for legal aid); *Gay-Straight All.*, 262 F. Supp. 2d at 1105 (district policies targeting LGBTQ students for discrimination frustrated GSA Network's mission). That standard has been met. Williams II Decl. ¶ 11 ("I have never seen such concerted and significant barriers put up against FCA by a school district."). Indeed, Defendants' District-wide policies have prevented student FCA representatives from obtaining official recognition for their club at *any* District school, impairing the organization's ability to reach over 10,000 students enrolled in District high schools. *Cf. Colin*, 83 F. Supp. 2d at 1140 (denial of official club approval confirmed organizational standing).

Defendants also argue that FCA's mission isn't frustrated because it includes "advoc[ating] on behalf of students to enforce their rights to meet as FCA clubs." Mot.26. This is factually wrong and legally irrelevant. First, FCA is not a legal advocacy organization; it is a religious ministry—litigation and advocacy are not FCA's mission. Williams II Decl. ¶¶ 8-9 ("impact" litigation not part of FCA's mission); ECF No. 64-3 ¶¶ 2-3; *see* Williams Tr. 61:17-18 (FCA does not budget for litigation); *id*. at 66:6-8 (no revenue in 2019 or 2020 from any litigation FCA filed); ECF No. 115-6 ¶ 12 (noting that the District's

behavior is very unusual). Nor has FCA sought to, in the District's words, "exploit" the victims of Defendants' discrimination by giving them a few minutes to share their experiences with co-religionists and receive encouragement. *See* Lopez IV Decl. ¶ 6; Klarke II Decl. ¶ 24.

Second, Defendants are wrong on the law. Even if an organization advances its mission through litigation, frustration of that mission can show organizational standing. In both *Hunt* and *Mink*, the Supreme Court and the Ninth Circuit confirmed that the advocacy organizations primarily served a segment of the community through, among other things, litigation. *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977). And yet both advocacy organizations had standing. *See also El Rescate Legal Servs.*, 959 F.2d at 748 (requiring legal services organizations "to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing"). Indeed, Defendants' rule would exclude organizations like the GSA Network that do often seek to advance their mission through litigation. *GSA Court Victories: A Quick Guide for Gay-Straight Alliances*, ACLU (July 1, 2015), https://perma.cc/Z2M6-2NMZ ("GSAs have prevailed in at least 17 federal EAA lawsuits"); *Gay-Straight All.*, 262 F. Supp. 2d at 1105.

3. FCA diverted resources in response to Defendants' actions.

The Ninth Circuit has frequently held that staff time spent addressing illegal conduct can establish diversion of resources. *See Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1166 (9th Cir. 2013) ("Diverted staff time is a compensable injury."); *see also Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (holding diversion of staff resources to combat FHA violations is sufficient to confer standing). Similarly, financial expenditures to avoid or mitigate an injury can justify standing. *See E. Bay Sanctuary*, 932 F.3d at 767 ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" (quoting *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017))). Though litigation expenditures themselves may not be counted as a diversion of resources, the provision of legal services, such as educating others about the law, can constitute diversion.[3]

[3] *See Valle del Sol*, 732 F.3d at 1018 (organizational standing where group was "forced to divert staff and resources to educating their members about the law"); *Pac. Shores Props.*, 730 F.3d at 1166-67 (organization able to recover as damages legal costs of permits and applications caused by discriminatory

Here, as FCA staff, Lopez spent and continues to spend significant time counseling student leaders in the District and communicating with District officials to explain FCA's stances and to protect the rights of the Student FCA Chapters. ECF No. 64-2 ¶¶ 4-9; Williams Tr. 105:8-11 (Lopez's time expenditure "was certainly outside of the norm for what most of our directors have to do"). Lopez began diverting his time because of the District's actions well before any litigation in this case, and this time was not related to the litigation. ECF No. 64-2 ¶ 12. Lopez lost time that he would have spent on other job duties when he consoled students, built morale, educated students about their rights, ensured student safety, and performed other tasks unrelated to litigation. *Id*. ¶¶ 4-10; Williams Tr. 105:23-25 (Lopez spent "inordinate amount of time helping [FCA students] and praying with them and counseling them on how to deal with what was going on"); ECF No. 64-4 ¶ 11 (documenting diverted time); Lopez IV Decl. ¶¶ 18 (confirming that at least 40 hours of diverted time was not associated with litigation). Lopez continues to divert time to educating current Pioneer FCA student representatives about their rights and counseling them in the face of the District's ongoing harassment of Pioneer FCA. Blomberg Decl. Ex. A ¶ 17 (documenting time supporting student FCA leaders).

