No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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

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STATEMENT OF INTEREST

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

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

INTRODUCTION

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

The District tries to salvage its policy by relying on *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) ("*CLS*"). But *CLS* does not control here for a simple reason: It rested explicitly on the parties' stipulation that the "all comers" policy at issue there had no exceptions, and required all student groups to accept all members regardless of status or beliefs. Properly understood, *CLS* stands only for the narrow proposition that a truly categorical, exceptionless "all comers" policy may satisfy the First Amendment in some circumstances. That holding has no bearing where, as here, a policy allows student groups to limit membership and leadership based on a variety of secular criteria. *See, e.g.*, *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 985–86 (8th Cir. 2021); *see also Fraternal Order of Police Newark Lodge No. 12. v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

ARGUMENT

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

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

> CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in [*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)], forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment;[2] it therefore cannot moor its request for accommodation to the Free Exercise Clause.

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

In so many words, the *CLS* Court reasoned that a true "across-the-board" policy fell within *Smith*'s safe harbor for "neutral and generally applicable" laws.

[2] Respectfully, this was an incorrect statement of CLS's position in *Martinez*. CLS explicitly contended that "[a]ll noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles." Br. for Pet'r at 2, *CLS*, 561 U.S. 661 (No. 08-1371), 2010 WL 711183, at *2.

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

That is not this case. Here, the record is replete with examples of how the District's purported "all comers" policy does not really live up to its name. It is up to this Court, then, to determine whether those exceptions are constitutionally significant. And *CLS* supplies no guidance when it comes to answering that question.

Instead, the Supreme Court's recent Free Exercise cases provide the framework for determining whether the school's policy is truly "generally applicable." *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Under that framework, a policy is not generally applicable—and is subject to strict scrutiny—if it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296; *see also Calvary*

Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Mem.) (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.").

Here, the District treats religious exercise worse than comparable secular activity because it allows secular groups to limit their leadership or membership on secular grounds, but it does not allow FCA to do the same based on religious criteria. In practice, the District has long permitted clubs to exclude students or specify leadership criteria based on sex or gender—for instance, with the Senior Women Club. *See, e.g.*, 2-ER-164. The District has also allowed student groups to exclude members for lacking traits like "good moral character" (at least in a secular sense). *See, e.g.*, 7-ER-1215. And the District also exempts its *own* initiatives from any "all comers" policy by hosting programs—such as the Latino Male Mentor Group, which pairs male Latino seniors as student mentors for male Latino freshmen—that are limited by race, age, and gender. *See, e.g.*, 9-ER-1816. In fact, FCA is the first and only student group against which the policy has been enforced—and even then, enforcement came only after many years, and as a result of an intolerant teacher who openly objected to the group on the basis of its views. *See, e.g.*, 10-ER-1926.

That is not an "all comers" policy. The District has granted exceptions to its policy to allow secular clubs and organizations to shape their membership and

leadership based on criteria important to them, but it has refused to extend the same solicitude to religious associations. Whatever the District thinks of FCA's sincerely held and constitutionally protected beliefs, the Constitution forbids the District from treating religious associational activity worse than comparable secular activity. *See Fulton*, 141 S. Ct. at 1878; *see also Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67.

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

The District argues that the record in *CLS* showed that the university allowed exceptions similar to the ones here. *See CLS*, 561 U.S. at 671 n.2. But that ignores what the Court actually said in *CLS*, explicitly resting its decision on the stipulated basis that the school's "all comers" policy had *no* exceptions based on a student's "status or beliefs." *See, e.g.*, *id.* at 671, 678 & n.10. By its own terms, the *CLS* Court had no occasion to consider what kinds of exceptions would turn a generally applicable "all comers" policy into a non-generally applicable one.

More fundamentally, the District ignores the "seismic shift in Free Exercise law" that has occurred since *CLS*. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020). As the Supreme Court has since made clear, the

Free Exercise Clause requires strict scrutiny whenever a policy treats "comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. And the test for whether secular conduct is "comparable" turns on whether the conduct implicates or "undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Tandon*, 141 S. Ct. at 1296.

