No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fellowship of Christian Athletes, an Oklahoma Corporation, et al.,

Plaintiffs-Appellants,

v.

San José Unified School District Board of Education, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:20-cv-02798-HSG

BRIEF OF RATIO CHRISTI AND CHI ALPHA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amici curiae submit the following corporate disclosure statements:

Ratio Christi, Inc., is a non-profit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Chi Alpha Campus Ministries, U.S.A., is a ministry of the General Counsel of the Assemblies of God, a non-profit organization. The Assemblies of God has no parent corporation and no publicly held company holds 10% of its stock.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Ratio Christi is a nonprofit ministry whose mission is to re-establish a strong and reasoned presence of Christian thinking in academia. With 120 chapters at universities across the country, including in California, Ratio Christi serves the student body by training students to discuss their beliefs in a rational manner, hosting events, and fostering dialogue on campus. Like Fellowship of Christian Athletes, Ratio Christi's adherence to fundamental orthodox Christian beliefs is essential to its identity and mission. The outcome of this matter may affect Ratio Christi's interests, including Ratio Christi's chapter's ability to maintain belief and conduct-based standards for its leadership that reflect its fundamental identity as a Christian organization with orthodox beliefs.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. Its mission is to reconcile students to Christ, equipping them through Spirit-filled communities of prayer, worship, fellowship, discipleship, and mission. With over 300 chapters at universities across the country and around the world, Chi Alpha serves students by providing community groups, fostering

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consented to its filing.

creativity and diversity, and promoting excellence, integrity, and student leadership. While Chi Alpha's meetings, events, and activities are open to all students, it seeks leaders who share and live by the religious convictions that are the basis for its ministry. Chi Alpha's belief in and adherence to its Pentecostal Christian beliefs are essential to its identity and mission, and thus Chi Alpha may also be adversely affected by a ruling against FCA.

SUMMARY OF ARGUMENT

"'Please sir, I want some more.' . . .
Never before has a boy wanted more.
Why ask for more when he knows what's in store."

-Oliver Twist (Film Adaptation), Charles Dickens

Why ask for more, indeed. FCA filed this lawsuit to ask this court for restatement to its prior status as a recognized organization. Yet the District claims FCA hasn't asked *it* enough times, or in the right way, even while admitting that it is futile for FCA to ask at all. This specious argument fails considering that the law and record establish Pioneer FCA and FCA National's standing to seek relief.

Fellowship of Christian Athletes served student athletes at Pioneer High School for more than a decade. But in 2019, it was stripped of its recognized status in response to a teacher's targeted campaign against the club based on its deeply held religious beliefs on human sexuality and requirement that club leaders affirm those beliefs. Each year since, despite the difficulties and disadvantages of running an unrecognized club, Pioneer FCA has kept meeting. And, along with the national FCA organization (FCA National), it filed this lawsuit seeking return to the status quo ante—i.e., the recognized status the club enjoyed for years in the San José Unified School District and Pioneer High School.

And for a few brief months during the 2022–23 school year, Pioneer FCA again enjoyed recognized status after the favorable panel

decision and application to District officials for re-recognition. But it appears as though the District has once again revoked that status, this time after the Court granted rehearing en banc and vacated the panel decision.[2]

Even so, the District argues that this case doesn't present a justiciable controversy for prospective relief. That's because, the District asserts, there must be a student-member declaration stating that the club intends to seek the recognized status should the club prevail in this lawsuit that the club filed to regain the recognized status that the District stripped from it. Defendants maintain that position even though they admit that Pioneer FCA is not eligible for recognized status under the District's policy that prohibits organizations from maintaining leadership criteria.

The law is clear: Pioneer FCA need not engage in the futile gesture of asking for the recognized status that the District revoked in 2019 and more recently re-revoked after the vacatur of the panel opinion. And the record amply shows that Pioneer FCA—a club that continues to exist and meet—intends to reapply for recognized status should this Court order injunctive relief.

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[2] The School's website no longer lists FCA as a student organization. *See* Clubs & ASB, Pioneer High, https://pioneer.sjusd.org/student-resources/clubs-asb/ (last visited February 15, 2023) (click on "Club List").

ARGUMENT

Defendants (collectively "the District") contend that there is no justiciable controversy for prospective relief. Defs.' Br. 20–28. But the record and law demonstrate that both Pioneer FCA and FCA National have suffered concrete injuries that are redressable by injunctive relief.

Pioneer FCA and FCA National each have standing.