Similarly, even apart from litigation, senior FCA officers have had to spend time away from their regular job responsibilities addressing this issue. ECF No. 64-3 ¶¶ 11, 13 (listing specific ways in which time was diverted); Williams Tr. 106:23-107:7, 152:4-16 (documenting conversations and time spent with senior FCA staff and officers in response to Defendants' actions). FCA also spent thousands of dollars preparing correspondence to the District to inform it of students' rights under the First Amendment and Equal Access Act. ECF No. 64-3 ¶ 12 (FCA spent over $10,000 to "educate the District about the rights of FCA and of students who choose to affiliate with FCA"). These expenses and diverted time were independent of litigation and would have occurred regardless of litigation. ECF No. 64-3 ¶ 13. But for Defendants' actions, these resources would have been spent on other efforts to advance FCA's mission. ECF No. 64-3 ¶ 11; ECF No. 64-2 ¶¶ 4-10; *Nat'l Council of La Raza*, 800 F.3d at 1039-40 (organizational

scheme); *Fair Hous. Council*, 666 F.3d at 1219 (organizational standing where the plaintiff responded to allegations by "start[ing] new education and outreach campaigns targeted at discriminatory roommate advertising"); *Combs*, 285 F.3d at 905 ($14,217 in expenses related to "investigating and other efforts to counteract Combs' discrimination" constituted diverted resources).

standing where an organization diverted "staff and volunteer time … they would have spent on some other aspect of their organizational purpose.").

In response, Defendants misstate Lopez's deposition testimony, claiming his efforts were all litigation-related. Mot.26. While Lopez of course confirmed that Defendants' voluminous discovery requests and other case-related matters have cost additional time, he did not testify that the lawsuit was the only reason his time or FCA's resources were diverted. Lopez Tr., ECF No. 115-3 at 154:11-155:10. Rather, Lopez specifically testified that he has spent more time with Pioneer FCA and its student FCA representatives, separate from this litigation, because of Defendants' discrimination, *id*. 156:4-9, which diverted him from being able to accomplish other aspects of his duties, *id.* 154:11-13. *See also* ECF No. 64-2 ¶ 10. And Defendants' argument about Lopez's time physically on campus at Pioneer fails, Mot.25, since much of the time that he diverted was time spent off campus. ECF No. 64-2 ¶ 7.

Put simply, FCA has organizational standing because it "has committed resources to advance goals which are thwarted by the alleged policies of the [District]," and has thus "suffered an injury in fact sufficient to confer direct standing." *Gay-Straight All.*, 262 F. Supp. 2d at 1105.

B. FCA National has associational standing.

FCA also has associational standing. An organization has associational standing if "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See America Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021) (citing *Hunt*, 432 U.S. at 343). "The ultimate consideration when determining whether an organization has associational standing is whether it has a 'personal stake in the outcome of the controversy.'" *Id*. at 1097 (quoting *Mink*, 322 F.3d at 1111).

1. FCA has a personal stake here due to its close relationship with student FCA leaders.

Associational standing does not require an organization to have members. Rather, an organization can have the necessary "personal stake in the outcome of the controversy" if it "is sufficiently identified with and subject to the influence of those it seeks to represent." *Mink*, 322 F.3d at 1111 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977)); *see also Rousseau*, 985 F.3d at 1097. This shared identity "undergird[s] the concept of associational standing" and "'assure[s] that

concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Mink*, 322 F.3d at 1111-12 (quoting *Hunt*, 432 U.S. at 345). In such instances, those whom the organization seeks to represent are the "functional equivalent of members." *Id.* at 1112.

The Ninth Circuit has recently held that a "close relationship" between an organization's mission and the interests of the non-members it seeks to represent "is enough to give the organization a personal stake in the outcome of the controversy" and therefore establish associational standing. *Rousseau*, 985 F.3d at 1097 (citation omitted). In that case, a "supporter" of the organization was sufficiently identified with its mission to give it associational standing. *Id.* Similarly, an organization had associational standing to represent day laborers because its "members" "attend meetings, participate in [the organization's] activities, such as 'know your rights' trainings and free community clean-up assistance to victims of recent fires and landslides" even though the "meetings are informal," "membership could change frequently," and the organization "requires no paper work to become a member, collects no fees or dues, has no elected leadership, [and] has no governing body." *La Asociacion de Trabajadores v. City of Lake Forest*, 2008 WL 11411732, at *4 (C.D. Cal. Aug. 18, 2008), *aff'd*, 624 F.3d 1083. *Trabajadores* premised its finding of associational standing on "the members' and groups' aligned interests to defend the right of day laborers to solicit work in the City and address the difficulties they face in seeking work." *Id.* at *5; *Mink*, 322 F.3d at 1111 (advocacy organization had associational standing, even though it did "not have all the indicia of membership," because it "is sufficiently identified with and subject to the influence of those it seeks to represent").

