No. 22-15827

United States Court of Appeals for the Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 20-CV-2798
HON. HAYWOOD S. GILLIAM, JR., PRESIDING

BRIEF OF CAMPUS CRUSADE FOR CHRIST, INC., INTERVARSITY CHRISTIAN FELLOWSHIP/USA, THE NAVIGATORS, AND YOUNG LIFE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each *amicus*, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

s/ *Christopher Mills*
Christopher Mills

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici religious organizations[1] collectively have over 300 years of experience on school campuses nationwide, and they currently support 10,000 campus chapters and 450,000 students. They share a concern in protecting the ability of religious organizations to follow their beliefs and select leaders who adhere to those beliefs. Public schools discriminate against *amici* and other religious student groups all too often.[2] But *amici* have never encountered the level of sustained hostility and blatant discrimination directed by the San Jose Unified School District against FCA.

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[1] All parties consented to this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person or entity (other than *amici* and their counsel) contributed money intended to fund the preparation or submission of the brief.

[2] *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108–09 (2001) (denying a student group access to meeting space for Bible lessons and scripture readings was viewpoint discrimination); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 246–47 (1990) (a student's request to form a religious group on campus must be granted under the Equal Access Act); *Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1001 (8th Cir. 2012) (viewpoint discrimination to exclude religious group from after-school program); *Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872 (2d Cir. 1996) (ruling for a religious group that restricted leadership positions to "professed Christians"); *Prince v. Jacoby*, 303 F.3d 1074, 1090–92 (9th Cir. 2002) (school denial of official status to a religious student group violated the First Amendment); *McKee v. Pleasanton Unified Sch. Dist. 344*, No. 2:06-cv-2370, 2007 WL 445192, at *1 (D. Kan. Jan. 30, 2007) (preliminary injunction in favor of FCA club that was denied registered status); *Hoppock ex rel. Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160, 1164 (D. Idaho 1991) (under the EAA, a religious student group must be able to meet and use school facilities); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1299–1300 (C.D. Cal. 2008) (religious student club likely to prevail on EAA and First Amendment claim for equal

The District stripped FCA of its status as an Associated Student Body (ASB) student group on the basis that FCA violates the District's non-discrimination policy and its newly minted "All Comers Policy" by asking its student leaders to sign a statement of faith: that is, to commit to the beliefs that animate the Fellowship of

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access to school facilities). Religious groups on college campuses have long encountered similar obstacles. *See, e.g.*, *Christian Legal Soc'y v. Walker,* 453 F.3d 835, 867 (7th Cir. 2006) (a religious group denied recognized status had shown a likelihood of success on expressive association and other First Amendment claims); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 863–64 (8th Cir. 2021) (a university's selective application of its nondiscrimination policy against religious student groups was viewpoint discrimination); *Beta Upsilon Chi Upsilon Chapter v. Machen*, 586 F.3d 908, 918 (11th Cir. 2009) (holding the case moot after a religious fraternity was granted registered status); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 839 (E.D. Mich. 2021) (granting injunction preventing university from revoking religious student groups registered status due to its religious leadership requirements); *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04-cv-765, 2006 WL 1286186, at *3–4 (M.D.N.C. May 4, 2006) (university modified its nondiscrimination policy to permit student organizations that restricted membership on account of religious belief); *Christian Legal Soc'y v. Crow*, No. 04-cv-2572, 2006 WL 8440339, at *5 (D. Ariz. May 1, 2006) (settlement that amended university policy so that religious groups could restrict membership and leadership positions on account of religious belief); Complaint for Damages, Declaratory, and Injunctive Relief at 9, 19, 35, *Ratio Christi at the Univ. of Houston-Clear Lake v. Khator*, No. 4:21-cv-3503 (S.D. Tex. filed Oct. 25, 2021) (involving denial of registered status to religious student group); Verified Complaint at 24–30, *Ratio Christi of Kennesaw State Univ. v. Olens*, No. 1:18-cv-745 (N.D. Ga. filed Feb. 20, 2018) (involving speech limitations on religious student group); Plaintiffs' Verified Complaint at 4, 19, *Ratio Christi at the Univ. of Colo. v. Sharkey*, No. 1:18-cv-2928 (D. Colo. filed Nov. 14, 2018) (involving denial of registered status to religious student groups based on leadership selection).