"To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (cleaned up). When a challenged law or policy "implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000); *see also Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018). Only one plaintiff need have standing for the relief sought. *City & Cnty. of S.F. v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 786–87 (9th Cir. 2019). The District disputes the first prong of the standing inquiry—whether FCA has demonstrated an "imminent injury" redressable by preliminary injunction. Pet. for Reh'g 4. The record and law establish that FCA has met that burden.

Plaintiffs "must make a clear showing of each element of standing" at the preliminary injunction stage. *LA All. for Hum. Rts. v. Cnty. of L.A.*, 14 F.4th 947, 956 (9th Cir. 2021). But that showing is

necessarily limited by the "manner and degree of evidence required at the successive stages of the litigation." *City & Cnty. of S.F.*, 944 F.3d at 786–87. At this preliminary injunction stage, "plaintiffs need only establish a risk or threat of injury to satisfy the actual injury requirement." *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 762 (9th Cir. 2004). And Plaintiffs may make that showing by "relying on the allegations in their complaint and whatever other evidence they submitted in support of their preliminary-injunction motion . . . ." *LA All. for Hum. Rts.*, 14 F.4th at 956–57 (cleaned up); *see also Italian Colors*, 878 F.3d at 1173 ("at oral argument, counsel for plaintiffs confirmed that all plaintiffs . . . would like to [engage in conduct that arguably violated the law]").

The record establishes that both Pioneer FCA and FCA National are harmed by the District's actions, and that harm is redressable by an injunction.

I. Banning Pioneer FCA from the ASB Recognition Forum creates an ongoing injury to the club redressable by a preliminary injunction.

In arguing that Pioneer FCA does not have standing to seek reinstatement to the Associated Student Body (ASB) program or forum, the District focuses on the wrong question: whether Pioneer FCA has proven it will continue on campus in the future. The district applied its policy when it booted Pioneer FCA from the forum that the club had

enjoyed for years. Thus, the relief requested is the reversal of the harm by return to the status quo ante.

The evidence required to show that Pioneer FCA would re-avail itself of the benefits of the forum it enjoyed for years before being kicked out should be minimal. When one's rights have been violated by being banned from a speech forum, *see Widmar v. Vincent*, 454 U.S. 263, 267, 277 (1981), that harm continues so long as the ban remains in place. And any expression of intent to return—such as seeking the reversal of the ban to the verboten forum after a favorable judicial decision—is enough to establish standing to challenge the ban.

A. The evidence shows Pioneer FCA intended to, and did, apply for recognition.

There is more than sufficient evidence of Pioneer FCA's intent to rejoin the forum upon receiving the requested injunctive relief. In fact, it is sufficient that Plaintiff Pioneer FCA continues to ask this court for reinstatement. Not only that, Pioneer FCA applied for re-recognition—and received it—immediately following the favorable panel decision. *See* Bob Egelko, *Christian Club That Challenged San Jose Unified is Now the District's Only Official Student Group*, San Francisco Chronicle (Nov. 11, 2022), https://bit.ly/3wSQ7dl; *see also* CA9 D.E. 98-4, 98-5. That the club did so comes as no surprise since it continued to meet and have student leaders despite the District's efforts to squash the club.

Despite all that, the District maintains that the lower court couldn't have known from the record that FCA would re-apply. Reply to Pet. for Reh'g at 10. Nonsense. Pioneer FCA existed on campus for over 15 years. Lopez Decl., 10-ER-2021 (club existed before Lopez began as area coordinator in 2006). Through counsel, Pioneer FCA has asked for the relief of reinstatement. *See, e.g.,* Third Am. Compl., ¶ 165 ("The Student Representatives and Pioneer Student FCA Chapter continue to seek and to be denied official recognition while other student groups who similarly violate the District's nondiscrimination and other policies are granted full recognition and its benefits."). Nothing more is required. *Cf. LA All. for Hum. Rts.*, 14 F.4th at 956–57 (plaintiff may establish standing by reliance on allegations in the complaint); *see also Italian Colors*, 878 F.3d at 1173 ("at oral argument, counsel for plaintiffs confirmed that all plaintiffs . . . would like to [engage in conduct that arguably violated the law]").

And the evidence does not end there. The record shows that Pioneer FCA applied for ASB benefits for the 2020–21 school year, which the District denied. B.W. Decl., 2-FER-380 ¶ 6. Pioneer FCA student leadership also declared its intent to apply for recognition in the 2021–22 school year. B.W. Decl., 2-FER-381 ¶ 12. And pioneer FCA even started to fill out the application for ASB recognition for the 2021–22 school year. Lopez Decl., 3-ER-0419, ¶ 8. But the student leader did not complete the application because the District's new policy—enacted

after the lawsuit commenced—made clear that organizations like FCA need not apply. *Id.* Simply put, the District was not going to entertain any application by the FCA so long as its leadership requirements remained intact. And the school principal (responsible for recognizing student organizations) admitted as much during his deposition. Espiritu Dep., 6-ER-0911.