Here, FCA's mission is exactly aligned with the interests of its student leaders, who have agreed to affirm and advance FCA's religious mission on their respective campuses as its student FCA representatives. ECF No. 64-5 ¶ 8. For example, to become a student FCA representative, students must affirm and agree to conduct themselves in accordance with FCA's Statement of Faith. *Id.* This is the same Statement of Faith FCA staff, officers, and directors must affirm. ECF No. 64-3 ¶ 7. Once a student becomes an FCA representative, they are responsible for presenting FCA's religious message at their school, and for correctly and faithfully conveying FCA's religious beliefs. *Id.* ¶¶ 6-7. FCA works to support these student representatives to ensure they can advance FCA's mission on their campuses. FCA

provides resources, training, and mentorship to its student representatives—both during the school year and through summer camps and programs. *Id.* ¶¶ 5-7; *see also* ECF No. 64-6 ¶ 4; ECF No. 64-4 ¶ 10. FCA's officers and directors thus share both an organizational goal and religious beliefs with the student leaders whose interest FCA seeks to represent in this lawsuit. ECF No. 64-3 ¶ 7. FCA also shares with its student representatives the very same religious beliefs that Defendants have challenged in this case. And by telling students in the District that FCA's religious beliefs disqualify its student representatives from being able to receive ASB-approval for their club, the District is disparaging those religious beliefs. *See* Williams II Decl. ¶ 6 ("FCA's mission is aligned with the interests of its student representatives."). Indeed, it is the student representatives' very affiliation with FCA that caused Defendants to take action against them, and to continue excluding them from obtaining ASB-approval for their club. On this basis alone, FCA therefore has a personal stake in the resolution of this litigation, which itself is sufficient for associational standing. *Rousseau*, 985 F.3d at 1097.

Further, while not necessary for associational standing, student FCA representatives also satisfy several specific indicia of membership, which provide additional support for FCA's associational standing. First, FCA "express[es] the[] collective views and protect[s] the[] collective interests" of its student FCA representatives. *Hunt*, 432 U.S. at 345. Religious groups are the "archetype of associations formed for expressive purposes," and their "very existence is dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200-01 (2012) (Alito, J., joined by Kagan, J., concurring). And here, all FCA representatives voluntarily chose to associate with FCA's religious beliefs and affirm its Statement of Faith, and FCA is expressing their views and protecting their interests by both expressing those beliefs on campuses and defending against Defendants' actions. ECF No. 64-3 ¶ 7. Second, as FCA's senior leadership has explained, student FCA representatives can "impact the mission" and goals of FCA in numerous ways. Williams II Decl. ¶ 3. For instance, "FCA is responsive to the views of its student FCA representatives and expresses their collective views on issues related to FCA's mission and ministry." *Id.* ¶ 7; *see also id.* ¶¶ 3-5. Indeed, at least half of FCA's Executive Team, including its President and CEO, were FCA student representatives or participants in FCA activities while students, and FCA views participation in its student ministry as a "significant" factor in evaluating prospective volunteers and staff. *Id.* ¶ 5 (former student

FCA leadership "help[s] ensure FCA is responsive to student FCA leaders' needs"). FCA's leadership therefore easily identifies with and responds to the needs and interests of its student representatives. *Id.* ¶ 7. Third, FCA's Board members are selected based on "nomination[s]" from field staff in consultation with those they interact with, including student FCA representatives. Williams Tr. at 18:17-19:2; Williams II Decl. ¶ 4. This is more than sufficient to confirm that FCA has associational standing. *Cf. Mink*, 322 F.3d at 1111 (finding associational standing even though "OAC is funded primarily by the federal government, and not by its constituents," "OAC's constituents are not the only ones who choose the leadership of OAC, and they are not the only ones who may serve on OAC's leadership bodies").

2. FCA easily satisfies the remaining requirements for associational standing.

Defendants do not contest that student FCA representatives would themselves have standing in this litigation, or that this litigation is germane to FCA's purposes. The only other relevant argument Defendants make is that the relief sought by FCA would require participation of individual student FCA representatives in this lawsuit. Mot.29-30. But Defendants mischaracterize this third prong of associational standing. If the fact that a member of the group may be a witness in a lawsuit could defeat associational standing, then associational standing would be a dead letter. Instead, the third prong seeks to ensure that the relief sought does not require specific, individualized proof of injury for each member, which is not susceptible to resolution by a representative entity. *City of S. Lake Tahoe Retirees Ass'n v. City of S. Lake Tahoe*, 2017 WL 2779013, at *2 (E.D. Cal. June 27, 2017) ("Associational standing is less appropriate where the claims or relief are specific to individual members."); *see also Gay-Straight All.*, 262 F. Supp. 2d at 1105 ("The participation of individual members is not required when the claims proffered and relief requested do not demand individualized proof on the part of an association's members."). Thus, as relevant here, "[i]ndividualized proof from the members is not needed where, as here, declaratory and injunctive relief is sought rather than monetary damages." *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998).

Here, "there is complete identity between the interests of [FCA] and those of its members, … and the necessary proof could be presented in a group context." *City of S. Lake Tahoe*, 2017 WL 2779013, at *2 (cleaned up) (quoting *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 10 n.4 (1988)). Associational standing is therefore appropriate. FCA's claims for prospective relief do not require the participation of

any specific student or individual to prove individualized harm or injury. Indeed, Defendants do not (and cannot) contest that, by seeking forward-looking injunctive relief, any remedy awarded by this Court will inure to the benefit of FCA's student representatives collectively, not to a specific individual uniquely. FCA's claims regarding derecognition of its affiliated clubs are not specific to one student. And the claims that Defendants have a policy of being callously indifferent to harassment of FCA members do not inure to a single member. Instead, Plaintiffs are challenging the District's exclusionary policy and are seeking prospective relief which will benefit all student FCA representatives in the District equally. This is exactly the sort of challenge amenable to representative litigation. *See Hunt*, 432 U.S. at 343 ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.").