Christian Athletes as an organization. This decision—penalizing a group for asking its leaders to share its beliefs—is unconstitutionally discriminatory.

The District has engaged in at least two forms of prohibited discrimination against FCA and its clubs based on their religious beliefs. First, the District's non-discrimination policy singles out religion as the one animating belief or ideology that a student group cannot adopt and demand that its leaders share. The District's policy allows other students groups to discriminate based on sex, age, ethnicity, GPA, and character. By prohibiting religious groups from considering religion in leadership selection, the District has violated the bedrock Free Exercise rule that government may not impose special disabilities based on religious status or views. For the same reason, the District has discriminated against religious viewpoints in violation of the Free Speech Clause. And the District's policy imposes serious burdens on religious student groups, including difficulty hosting events, procuring meeting space, and communicating with students and administrators.

Second, the District discriminated against religion by refusing to exempt religious groups from the policy while it exempted comparable groups that also restricted leadership or membership based on otherwise prohibited grounds. The District unconstitutionally devalued FCA's religious reasons for "discriminating"—that is, setting criteria for its leaders—by judging them to be of lesser import than other organizations' reasons.

An injunction is necessary to protect FCA's constitutional rights. For years, the District has tried to hound FCA student groups out of existence by bullying students for their religious beliefs—while being willing to register "a White nationalist group." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1095 n.7 (9th Cir. 2022) ("*FCA*"). This sustained, official pressure by the District on individual students poses an imminent threat to the survival of the student groups. By their nature, school communities are transient and often fragile. School children are easily impressionable. And schools are characterized by an "inherent power asymmetry," as officials control both the policy and the tone of the school environment. *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 869 (9th Cir. 2016). Few children would be willing to stand against continual pressure by those in authority. And the District knows this: after its officials viciously demeaned the beliefs of FCA students for years, *see FCA*, 46 F.4th at 1099–1102 (Lee, J., concurring), it came to court claiming mootness because its campaign of intimidation has driven many students away. Then it responded to the panel's injunction by shutting down all other clubs district-wide for the entire semester—so that it would not have "a harder time defending [its] position."[3]

[3] Bob Egelko, *Christian club that challenged San Jose Unified is now the district's only official student group*, S.F. Chronicle, https://www.sfchronicle.com/politics/article/Christian-club-San-Jose-school-17575850.php (Nov. 11, 2022).

Religious discrimination against student groups like *amici*'s is unfortunately nothing new. But the District's discrimination is as egregious as anything encountered by *amici*. Letting that discrimination continue would effectively allow extermination of unpopular student groups across the country. To vindicate the constitutional prohibition on discrimination against religious exercise and speech, the en banc Court should direct the district court to enter an injunction, as the panel did.

ARGUMENT

I. The District's policy discriminates against religion.

Government discrimination against religion violates the Free Exercise Clause. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). Government discrimination against religious viewpoints violates the Free Speech Clause. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The District's policy, when applied to bar a religious group from requiring that its leaders adhere to its religion, violates both clauses. By its policy's structure and operation, the District singles out religious groups as the only groups that cannot set their animating beliefs as criteria for the selection of student leaders.

A. The District's policy violates free exercise.

The District stripped FCA of its ASB status after it concluded that the club's beliefs were "of a discriminatory nature." ER.315. As the District admitted, FCA

remains the only ASB-approved club in the District to be derecognized for its leadership requirements. *See* ER.871. That action flows from both the terms of the District's rules and its special hostility toward FCA. The terms require consideration of whether a leader is selected based on "religion." ER.703; *see* ER.1776–78. And as Judge Lee's panel concurrence explained, FCA has been repeatedly and viciously targeted by the District. *FCA*, 46 F.4th at 1099–1102. These facts alone warrant strict scrutiny: "the District sought to restrict [FCA's] actions at least in part because of their religious character." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022).