Here, the exceptions to the District's so-called "all comers" policy directly implicate—and undermine—the District's asserted interests. The District asserts that its policy is justified on the ground that it furthers an interest in combatting discrimination and ensuring that students have equal access to school programs. But the District allows some programs to close their ranks based on race, sex, and gender. It also allows clubs to restrict membership for "good moral character" (so long as it is judged from a secular lens). In reality, the District maintains an "all comers" policy only so long as it believes ensuring equal access is not outweighed by the social benefits of an exception (such as "clos[ing] the gender gap," *see Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 20-cv-02798, 2022 WL 1786574, at *11 (N.D. Cal. Jun. 1, 2022)). Of course, the District is free to make that value judgment. But once it determines that the value of equal access can be overridden by certain *secular* considerations, it bears the heavy burden of showing that the same solicitude is not owed to religious exercise. *See, e.g.*, *Fulton*, 141 S. Ct. at 1882 ("The creation of a system of exceptions under the contract

undermines the City's contention that its non-discrimination policies can brook no departures.").

Similarly, in minimizing the exceptions to its policy, the District says that its own programs—like the Latino Male Mentor Group—should not count. But that misses the mark. The Supreme Court has repeatedly rejected attempts by governments to define comparability in exceedingly narrow terms, lest they launder "religious gerrymanders" through manipulation of categories. *Carson v. Makin*, 142 S. Ct. 1987, 2022 WL 2203333, at *9 (2022). Comparability does not turn on government labels ("ASB clubs" versus "district programs"); it turns on whether the activities implicate the same asserted interest. *See e.g.*, *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 (comparing synagogues with big box stores). And here, the District's programs—which are akin to student clubs in all relevant respects, and are subject to the same non-discrimination policy that also undergirds the "all comers" policy—implicate the very same non-discrimination and equal access interests. For that reason, when the District excludes students from its own programs based on race, sex, or ethnicity, it cannot blithely assert an overriding interest in "equal access" to preclude religious student groups from limiting their membership or leadership based on religious criteria. *See Tandon*, 141 S. Ct. at 1297.

Indeed, the district has it backwards. Race, sex, and ethnicity-based discrimination by the government is contrary to the nation's most fundamental

constitutional commitments. But expressive associations have the right to express their views through leadership criteria, and there is nothing remotely invidious about religious groups insisting that their leaders share their views. Indeed, it is grotesque for a public institution to demand that non-Christians be allowed to lead a Christian prayer group, gentiles to lead a Torah study, or non-Muslims to act as imams.

For that matter, the District's general nondiscrimination policy—the district-wide policy upon which the "all comers" policy was based—fares no better than the "all comers" policy itself. For starters, on its face, the policy prohibits discrimination only on certain enumerated grounds (race, sex, sexual orientation, religion, and the like). It does not prohibit discrimination on the basis of (secular) ideological beliefs. As such, the Communist Club does not need to admit free-marketeers; the Vegan Club may close its doors to carnivores. But religious groups like FCA are barred from requiring their leaders to share their beliefs. Such disparate treatment cannot survive under *Fulton*, *Tandon*, and *Roman Catholic Diocese*—cases that have since refined what it means to be "generally applicable" under *Smith*.

In addition, as with the "all comers" policy, the District also grants multiple exceptions to its general nondiscrimination policy. For instance, the District allows for single-sex sports teams and sponsors things like the "Girls' Circle," all which are limited to students identifying as female. *See, e.g.*, 7-ER-1287–88; 10-ER-1941. And as noted, the District has initiatives like the Latino Male Mentor Group that

limit eligibility by gender, age, and race. All of those exceptions are contrary to the explicit terms of the policy, which apply to the District no less than student groups. *See* 9-ER-1724; 6-ER-1048–49. And all of those exceptions place comparable secular conduct above religious exercise.

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

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

In the same light, the District also cannot rely on *CLS* to save its policy under the Free Speech Clause. As with free exercise, the parties' trial court stipulation was the rock upon which the *CLS* Court built its free speech analysis. 561 U.S. at 675–78. As the Court put it: "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers." *Id.* at 694.

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

That is viewpoint discrimination. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1593 (2022); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). It is by now black-letter law that an organization's selection of its members or leaders is an expressive act that merits constitutional protection. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *see also Democratic Party of U.S. v. Wis. ex rel. Follette*, 450 U.S. 107 (1981) ("[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." (citation omitted)). That is especially so where, as here, it is a religious organization whose leaders are tasked with conducting prayer, worship, and religious expression. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 201 (2012) (Alito, J., concurring).

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

The District replies that its policy does not discriminate against viewpoint because it does not target religious speech, only burdening it incidentally. Drawing on *Alpha Delta Chi-Delta Chapter v. Reed*, the District contends that its policy is constitutional because it is not done "for the *purpose* of suppressing [a religious] viewpoint." 648 F.3d 790, 801 (9th Cir. 2011); *see also Truth v. Kent Sch. Dist.*, 542 F.3d 634, 650 (9th Cir. 2008) (asking whether action "based" on group's religious viewpoint).