C. FCA National has standing for its claims in Counts I and IX through XII.

Turning from types of relief to types of *claims*, Defendants separately contest FCA's standing for Counts I and IX through XII, but these arguments fail for the same reasons explained above: FCA has been directly injured as an organization by Defendants' statutory and constitutional violations, and Defendants do not dispute that FCA's student representatives have standing to bring these causes of action. For this reason, FCA has both organizational and associational standing for all five counts.

The only case Defendants cite to support their claim that FCA lacks statutory standing under the EAA expressly turned on the fact that there were no members or affiliates of the national student organization who themselves would have had standing. *See AHA v. Douglas Cnty. Sch. Dist. RE-1*, 158 F. Supp. 3d 1123, 1140 (D. Colo. 2016). Indeed, the court even noted that an organization *would* have standing to "assert a claim on behalf of its members" if it could "establish that 'its members would otherwise have standing to sue in their own right.'" *Id.*; *accord. Serv. Women's Action Network v. Mattis*, 352 F. Supp. 3d 977, 985-87 (N.D. Cal. 2018) (citing *Associated Gen. Contractors v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013)). As Defendants concede, FCA's student representatives and Pioneer FCA both have standing to bring claims under the EAA. Mot.30-31 ("students and student groups who were denied access to a school's limited open forum" could seek relief under the EAA). And, because the student FCA leaders' standing is the basis for FCA's associational standing, Defendants' arguments about

statutory standing simply collapse into a restatement of their argument about associational standing already addressed above. *Supra* Section I.B.

The same is true for FCA's First and Fourteenth Amendment claims. First, FCA has associational standing for Counts IX through XII because, as Defendants do not dispute, FCA's student representatives have suffered such constitutional violations. Second, FCA also has organizational standing for each of those claims because Defendants' unlawful conduct directed at FCA's student representatives frustrated FCA's mission, ECF No. 64-3, Ex. A at 12, and forced FCA to divert resources to address those constitutional violations that would have otherwise been spent elsewhere. This is sufficient for FCA itself to have organizational standing for all its claims. *Supra* Section I.A.

D. Pioneer FCA has standing to seek prospective relief.

Courts regularly permit student groups like Pioneer FCA to sue on behalf of their members or affiliates. *See, e.g.*, *Gay-Straight All.*, 262 F. Supp. 2d at 1103 (minor students were not named in lawsuit because they feared harassment and retaliation); *BLinC*, 360 F. Supp. 3d at 885 (unincorporated association); *accord InterVarsity*, 408 F. Supp. 3d at 960 (same). Here, Plaintiffs have pointed to real students whose ability to meet, encourage each other in their faith, receive faculty support, and reach out to others at their school is materially harmed by the District's ongoing harassment and refusal to recognize their student club. Lopez IV Decl. ¶¶ 7-11. Similarly, Pioneer FCA has shown—and Defendants do not dispute—that Pioneer FCA's mission has been frustrated by Defendants actions and that its leaders have diverted their time from mission and ministry to address Defendants' unlawful actions. *E.g.*, *id.* ¶ 13 (explaining how Defendants' actions "put a stigma on clubs, making students feel uncomfortable associating with the club and meeting together"); Blomberg Decl., Ex. A ¶¶ 17-19.

The strength of these arguments is confirmed by Defendants' failure to challenge either Pioneer FCA's associational or organizational standing. Indeed, the only standing argument addressed to Pioneer FCA by Defendants is a half-hearted attempt to argue that Plaintiffs must provide affidavits from individual members to prove standing. Mot.20-21.[4] That is wrong. Courts frequently find associational standing

[4] All Defendants' arguments regarding the alleged non-existence of Pioneer FCA go to mootness, not

where, as here, the complaint alleges the organization's members would actually be affected. *See, e.g.*, *Nat'l Fed'n of the Blind v. Uber Techs., Inc*., 103 F. Supp. 3d 1073, 1079-80 (N.D. Cal. 2015) (associational standing established based on allegations in the complaint, without individual affidavits); *Garcia v. City of Los Angeles*, 2020 WL 6586303, at *2-5 (C.D. Cal. Sept. 15, 2020) (same). Plaintiffs have also identified, by initials, multiple minor students who are current FCA leaders or members, several of whom Defendants, as confirmed by their harassment of these students, have identified as current students at Pioneer High School. Blomberg Decl. Ex. A ¶¶ 6-9 (identifying students); *id.* ¶¶ 10, 19 (student leader meeting with both District staff and named defendant).

Pioneer FCA thus has associational and organizational standing to pursue its claims in this case.