The District challenges some of this evidence—specifically the declaration by Rigoberto Lopez, the FCA area director—by mischaracterizing it as if in *Lujan* "a staffer assert[ed] that some nameless member intended at some point in the future to visit the areas at issue (without even explaining the basis for the staffer's speculation)." Pet. for Reh'g at 6. That's not what the record reflects.

First, the FCA declarant, Mr. Lopez, is no random staffer without "basis" for his knowledge. He has worked with Pioneer FCA since 2006. Lopez Decl., 10-ER-2020–21. He attended club meetings, including leadership meetings discussing applying for recognition. See Lopez Decl., 2-ER-0055–56; Lopez Decl., 2-ER-0071. Second, the members of FCA are not "nameless" or unknown. Student leader B.W. signed a declaration stating FCA's intent to apply for recognition, B.W. Decl., 2-FER-379–82, and Mr. Lopez identified additional student leaders and their actions taken in furtherance of recognition. FCA. Lopez Decl., 3-ER-0419, ¶ 8. Third, FCA's declared intent to continue to seek recognition was not for some unknown time in the future; it was for the next

school year or, if no relief was obtained by the next school year, once judicial relief was granted. *See* B.W. Decl., 2-FER-380–81 (student intent to apply for 2021–22 academic year); Lopez Decl., 2-ER-0056 (confirming student leadership existed for the 2022–23 academic year); B.W. Decl., 2-FER-380 (unsuccessfully sought recognition for 2019–20 and 2020–21 academic years).

The District seeks to hang its hat on a series of Supreme Court environmental standing cases, claiming Pioneer FCA's alleged "vague allegations of future plans" to apply for recognition "are insufficient to establish impending injury warranting prospective relief." Pet. for Reh'g at 4–5 (relying on the panel dissent's citations to *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 490 (2009); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). But the facts in those cases alleging future aesthetic harm make them inapposite here.

The organizational plaintiff in *Lujan* sought to show future travel plans, and hence harm from a challenged environmental regulation, by pointing to affidavits from two members. 504 U.S. at 559, 563. The first said she had *once* visited Egypt and "intend[ed] to do so again." *Id.* at 563. The second declared that she had *once* traveled to Sri Lanka and "intend[ed] to go back" but "had no current plans" to do so. *Id.* at 563–64. In *Summers*, the plaintiff's allegations that he "plan[ned] to visit several unnamed national forests in the future" did not confer standing

because it was unlikely that the plaintiff's "wanderings [would] bring him to a parcel . . . affected" by the challenged regulation. 555 U.S. at 495–96. And similarly, the organizational plaintiff in *Sierra Club* did not have standing because there was no allegation that its members used the wilderness area affected by the challenged government actions. 405 U.S. at 735.

In stark contrast here, Pioneer FCA was a member of the ASB forum for more than a decade before being kicked out under the District's policy. And unlike the plaintiffs in *Summers* and *Sierra Club*, who did not even use the affected parcels of land, Pioneer FCA's entire case is about being able to rejoin the very forum they were booted from. And since being kicked out in 2019, Pioneer FCA has had student members who have applied internally to FCA National to lead the chapter and has submitted an application to rejoin the forum, which the District rejected. On top of that, Pioneer FCA has submitted a declaration explaining why the amended "all-comers" policy prohibits Pioneer FCA from even attempting to re-apply. Finally, the club did re-apply for—and receive—recognized status after the panel's favorable decision. And exercising the same spite exhibited since 2019, it appears the District *again* kicked FCA out of the forum once this Court vacated the panel decision for en banc rehearing. *See supra* n.2. The facts here are nothing like those in *Lujan*, *Summers*, and *Sierra Club*.

In sum, the record shows that Pioneer FCA has all along intended to and has, in fact, twice applied for recognized status since being kicked out in 2019.

B. The law does not require futile acts to establish standing.

Defendants seize on the fact that Pioneer FCA did not complete the application for ASB status during the 2021–22 school year, claiming this shows that the club has only some vague plan to rejoin the forum. Pet. for Reh'g at 5. They contend that this fact precludes equitable, prospective relief. Not so.