The District's new policy also flunks the requirements of neutrality and general applicability because it is riddled with exemptions. Most notably, it permits ASB-approved clubs to exclude students based on so-called "non-discriminatory criteria." The District does not know or define what qualifies as "nondiscriminatory," instead leaving enforcement to the "common sense" discretion of each District school. ER.1046–47; ER.509; ER.556. FCA's statement of faith constitutes its animating beliefs and ideology, but the District has exercised its sweeping discretion and determined that such a statement does not qualify as a nondiscriminatory criterion. The District thus penalized FCA, singling it out—as a religious group—as the one kind of group that cannot require its leaders to commit to its animating beliefs or ideology. This differential treatment violates the Free Exercise Clause, which

forbids government from "impos[ing] special disabilities on the basis of religious views or religious status," including denial of benefits. *Trinity Lutheran*, 137 S. Ct. at 2021.

Prohibiting religious discrimination in the selection of leaders makes sense as to student groups that are not organized around religious beliefs. The Chess Club has no legitimate interest in asking leaders to sign a statement of Christian faith. And prohibiting religious discrimination poses no meaningful restriction to nonreligious groups; the policy leaves them free to discriminate based on their nonreligious animating views.

Here, for instance, the District supports the Latino Male Mentoring Group at Pioneer High School. ER.1123. Likewise, the Male Summit Conference is a District program for "[o]nly males," intended to encourage higher education for boys. ER.954. According to the District, "a multitude of [similar] programs" exist. ER.1653. And the District has long permitted sex-segregated student events, celebrations, and games. *E.g.*, ER.1272–78. Each of these official school activities may restrict participation as part of its organizational mission, and it makes sense that these activities may not discriminate based on religion.

For religious groups, however, shared beliefs are inextricably linked to shared status, and these groups have no other way to define their mission apart from this protected characteristic. Thus, policies like the District's end up "singl[ing] out

religion as belief for uniquely unfavorable treatment." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 916 (2009). Groups that favor nonreligious causes may control their membership and leadership, while groups exercising a fundamental liberty—freely exercising religion—may not. That perverse result contradicts the First Amendment.

The District has claimed that its rule is facially neutral because it applies to all student clubs and is not undermined by individual exemptions like those in *Fulton v. City of Philadelphia*. But in *Fulton*, the Supreme Court struck down a policy that reserved the application of a system of individual exemptions to the "sole discretion" of a commissioner. 141 S. Ct. 1868, 1879 (2021). Here, the District claims for itself capacious discretion to determine when exclusionary rules fall under the "non-discriminatory" exemption of its policy. And the District reserves "discretion" on whether to apply the policy at all. ER.1655. Such sweeping discretion renders the policy not generally applicable. If anything, these discretionary exemptions pose a greater threat of swallowing the entire policy than any of the narrow exemptions in *Fulton*.

For its part, the district court said that the policy does not give the District "an impermissible degree of discretion" because "discriminatory criteria are enumerated in the list of protected characteristics, so non-discriminatory criteria must be criteria not based on those characteristics." ER.16. That circular explanation misses the

point. There are virtually *infinite* secular criteria on which the policy permits discrimination, and the District gets to pick and choose among them—and whether to apply the policy at all. That is the constitutional problem. More, the District has also permitted groups and activities to discriminate based on the protected characteristics in the policy itself. *See* Part II *infra*.