II. FCA's request for prospective relief is ripe and not moot.

A. FCA's request for prospective relief is ripe.

Claims are ripe when they "present issues that are 'definite and concrete, not hypothetical or abstract.'" *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 747 (9th Cir. 2020). The purpose of ripeness doctrine is to prevent "premature adjudication" of "abstract disagreements," and instead focus disputes on a policy that "has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 746. For this reason, ripeness analysis often starts and ends by determining whether a party has "adequately alleged an injury in fact." *California v. Bernhardt*, 460 F. Supp. 3d 875, 893 (N.D. Cal. 2020). An adequate injury is "concrete and particularized" and "actual or imminent." *Skyline*, 968 F.3d at 747. And when a private plaintiff is "challenging the legality of government action" to which the plaintiff has been "an object of the action," then there is "little question" that injury-in-fact has been shown. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Defendants concede that this is the standard. Mot.13 (agreeing ripeness shown when a "challenged rule has been applied to plaintiffs' situation by some concrete action").

As a part of FCA's religious mission and identity, all FCA clubs must require their student leaders to agree with their faith. But the District has a written policy that, as a condition of eligibility for ASB

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standing, as Defendants do not dispute that when the complaint in this case was filed, Pioneer FCA existed and had members. *Compare* Mot.14-15 ("FCA Pioneer was treated no differently than any other student group" for the 2020-2021 school year) *with* ECF No. 55 (TAC submitted on Feb. 18, 2021).

approval, bans FCA and its clubs from requiring their student leaders to embrace their faith. Thus, FCA and its clubs are ineligible for ASB approval.

Further, Defendants have repeatedly denied ASB approval to FCA solely on those grounds. In Spring 2019, after years of granting ASB recognition to FCA clubs on several District campuses, Defendants abruptly revoked Pioneer FCA's approved status under the challenged District policy and told other FCA chapters that their status would likewise be revoked for the same reason. Espiritu I Tr., ECF No. 102-1 at 44:12-18, 195:12-19, 261:8-17, 345, 366; McMahon Tr., ECF No. 102-3 at 276-77. In Fall 2019, Defendants denied ASB approval to Pioneer FCA when it reapplied, again solely on the basis of FCA religious leadership requirement. ECF No. 102-1 at 344. In February 2021, the District updated its policy to make it even more explicit that FCA clubs could not have religious leadership requirements. ECF No. 102-1 at 384-86; 30(b)(6) I Tr., ECF No. 102-4 at 175:6-176:10. In mid-Summer 2021, the District's 30(b)(6) witness testified in detail confirming that the updated policy does not allow FCA's religious leadership requirement in several ways, and accordingly that a student club with those religious requirements would not be eligible for approval. ECF No. 102-4 at 250:13-251:16, 252:11-253:6. Pioneer's principal testified the same. ECF No. 102-1 at 192:4-14. And in late Summer 2021, the District issued a new ASB application form that, on its face, made it impossible for FCA clubs to submit an application for ASB approval. McGee Decl. ECF No. 111-8 at 5-6. Further, the District issued new guidelines on the application of the policy stating that ASB-approved clubs could not discriminate based on religion, and that "ASB recognized status *will not* be granted to *any* student organization that restricts eligibility for … leadership" on religious grounds. ECF No. 127-10 at 21 (emphases supplied).

Finally, the District's actions have deterred students from attending FCA club meetings, from volunteering as leaders in FCA clubs, and from becoming student representatives of FCA itself, all of which have interfered with FCA and its clubs' ability to carry out their ministry. Indeed, that interference, and the resulting diminished attendance, has been the District's objective from the beginning and remains so now. ECF No. 115 at 17. This is a "distinct and palpable" concrete organizational injury-in-fact to FCA and Pioneer FCA. *Presbyterian Church*, 870 F.2d at 521-22.

After all this, ripeness could hardly be clearer. Plaintiffs are "challenging the legality of [this] government action," and have *repeatedly* been the "object of [this] action," *Lujan*, 504 U.S. at 561. Indeed,

FCA clubs are the first and only clubs to have ever been an object of the District's policy. ECF No. 102-4 at 37:7-10; Mayhew Tr., ECF No. 102-2 at 26:4-12. Their challenge to the policy is thus 'definite and concrete," and "not hypothetical or abstract.'" *Skyline*, 968 F.3d at 747. Indeed, "[t]here is nothing hypothetical about the situation" at all, since FCA "has already lost something it previously had," *id.* at 747-48—namely, ASB recognition. Plaintiffs' claims for prospective relief are ripe.

B. FCA's request for prospective relief is not moot.

"The burden of demonstrating mootness is a heavy one," *West v. Sec'y of Dep't of Transp*., 206 F.3d 920, 925 (9th Cir. 2000) (cleaned up), and it lies on "[t]he party asserting mootness," *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). A case is not moot if a court could grant "any effective relief." *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017). If any relief would at least partially redress Plaintiffs' injury, the case is live. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065-66 (9th Cir. 2002); *accord West*, 206 F.3d at 925 (noting this can include relief that is not "the precise relief sought at the time the application for an injunction was filed"). And even a defendant's "voluntary cessation" of challenged conduct doesn't moot a case unless it is "absolutely clear" the conduct won't recur. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982).