That misunderstands the current state of the law. As the Supreme Court has made clear since *CLS* and *Alpha Delta*, a policy need not target religion for it to infringe on the First Amendment rights of religious organizations. *See Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015); *Hosanna-Tabor*, 565 U.S. at 188 (rejecting argument the government may use a neutral and generally applicable non-

discrimination policy to restrict the rights of a religious group to control "the selection of those who will personify its beliefs"); *see also Rosenberger*, 515 U.S. at 829–30; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–94 (1993). In *Gilbert*, for example, there was no whiff of discriminatory intent in the town's signage ordinance, but a church won its free speech case because of better treatment of other speakers.[3] Indeed, core First Amendment principles of religious autonomy and expression prohibit even neutral and generally applicable anti-discrimination laws from interfering with the right of an expressive group to select those who will "serve[] as a messenger or teacher of its [beliefs]." *Our Lady of Guadalupe School*, 140 S. Ct. at 2064; *see also Dale*, 530 U.S. at 647–48, 659; *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995).

When a governmental body exempts favored secular organizations from an otherwise-generally applicable rule, but not comparable religious organizations, the policy necessarily harbors a latent value judgment that is hostile toward religion, under the Supreme Court's precedents. It inherently "devalues religious reasons for [acting] by judging them to be of lesser import than non[-]religious reasons."

[3] It is not necessary to this case, but the evidence of hostility and animus from teachers and administrators, and their encouragement of bullying behavior from other students, far exceeds that in cases like *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 537–38 (1993); *see also Fulton*, 141 S. Ct. at 1877. Here, the school district has made plain that it values advancing certain secular interests—such as "closing the gender gap"—over the ability of a faith-based group to control its message. That latent value judgment—no matter the policy's supposed purpose or the policymaker's intent—renders an expression-regulating policy unlawful under *both* the Free Exercise and Free Speech Clauses. Simply put, a policy that is discriminatory under the Free Exercise Clause cannot be viewpoint neutral under the Free Speech Clause under the logic of *Shurtleff*, *Rosenberger*, *Lamb's Chapel*, *Tandon*, *Fulton*, and *Roman Catholic Diocese of Brooklyn*.

In this sense, the Free Speech and Free Exercise Clauses "work in tandem" to provide "double protection for religious expression." *Kennedy v. Bremerton Sch. Dist.*, No. 21-418, 2022 WL 2295034, at *8, *16 (U.S. 2022). When a policy treats religious expression worse than comparable secular expression, it thereby violates the First Amendment twice over—discriminating not only against religious exercise, but also against the religious *viewpoint* necessarily underlying that exercise. The fact of unjustified disparate treatment suffices to establish viewpoint discrimination against religion; neither animus nor discriminatory purpose is required.

To the extent cases like *Alpha Delta* stand for anything to the contrary, they are no longer good law. The government cannot use anti-discrimination law to

interfere with the rights of expressive groups, including religious groups, to determine for themselves "who leads [the] religious organization . . . or serves as a messenger or teacher of its faith." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064. Much less can the government maintain a *discriminatory* policy that denies these freedoms to religious groups while granting them to secular groups.

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

Whatever the merits of the Court's decision in *CLS*, it cannot save the District's discriminatory policy here. *CLS* has no bearing on an "all comers" policy like the one here that treats religious exercise worse than comparable secular conduct. Such a policy is governed—and decisively foreclosed—by the Supreme Court's more recent cases.

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

This case is, unfortunately, all too typical. In both public universities and public school districts, administrators seem to regard religious speech as offensive and second-class, cloaking a host of discriminatory policies under the nominal garb of neutrality. *See, e.g.*, *Kennedy*, 2022 WL 2295034, at *17; *see also Uzuegbunam*

v. Preczewski, 141 S. Ct. 792 (2021); *Perlot v. Green*, No. 22-cv-00183, 2022 WL 2355532 (D. Idaho Jun. 30, 2022). Congress thought it solved this problem decades ago with the Equal Access Act, 20 U.S.C. § 4071, but to the extent that Act has loopholes, they must be plugged. Without an emphatic statement of constitutional principle, school administrators are unlikely to get the message.

CONCLUSION

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

July 5, 2022

Respectfully submitted,

/s/ Anthony J. Dick

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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/s/ Anthony J. Dick
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