The Supreme Court has made clear that "[f]acial neutrality is not determinative"; the Free Exercise Clause "forbids subtle departures from neutrality" too. *Lukumi*, 508 U.S. at 534. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id. Lukumi* held that ordinances prohibiting the ritual sacrifice of animals were neither neutral nor generally applicable, not just because of their text but because of their "real operation" in conjunction with other laws: they prohibited Santeria sacrifices while leaving unpunished "killings that are no more necessary or humane in almost all other circumstances." *Id.* at 535–36. Similarly, in its "real operation," the District's policy targets religious student groups, barring them from requiring that their leaders adhere to the group's beliefs but allowing almost all other groups to do so.

B. The District's policy violates free speech by discriminating against religious viewpoints.

For similar reasons, applying the District's policy to FCA discriminates against religious viewpoints in violation of the Free Speech Clause. When a public

school opens a limited public forum, such as here, it may not "discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829. A "[r]eligion is [itself] [a] viewpoint from which ideas are conveyed." *Good News Club*, 533 U.S. at 112 n.4. As just shown, the District's policy denies only religious groups the ability to preserve their animating beliefs and viewpoints.

In cases from *Lamb's Chapel* through *Good News Club*, the Supreme Court looked beyond a policy's face and a school's characterization to determine whether its application to a religious group was unconstitutional viewpoint discrimination. For example, in *Lamb's Chapel*, the school district described its rule as forbidding any group to use facilities "for religious purposes" (which covered all organizations and arguably did not facially single out speech). 508 U.S. at 387, 393. But the Court determined that the policy was being used to exclude a film on child-rearing, an otherwise allowable subject, because of its religious perspective; the policy thus "was unconstitutionally applied in this case." *Id.* at 393–94.

In each of the Supreme Court's decisions protecting religious student organizations—*Lamb's Chapel*, *Rosenberger*, *Good News Club*, and *Widmar v. Vincent*, 454 U.S. 263 (1981)—the schools might have argued that their policies were neutral because they prohibited "all organizations" from engaging in religious language, activity, or purposes. Of course, the Supreme Court would—and did—reject that artificial argument as discriminatory against religious viewpoints. But the notion that a

religious group should ignore religion in choosing its leaders, because nonreligious groups must ignore it, is just as incongruous as the notion that a religious group should pursue nonreligious language or purposes because nonreligious groups do so. Just as nonreligious groups may choose leaders who will advance their mission, religious groups must be able to as well.

In the district court's view, the policy "is neutral as to content and viewpoint" "because it serves a purpose unrelated to the suppression of expression" and "because it does not preclude religious speech but rather prohibits acts of discrimination." ER.11, 15 (cleaned up). Neither reason is sound. First, whatever the new policy's other supposed purposes, it has been *applied* to exclude only religious viewpoints. "[E]xclud[ing] speech based on religious viewpoint" always "constitutes impermissible viewpoint discrimination" and "violate[s] the Free Speech Clause." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1593 (2022) (cleaned up).

Likewise, a regulation can govern conduct and still be viewpoint discriminatory. The government could not forbid racial discrimination only when groups espousing religious beliefs engage in it; that would be viewpoint discrimination. In *R.A.V. v. City of St. Paul*, the Supreme Court held that even categories of unprotected activity may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." 505 U.S. 377, 383–84 (1992). When this case is viewed in the relevant perspective—an expressive group's selection of the leaders

and members who express its beliefs and determine its course—the District's exclusion of FCA is exactly the kind of selective restriction that *R.A.V.* condemns.

More, the District "allows secular student groups to impose their own (secular-based) moral code for membership"—"[f]or example, the Interact club requires its members and leaders to 'demonstrate good moral character'"—but "does not allow religion-based moral requirements." *FCA*, 46 F.4th at 1096. When a government body excludes "the teaching of morals and character" only "from a religious standpoint," it is "quite clear that [it] engaged in viewpoint discrimination." *Good News Club*, 533 U.S. at 109.