Here, Defendants have not met their burden since their challenged exclusion of FCA clubs has not ceased, voluntarily or otherwise, and thus it is readily apparent that this Court can order numerous forms of prospective relief that would redress Plaintiffs' injuries, at least in part.

For instance, this Court could issue an injunction requiring the District to restore Pioneer FCA's ASB-approved status. Several federal courts have recently issued such orders in cases concerning a religious student group's loss of recognized status due to its religious beliefs. *See, e.g.*, *BLinC v. Univ. of Iowa*, 2018 WL 4701879, at *14 (S.D. Iowa 2018) (issuing preliminary injunction); *InterVarsity*, 408 F. Supp. 3d at 905 (permanent injunction); *InterVarsity v. Bd. of Governors of Wayne State Univ*., 534 F. Supp. 3d 785 (E.D. Mich. 2021) (same). That relief would be particularly appropriate here, both because Pioneer FCA had previously been recognized for years at Pioneer, and because it was conditionally approved last year. ECF No. 102-6 ¶¶ 5, 24; ECF No. 102-2 at 176:7-177:1.

Similarly, this Court could enjoin the District from treating FCA clubs as ineligible for ASB recognition due to their religious leadership requirements. The injury suffered by both FCA and Pioneer

FCA is not just the denial of ASB status as such, but also their exclusion from eligibility to apply "on an equal footing" with secular groups "without having to disavow [their] religious character." *Trinity Lutheran*, 137 S. Ct. at 2022. Such relief would "prohibit[] the [District] from discriminating against [FCA] on that basis in future [ASB] applications." *Id.* at 2018; *see also Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract.").

Further, the Court could enjoin the District from interfering in the internal religious leadership decisions of FCA and FCA clubs. For instance, in *Wayne State*, the district court granted a permanent injunction protecting the internal religious management rights of both InterVarsity/USA and its on-campus chapter at the university. 534 F. Supp. 3d at 801-13, 838.

As a final example, this Court could also grant declaratory judgment to FCA, since there is a substantial, immediate, and concrete controversy between "parties having adverse legal interests." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Resolving such controversies to avoid the coercion caused by making plaintiffs choose between "abandoning [their] rights or risking prosecution" is "the very purpose of the Declaratory Judgment Act." *Id.* at 129 (internal quotation marks omitted).

C. Defendants' contrary arguments fail.

Defendants make two arguments to support their claim that the case is moot and not ripe. Both fail.

First, Defendants claim that Pioneer FCA does not exist and thus that no relief can be granted. This is wrong in several ways. For one, Defendants' own exhibits confirm that Pioneer FCA students have met together twice on campus this semester, ECF No. 127-9 ¶¶ 4, 5, 7, and Plaintiffs have shown that Pioneer students this past semester have taken FCA leadership training, applied and been accepted as FCA leaders, held off-campus meetings, and confirmed that they want to continue their membership in Pioneer FCA. Lopez IV Decl., Ex. A, C, D, and E. Defendants' argument to the contrary seems to be relying in part on yet another anti-FCA double standard: that FCA must meet on campus more than twice per semester to seek relief. But that is doubly wrong. Even ASB-recognized clubs are only expected to meet at least once "per semester," ECF No. 127-10 at 8, a threshold Pioneer FCA met even without the many helpful benefits of ASB recognition. Moreover, Pioneer FCA is an "unincorporated association," and thus—regardless of how many meetings it can hold on a hostile campus—exists for purposes of federal law so long as its

pleadings show it is "a voluntary group of persons formed by mutual consent for the purpose of promoting a common objective." *Niantic, Inc. v. Global++*, 2019 WL 8333451, at *4 (N.D. Cal. Sept. 26, 2019). The record shows that such a voluntary group exists here. Blomberg Decl. Ex. A ¶¶ 6, 11-12; Lopez IV Decl. ¶ 7; ECF No. 127-9 ¶¶ 4, 5. Finally, FCA National may in any event sue to vindicate its interests and the interests of the students within the District who wish to associate with it and form a new FCA club. Blomberg Decl. Ex. A ¶¶ 7, 9. 20 (current students are student FCA leaders); Lopez IV Decl. Ex. C, E (student leadership applications); *see also Wayne State*, 534 F. Supp. 3d at 838 (granting relief to national organization as well as to the local chapter); *InterVarsity*, 408 F. Supp. 3d at 960 (same).

Second, Defendants argue that FCA cannot ask for relief from Defendants' discriminatory ASB application process because it did not submit an application. Defendants go so far as to claim that this means Plaintiffs have suffered "no cognizable injury," or at least that their only "injuries are self-inflicted." Mot.15-17. Defendants are wrong.

There is no requirement for a plaintiff to submit herself to a discriminatory application process in order to challenge that process. Rather, "[w]hen the government erects a barrier that makes it *more difficult* for members of one group to obtain a benefit than it is for members of another group," a cognizable injury arises from "the denial of equal treatment resulting from the imposition of the barrier," not just any "ultimate inability to obtain the benefit." *Jacksonville*, 508 U.S. at 666 (emphasis added). That is, the First Amendment confers "a federal constitutional right to be *considered* for public [benefits] without the burden of invidiously discriminatory" qualifications. *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (emphasis added). Thus, FCA can challenge the District policy that discriminatorily excludes it and its clubs from equal consideration for ASB recognition. *Jacksonville*, 508 U.S. at 666.