First, the District has never adequately explained why Pioneer FCA must "apply" or "re-apply" to join a forum from which it was booted, particularly when the club is seeking in this litigation a return to the status quo ante. What's more, it was in the fall of 2021 that the District's new policy went into effect. That policy requires all ASB clubs "to permit any student to become a member or leader." Affirmation of Conformance, 6-ER-1048. This update directly targeted FCA, *see* McMahon Dep., 8-ER-1357 (testimony of deputy superintendent that "[t]he FCA matter was the starting point for ensuring that we had the right guidance to all the schools"), and made clear that Pioneer FCA need not apply. After all—as the District well knows—FCA chapter leaders must affirm their agreement with the FCA Statement of Faith. Espiritu Dep., 6-ER-0911 (admitting any FCA application that included

FCA's leadership requirements would be denied). Indeed, the fact that Pioneer FCA began filling out the application and stopped because of the challenged policy itself establishes standing due to self-censorship under this Circuit's precedent. *See LSO, Ltd.*, 205 F.3d at 1156.

Further, the Constitution doesn't require a futile act to establish standing. *See Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1092–93 (9th Cir. 2020); *C.R. Educ. & Enf't Center v. Hosp. Props. Tr.*, 867 F.3d 1093, 1097, 1099 (9th Cir. 2017); *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1135–36, 1138 (9th Cir. 2002). "[T]he proper question is whether Plaintiffs have actual knowledge of and are deterred by allegedly illegal barriers to access." *Namisnak*, 971 F.3d at 1092–93; *see also Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1040–41 (9th Cir. 2008) (recognizing deterrent-effect standing). And this Court has held in the context of the civil rights statutes (Title VII) that an employee need not apply for a job to show standing if he can show that he "was a potential victim of unlawful discrimination" and that he "would have applied for the job had it not been for those discriminatory practices." *Gutowsky v. Cnty. of Placer*, 108 F.3d 256, 260 (9th Cir. 1997) (quoting *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 367–68 (1977) (markings omitted). In such cases, a court may conduct a "subjective evaluation" into whether applying would have been futile. *Bouman v. Block*, 940 F.2d 1211, 1222 (9th Cir. 1991). Under a "subjective evaluation," a plaintiff must show a "reasonable belief" that the employer "was so

biased that resort to its procedures would have been futile." *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 n.24 (9th Cir. 2003).

There is far more in this case than just a reasonable belief by Pioneer FCA that applying for recognition would have been futile. Pioneer FCA had—and continues to have—actual knowledge of the barriers to access to the recognized-club forum:

- A teacher pinned FCA's statement of faith to his whiteboard to berate the Pioneer club and its members about their "bullsh*t" statement of faith, Whiteboard Photo, 10-ER-2015; Glasser Email, 10-ER-1926;
- FCA lost its recognized status because of its statement of faith, Espiritu Email, 8-ER-1510–11, which has remained unchanged;
- Principal Espiritu publicly flaunted Pioneer FCA's derecognition in the student newspaper, Pony Express Article, 6-ER-1008;
- Not just students but teachers protested FCA during their meetings post-derecognition, Klarke Decl., 1-FER-208; Rudolph Email, 10-ER-1889; Protest Photo, 10-ER-1932; Protest Flyer, 6-ER-1057; GSA Instagram Post, 10-ER-1947; and
- The District updated the policy in Fall 2021 to exclude FCA, a change for which "the FCA matter was the starting point," McMahon Dep., 8-ER-1357; B.W. Decl., 2-FER-380–81; Lopez Decl., 3-ER-0419, ¶ 8 (student started filling out application but

was deterred by policy that required FCA to abandon its Statement of Faith requirement).

This is the exact opposite of "rank speculation." Def. Br. 26. The futility of any need to apply for ASB status over and over to keep this case alive is instead grounded squarely in the record.

II. Banning Pioneer FCA from the ASB Recognition Forum creates an ongoing injury to FCA National that is redressable by a preliminary injunction.

FCA National has both direct standing and third party standing. That is because FCA National is directly harmed by the continued exclusion of its affiliate club from the forum.

An organization may assert standing on its own behalf without invoking the rights of third-party individuals. *See E. Bay Sanctuary Covenant v. Trump* (*EBSC I*), 950 F.3d 1242, 1265, 1284 (9th Cir. 2020) (affirming order granting preliminary injunction). To do so, an organization must show that "defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *Id.* (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)); *see also E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 843–44 (9th Cir. 2020). An organizational plaintiff must show it has been "perceptibly impaired" in its ability to perform its services to prevail on its burden to prove standing. *EBSC I*, 950 F.3d at 1265.