The district court relied on *Christian Legal Society v. Martinez*, which suggested "other available avenues for the group" in that case "to exercise its First Amendment rights." 561 U.S. 661, 690 (2010); *see* ER.10–13 & nn. 4–5. But the opinion in *Martinez* emphasized these "other available avenues" only *after* finding that the "access barriers" there were "viewpoint neutral." 561 U.S. at 690. When a policy's application discriminates against religion, strict scrutiny applies regardless of the burden.

C. Discrimination against religion triggers strict scrutiny.

Because the District's policy singles out religious groups in its structure and operation, the District's application of the policy to religious groups must satisfy strict scrutiny. When discrimination against religion coerces groups to choose

between their religious nature and a government benefit, it "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Lukumi*, 508 U.S. at 546). When the government singles out religion for discrimination, it does not matter that the consequences of denying the benefit are less than "dramatic," like a "few extra scraped knees" from unsurfaced playgrounds in *Trinity Lutheran*, 137 S. Ct. at 2024–25. A denial based on discrimination against religion is "'odious to our Constitution all the same.'" *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025). As the Supreme Court recently reiterated, strict scrutiny is required under the Free Exercise Clause whenever the government "treat[s] *any* comparable activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

So too with respect to the District's singling out of religious viewpoints under the Free Speech Clause: the viewpoint discrimination itself triggers strict scrutiny. In none of the decisions involving exclusion of religious groups from a limited public forum—from *Widmar* through *Good News Club*—did the Court ask whether the exclusion imposed large burdens on such groups. However large the burden, "to justify discriminatory exclusion from a public forum based on the religious content of

a group's intended speech," the government "must show that its regulation [satisfies strict scrutiny]." *Widmar*, 454 U.S. at 269–70.[4]

D. Denial of recognized status seriously burdens student religious groups.

In any event, the District's discrimination against religious groups like FCA significantly burdens their rights of religious exercise, speech, and association. To retain its status as an ASB group, FCA must forgo its fundamental right to select its leaders according to its religious beliefs. And if it is deregistered for exercising that right, it suffers multiple harms.

1. Burdening a religious group's ability to select its leaders is a serious harm.

The Supreme Court has repeatedly affirmed that a religious group must have "control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). Without that autonomy, a religious group could not "shape its own faith and mission," *id.*: "a wayward [leader]'s preaching, teaching, and counseling could contradict the [group's] tenets and lead the congregation away from the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). As with all expressive

[4] In *Martinez*, the Supreme Court emphasized what it viewed as "other available avenues for the group to exercise its First Amendment rights" only *after* finding that the "access barriers" there were "viewpoint neutral." 561 U.S. at 690. When a policy discriminates against religion, strict scrutiny applies regardless of the burden.

groups, "[f]orcing a [religious] group to accept certain members [or leaders] may impair the ability of the group to express those views, and only those views, that it intends to express." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). These interests apply to FCA's student leaders, who "lead and participate in prayer, worship, and religious teaching" and "help decide the religious content of meetings." ER.1325.

2. Derecognition of a group seriously burdens it.

The district court minimized the burdens of deregistration, noting that FCA could "meet on campus" and "advertise through 'non-[school] electronic resources.'" ER.10 n.5. These "alternative avenues" (*id.*) are far from registered Main Street. To give only a few examples:

Loss of Club Benefits. By stripping FCA of ASB status, the club loses access to resources, means of communication and funding, and even participation in the yearbook. ER.1329–30.

Stigma. Deregistration also stigmatized FCA and its members. The first removal of FCA's ASB status began when a teacher wrote a message on his classroom board asserting that FCA's views were an injury "to the rights of others in my community." ER.1199; *see also* ER.1204; ER.1219; ER.1227; ER. 1312; ER.1322. Echoing school officials, students led loud protests right outside FCA's meeting, carrying signs disparaging the beliefs of FCA as "HATRED." ER.1239. Pioneer granted

recognition to a Satanic Temple Club chapter formed to "openly mock" FCA's beliefs. ER.1309–10. It is also willing to recognize "a White nationalist group." *See FCA*, 46 F.4th at 1095. But not a small religious student group.