For instance, in *Trinity Lutheran*, the church successfully obtained prospective relief prohibiting the government from continuing its religious discrimination "in *future* grant applications." 137 S. Ct. at 2018 (emphasis added). Likewise, in *Koala v. Khosla*, the Ninth Circuit allowed a student group to seek declarative and injunctive relief under the First Amendment to restore its *eligibility* to seek school benefits, as distinct from seeking an order directly granting the benefits themselves. 931 F.3d 887, 895 (9th Cir. 2019). *See also Gratz v. Bollinger*, 539 U.S. 244, 260-61 (2003) (whether plaintiff "actually applied" for

desired benefit "is not determinative of his ability to seek injunctive relief"; was sufficient that he *intended* to apply when the discriminatory criteria was no longer used).

And there's good reason for this rule. The injury from a discriminatory eligibility policy is not just to applicants who are turned away, but to those who refuse to subject themselves to the indignity of the discriminatory process in the first place. *Namisnak v. Uber Techs, Inc.*, 971 F.3d 1088, 1092 (9th Cir. 2020). The "stigmatization" created by discriminatory eligibility criteria "is a cognizable harm in and of itself" sufficient to overcome standing and ripeness arguments. *Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin.*, 993 F.2d 1222, 1224 (5th Cir. 1993) (collecting cases); *accord Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) ("being subjected to discrimination is by itself an irreparable harm" for religious plaintiffs); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) ("a sign reading 'Whites Only' on the hiring-office door" actionably injures both those "who go[] through the motions of submitting an application" and those who refuse to "engage in a futile gesture" by submitting "a formal application").

Defendants' remarkable response is that it is not certain they will deny an application from FCA. But at this point, Defendants can't play coy. They bear the responsibility not only to disavow enforcement, but to establish new policies showing that enforcement against FCA could not reasonably recur in the future. *See Rosebrock*, 745 F.3d at 971. They have not done so. Nor could they. They have already repeatedly denied FCA's applications. They confirmed under oath that they would again. ECF No. 102-1 at 192:4-14. And their policy says as much on its face. This case is ripe and ready for resolution.[5]

III. Plaintiffs' claims for harassment and retaliation are not moot.

Plaintiffs' claims are not moot both because Defendants' unlawful harassment and retaliation are ongoing and because, even if the conduct had ceased, Defendants have not shown it will stay that way. As noted above, a claim is not moot when the illegal practice is ongoing and the court could grant "*any* effective relief." *Allen*, 871 F.3d at 724 (emphasis added). Accordingly, a defendant must carry a "heavy

[5] Defendants mistakenly rely on *Reno v. Catholic Social Services*. *Reno* had "no history of application[s]" to support a claim that the plaintiff "would have applied … but for the invalid regulation," and instead the plaintiff merely "*may* have heard of the invalid regulations through … 'word of mouth.'" 509 U.S. 43, 58 n.19 (1993). Here the history of both application and denial are firmly established.

burden" to prove mootness by showing both that their unlawful conduct has ceased and that it is "*absolutely clear*…that the allegedly wrongful behavior could not reasonably be expected to recur." *See Rosebrock*, 745 F.3d at 971 (emphasis added) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000)). Defendants once again fail to meet this burden. Here, *even if* Defendants were correct that they have ceased harassing Plaintiffs (they are not), Defendants have not shown that their illegal conduct could not reasonably expected to recur. But, more importantly, Defendants have continued their long history of harassing FCA's student representatives, disparaging FCA and Pioneer FCA (and its student leaders) because of their religious beliefs, and imposing unique hurdles on student FCA representatives seeking official recognition for their student-led FCA club. For these two independent reasons, Plaintiffs' claims are not moot.

First, this Court has already recognized that Plaintiffs have adequately alleged that harassment of Pioneer FCA is reasonably likely to recur, and it has rejected similar mootness arguments from Defendants for failure to meet their "heavy burden." *Sinclair v. San Jose Unified Sch. Dist. Bd.*, 2021 WL 2948871, at *7 (N.D. Cal. July 13, 2021). Indeed, Defendants reaffirmed under oath that (1) they do not believe their behavior towards Pioneer FCA was wrong, and that "the system worked in the way that it's supposed to work," (2) no Defendant or other District employee has ever been reprimanded for the illegal actions taken against Pioneer FCA members, and (3) they have taken no steps to prevent such illegal activity from recurring. *See, e.g.*, Glasser II Tr. at 18:8-19:19 (Glasser testifying that neither Espiritu nor any other District official ever told him he should not "do the same all over again," and expressing no regret for his bullying of teenage girl students in Pioneer FCA); Espiritu II Tr. at 14:17-15:1, 23:8-17, 23:24-24:6, 39:18-39:24 (Pioneer principal testifying that Glasser's actions were permitted and that he never took steps to correct Glasser); 30(b)(6) II Tr. at 323:13-324:11. Indeed, rather than foreswear harassment, Glasser refuses to recant his view that he is "morally and professionally bound" to resume his same conduct against Pioneer FCA. Espiritu II Tr. Ex. 132; Glasser II Tr. at 18:22-19:23.