The bar is low. In *EBSC I*, this Court held that it was sufficient for plaintiffs to have pleaded injuries that included frustration of their mission because the challenged policy discouraged asylum seekers, causing plaintiffs to potentially lose clients. 950 F.3d at 1266–67 ("The Organizations are not required to demonstrate some threshold magnitude of their injuries; one less client that they may have had but-for the Rule's issuance is enough. In other words, plaintiffs who suffer concrete, redressable harms that amount to pennies are still entitled to relief."); *see also Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1078, 1095 (9th Cir. 2020) (affirming order of preliminary injunction), *vacated as moot*, 5 F.4th 1099 (9th Cir. 2021). Simply being "forced to modify its speech and behavior to comply with [a] statute" also gives a plaintiff standing. *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003).

FCA National has more than pleaded direct harm, frustration of purpose, and modification of behavior. It has shown it.

First, FCA National currently has one less recognized student organization than it did before the District derecognized Pioneer FCA. Second, it has less members since the District's campaign against FCA has discouraged members from joining. *See* Lopez Decl., 2-ER-0055. As a result of a reduction in chapters and membership, FCA National's speech is diminished. Third, absent an injunction, FCA National has diverted and continues to divert resources to assist Pioneer FCA to stay

afloat in the face of the District's continued exclusionary policy. Lopez Decl., 2-FER-368.

Area Director Lopez, an FCA National employee, spent a great deal of time responding to problems created by district officials' unlawful actions against Pioneer FCA, including prioritizing his attendance at the meetings held by Pioneer FCA to boost morale, monitor the treatment of the club's members, help minimize disruptions, help ensure student safety, and guide student members through interactions with school administrators. Lopez Decl., 2-FER-368–69. Pioneer High's visitor logs show that he visited the high school only six times each during the 2017–18 and 2018–19 academic years, but visited 14 times during the 2019–20 academic year (when the District derecognized Pioneer FCA). *Id.* All this, and more, diverted resources from FCA as it sought to respond to the District's frustration of the organization's purpose of spreading the Gospel to students and student-athletes through its local chapters—i.e., local chapters like Pioneer FCA. *Id.*

The fact that FCA National's speech and resources are harmed by the District's actions against students and student chapters is dispositive. In *Washington v. Trump*, for example, this Court held that various states (alleging harm to their universities) had standing to challenge an executive order limiting entry to the United States from seven specific countries. 847 F.3d 1151, 1159 (9th Cir. 2017). This Court found sufficient for standing the states' "alleg[ations] that the teaching

and research missions of their universities are harmed by the Executive Order's effect on their faculty and students who are nationals of the seven affected countries." *Id.* In other words, standing existed even though the states' harms were based on defendant's actions against third parties. *Id.* at 1160 (applying the third-party standing doctrine and noting that doctors have been permitted to assert the rights of their patients—*e.g.*, challenging abortion restrictions—and advocacy organizations have been permitted to assert the constitutional rights of their members). This Court even allowed the states to simply rely on the allegations in their complaint to meet their burden to show standing for a TRO. *Id.* at 1159. Under this standard, the District's banning of Pioneer FCA from ASB status is a direct harm to FCA National, full stop.

What's more, FCA National has third party-standing. *Cf. id.* at 1160 (citing *Singleton v. Wulff*, 428 U.S. 106, 114–16 (1976)) ("explaining that third-party standing is allowed when the third party's interests are 'inextricably bound up with the activity the litigant wishes to pursue'; when the litigant is 'fully, or very nearly, as effective a proponent of the right' as the third party; or when the third party is less able to assert her own rights"). FCA National's interests are inextricably bound up with Pioneer FCA's interests. FCA National, after all, could not carry out its mission without local affiliates like

Pioneer FCA. Thus, FCA National has third-party standing to represent Pioneer FCA's interests.

To hold otherwise would harm not only amici, who are similarly situated to FCA National, but also upend decades of standing law. The NAACP, for example, would no longer have standing to challenge harms done to its local affiliates, *cf. NAACP v. Alabama*, 357 U.S. 449 (1958), and doctors could no longer represent the interests of their patients, *cf. Griswold v. Connecticut*, 381 U.S. 479 (1965).

CONCLUSION

FCA served harmoniously at Pioneer High as a recognized student organization for years before it was derecognized and its members harassed. Despite this, it continues to persist, and thus exist, outside the forum the District has created for recognized clubs. It filed a lawsuit to restore the status quo and regain recognition. Plaintiffs have standing for the requested injunctive relief, and a refusal to recognize that standing will jeopardize innumerable civil-rights plaintiffs and organizations from being able to seek redress for their injuries in the future.

Respectfully submitted,

By: */s/ John J. Bursch*

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Dated: February 22, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
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Attorney for *Amici Curiae*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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