Intimidation. Unsurprisingly, the cloud of stigma that now surrounds FCA has intimidated students and made recruitment of new leaders and members for the Pioneer club much harder. ER.1709–12. Lack of ASB approval discourages students from becoming student FCA representatives and club leaders. The District-sanctioned message to students interested in FCA is clear: stay away and keep your religious views to yourself. For impressionable students whose academic success depends on the very teachers and administrators belittling their beliefs, this official pressure is often overwhelming.

Such harms are common when student religious groups try to choose committed leaders in an atmosphere of hostility to that right. For example, at the Ohio State University Moritz College of Law, after a student complained that the Christian Legal Society chapter was requiring that leaders and voting members hold its Christian beliefs, the chapter's student president faced a hostile education environment in which he was "often the subject of name-calling, gossip, and rumor-mongering," was "verbally admonished" by classmates for his religious beliefs, and was "warned by upperclassmen not to take courses by certain professors who were not likely to

give [him] fair evaluations."[5] While these harms are all too common, the harms here are especially severe.

These severe burdens confirm both that strict scrutiny of the District's discriminatory actions is required and that a preliminary injunction is necessary.

II. The District devalues religious exercise by allowing other groups to discriminate.

The District's discrimination against religious groups is not limited to denying them the right, enjoyed by all other groups, to expect commitments of belief from their leaders. The District has also discriminated against religion by exempting other groups that restrict leadership or membership based on otherwise prohibited grounds, while refusing to provide the same protection to religious groups. More broadly, the District allows groups to be formed around purposes or benefits for protected classes—resulting in discrimination—so its refusal to permit religious groups to consider the beliefs of their leaders is discriminatory.

Under Supreme Court precedent, laws that burden religious exercise are subject to strict scrutiny unless they are both neutral and generally applicable. *Smith*, 494 U.S. at 878–82. "Government fails to act neutrally when it proceeds in a manner

[5] *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114th Cong. 39–58 (June 2, 2015), Supp. Hrg. Rec. 62–64 (Letter from Michael Berry to Chairman Trent Franks (June 5, 2015)), *available at* http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf.

intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. And a "law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (cleaned up). In other words, a law may "appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (citing both *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365–67 (3d Cir. 1999)). "An exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* (citation omitted).

Thus, "government regulations are not neutral and generally applicable" "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.*; *see Carson v. Makin*, 142 S. Ct. 1987, 2000 (2022) ("The Court must survey meticulously the circumstances

of governmental categories to eliminate, as it were, religious gerrymanders." (cleaned up)).

In *Fraternal Order of Police*, for example, the police department forbade officers to wear beards but gave an exception for officers with a medical reason for wearing beards. 170 F.3d at 360–61. The Third Circuit, in an opinion by then-Judge Alito, held that the department discriminated against religion when it refused an analogous exception to Muslim officers who wore beards as a command of their faith. The court agreed that the department had "unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons." *Id.* at 365.

In the same way, the District has allowed multiple organizations to set leadership, membership, or purpose criteria on grounds that either its policy prohibits or that result in discrimination based on protected characteristics. The District has thus "unconstitutionally devalued [FCA's] religious reasons for [setting criteria] by judging them to be of lesser import than [other organizations'] reasons." *Id.*; *cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–67 (2020) (finding public health orders discriminatory when they restricted houses of worship more than comparable businesses).