The likelihood of resumed harassment and retaliation has only grown clearer through discovery. Far from taking no steps to address that past harassment; Defendants have actively taken illegal steps to cover it up. The California Board of Education recognized that Pioneer FCA members made a credible claim of harassment against Defendants and instructed the District that it had a duty to promptly investigate under

state law. 30(b)(6) II Tr. Ex. 137. But instead of complying with their acknowledged duty, District officials made false statements to both the Department of Education and Plaintiffs, telling them that investigations were ongoing when in fact no investigation was ever initiated or performed, and that there never had been and was no intent for them ever to be performed. 30(b)(6) II Tr. 317:13-318:6 (admitting that "there was no investigation"); *accord* 30(b)(6) II Tr. at 287:20-25; *compare id.* at 317:25-318:1-2 (admitting "the Unified School District [did not] conduct the required investigation"), 316:24-25 ("no investigation was actually performed"); *with* 30(b)(6) II Tr. Ex. 136 (representing to the state Department of Education, "[o]n behalf of [Defendant] Albarran and the San Jose Unified School District," that the District was in the midst of its "investigation process" and asking the Department of Education to provide "the full opportunity to investigate this and issue a decision"). To date, Defendants have never informed the State that they lied about this investigation, and they openly admit they have no plans to pursue an investigation now or in the future. 30(b)(6) II Tr. at 301:6-302:6, 303:9-304:2.

Defendants' failure to acknowledge wrongdoing or take any steps to prevent their actions from recurring confirms that there is a "reasonable expectation" of future harassment which Defendants have not (and cannot) rebut. *Sinclair*, 2021 WL 2948871, at *7. Indeed, the Ninth Circuit has expressly recognized that retaliation is likely to recur in the context of a dispute between a student organization and the school's governing board because of the "inherent power asymmetry" and the ability of the school to "punish" and "attempt to bankrupt" the student organization—exactly what has been happening to Pioneer FCA. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 869 (9th Cir. 2016). And this is true even *assuming* Pioneer FCA "has no independent or affirmative right to that government benefit," as the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Id.* Here, the District has denied Pioneer FCA recognized status on the basis of its religious leadership requirement; regardless of whether Pioneer FCA would otherwise be entitled to recognition, that "refus[al] to grant a benefit on the basis of speech" is unlawful and should be enjoined. *Id.* Accordingly, Plaintiffs' claims for forward-looking relief are not moot.

Second, even apart from overcoming voluntary cessation, Defendants' *ongoing* harassment of students currently associating with FCA and Pioneer FCA confirms that this is still a live controversy. Defendants have repeatedly targeted Pioneer FCA and FCA for unique burdens just this fall semester. For

instance, when a Pioneer FCA student leader, M.H., attempted to have Pioneer FCA participate in normal school club activities, Defendant Espiritu required her to meet with him in person as a condition precedent to participation. ECF No. 123-1 ¶ 15. There is no such requirement for other student groups, and Defendant Espiritu was specifically warned by Pioneer FCA's volunteer advisor and school guidance counselor, Milara Gatcke, that M.H., who is a freshman girl, was intimidated by him and that forcing her to meet with him was unnecessary and unhelpful. *Id.* ¶ 16. But Defendant Espiritu insisted, which led to the predicted intimidation of M.H. *Id.* ¶ 19.

Similarly, Defendants sought to depose N.M., another current Pioneer FCA student leader who is a minor and not a party to this case. Blomberg Decl. Ex. C. Defendants have also gone after Pioneer FCA's faculty advisor, Ms. Gatcke. While Ms. Gatcke was initially very responsive to outreach from both Pioneer FCA students and Lopez, she has since been approached by Defendants' lawyers concerning her role in helping Pioneer FCA. Lopez IV Decl. ¶ 8. Since that time, she has refused to communicate with Lopez (despite no school policy against faculty club advisors working with outside organizations) and, on the whole, been significantly more reticent in her support for Pioneer FCA's activities on campus. *Id.* ¶¶ 8-13. This kind of intimidation will inevitably "chill and discourage a student or student organization … from exercising its free-speech rights." *Ariz. Students' Ass'n*, 824 F.3d at 869. Defendants' litigation tactics simply reinforce their position—which they still maintain—that FCA has no place on campus and should be extinguished to prevent "spread[ing] its brand of religion to students." Mot.22-23.

Because Defendants have failed to carry their heavy burden of showing that their illegal actions are not reasonably likely to recur, and because Defendants' harassment is in fact *ongoing*, Plaintiffs' claims for harassment and retaliation are not moot.

CONCLUSION

For the reasons given above, this Court should deny Defendants' motion to dismiss.

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Respectfully submitted,

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