First, the District justified its categorical exception allowing student athletics teams to discriminate based on sex in their leadership and membership because they

fall "under a different umbrella"—but they too "must be ASB approved" and have ASB accounts. ER.176; ER.443; SER.418; *accord* ER.17 n.10; ER.1019; ER.673 ("student athletic teams" are "subject to the District's non-discrimination policies"). Regardless, the District cannot avoid strict scrutiny by arbitrarily classifying all groups that *do* engage in prohibited discrimination as outside the ASB program. "Comparability is concerned" not with the government's own classification, but "with the risks various activities pose" to "the asserted government interest." *Tandon*, 141 S. Ct. at 1296. Here, the district court said that it would be "reasonable" to think that "students cannot engage in the school community if they are prohibited from joining clubs or holding leadership positions because of" some "other protected characteristic." ER.10. This generic interest applies equally to *all* school activities. Plus, the District has characterized the ASB policy as merely a manifestation of the "same nondiscrimination policy" that applies to "all San Jose Unified programs." ER.1361.

Further, the right of religious organizations to select their leaders is at least as fundamental as any interest in recreational events. When the Supreme Court unanimously affirmed that First Amendment right in *Hosanna-Tabor*, the Court traced its roots in both England (back to Magna Carta) and in colonial and founding-era America, concluding "against this background" that both clauses of the First Amendment prevent the government from "interfering with the freedom of religious groups to

select their own [ministers and leaders].” 565 U.S. at 183–84; *see also Our Lady*, 140 S. Ct. at 2061 (reiterating that *Hosanna-Tabor* “‘looked to the ‘background’ against which ‘the First Amendment was adopted’”).

In short, single-sex athletic teams undercut the District’s asserted non-discrimination interests as much as or more than student religious groups do. Because the government may not “treat *any* comparable secular activity more favorably than religious exercise” without satisfying strict scrutiny, *Tandon*, 141 S. Ct. at 1296, the District must take the simple and reasonable step of allowing religious groups an exception to choose leaders who adhere to their religion. *Cf. Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (“[N]o precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide.”); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228–29 (C.D. Cal. 2002) (rejecting argument that revenue generation is a compelling interest justifying discrimination against religious organizations).[6]

Second, the District’s asserted policy is not applied to comparable activities either. As noted above, the District allows the Latino Male Mentoring Group to

[6] Of course, the problem is not single-sex sports teams, but undervaluing religious rationales for selection.

discriminate based on age, sex, and ethnicity. It allows the Male Summit Conference and various school contests to discriminate based on sex. These and other District programs discriminate based on many protected characteristics. *See generally* ER.939; ER.1156–61; ER.1035. The District has protested that all these types of discrimination are "reasonable." But once again, that only underscores the impermissible value judgment that the District is making *against* religious exercise. "[T]he asserted government interest that justifies" the District's policy is a blanket one: non-discrimination. *Tandon*, 141 S. Ct. at 1296. So, if the District believes that some other values overcome its non-discrimination interest (either within or without its ASB program), the First Amendment requires it to give religious exercise the same consideration.

Third, the District allows groups to be formed with the purpose of benefitting individuals based on their membership in protected classes, including sex and race. ER.1764; *e.g.*, ER.1675 (Girls Who Code's purpose is to "advanc[e] women in science"); ER.1414 (Black Student Union, "promote the right of African-Americans"). In other words, the District embraces these groups—including a White nationalist group, *FCA*, 46 F.4th at 1095 n.7—even though their purposes and effects are to discriminate based on protected classifications. Prohibiting a religious group from considering the beliefs of its leaders while permitting other groups to be formed

around discriminatory purposes again reflects a discrimination against religious exercise.

CONCLUSION

The District's discrimination against FCA for its religious exercise is as egregious as anything encountered by *amici* in their decades of serving thousands of school campuses nationwide. The Court should direct the district court to enter a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Christopher Mills, do hereby certify that the foregoing Brief:

1) Complies with the type-volume limit of 9th Cir. R. 29-2(c)(3) because it contains 5,404 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare this brief; and,

2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

/s *Christopher Mills*
Christopher Mills

Dated: February 21, 2023

CERTIFICATE OF SERVICE

I, Christopher Mills, hereby certify that I filed the foregoing Brief electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on February 21, 2023. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Christopher Mills*
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