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 JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Honorable Haywood S. Gilliam, Jr.
(4:20-cv-02798-HSG)

BRIEF OF D.B., HANNAH THOMPSON, AND JACOB ESTELL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTERESTS OF *AMICI*[1]

Amici are current and former students who faced religious discrimination from their public schools because they led religious student clubs. They submit this brief in support of the FCA-affiliated students.

In 2019, **D.B.** was a high school freshman in upstate New York, who wanted to form a Christian club. School administrators delayed approving her club for months, and the principal insisted on meeting with D.B. on three separate occasions. After several meetings and emails with the school administrators who ultimately denied her request, D.B. appealed to the district. The assistant superintendent also denied her club application, claiming it would be "seen as exclusive" although it would be open to all students. Even after D.B. told the district that the Equal Access Act allowed her to form the club, the district still denied the application because the club was religious. D.B. then retained First Liberty Institute, which wrote a letter to the district explaining its legal obligations under the Equal Access Act, and the district promptly approved D.B.'s Christian club. Three years later, her club is still meeting and thriving, without further opposition from administrators. Leading this club has been one of the most fulfilling and rewarding experiences of D.B.'s high school career.

D.B. can relate to the anxiety and chilling effect that the FCA students in this case experienced when District administrators openly opposed the club in front of the student body. As a committed Christian, D.B. believes that religious freedom is

[1] *Amici* state that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the prepation or submission of this brief. All parties have consented to the filing of this brief.

important for students of all faiths, and that students need a safe place to be able to support each other in their beliefs. D.B. also believes that because her school district celebrates diversity and the right to express oneself, religious students deserve to express their beliefs as well. D.B. asks the Court to consider how its decision will impact students who desire to form or lead religious clubs on their campuses.

Hannah Thompson is a University of Iowa graduate. As a business student, Hannah co-founded the club Business Leaders in Christ (BLinC), so that "seekers of Christ" could learn "how to continually keep Christ first in the fast-paced business world," "[u]sing the Bible as a guide." Thompson Decl. at 2, ECF No. 7-5, *Bus. Leaders in Christ v. Univ. of Iowa*, No. 3:17-cv-000-80-SMR-SBJ (S.D. Iowa Dec. 13, 2017). She served as president during the 2016-17 school year. BLinC was registered with the University, which allowed the club to receive funding from student activity fees, meet on campus, and participate in student recruitment fairs. As club president, Hannah led weekly meetings with prayer, Bible discussion, and spiritual reflection. She also planned community service projects and invited local Christian members of the business community to speak about how they lived out their faith in their careers.

In spring 2016, Hannah was approached by a BLinC member who expressed interest in serving as a leader. After several conversations, the student made clear to Hannah that he did not agree with BLinC's Biblical position regarding sexual conduct. Despite Hannah's efforts to continue her friendship with the student, he filed a complaint with the University, which then investigated BLinC because of its religious beliefs. The University bullied Hannah by accusing her of discriminating

against the student because of his sexual orientation, even though BLinC had always desired to cultivate a welcoming environment open to everyone. Hannah's anxiety increased when the school newspaper wrote an article about her, portraying her and her club as bigoted. Hannah was forbidden by the University administrators from sharing her viewpoint. When the article was published, Hannah was afraid to go on campus because of how her community might react. Once litigation began, Hannah experienced additional stress during discovery. Being deposed was particularly intimidating and stressful. Hannah believes this experience would be more traumatic as a high school student with fewer years of life experience and maturity in her faith. Hannah believes that religious students across the country deserve the opportunity to meet in a safe space where they can be understood by fellow students who share their values.

Jacob Estell is also a University of Iowa graduate. He enjoyed participating in FCA during high school. In college, he became president of BLinC when Hannah graduated in May 2017. He joined the club because he was growing in his faith and wanted to meet with other students who shared his beliefs. After the University opened its investigation, school administrators met with Jacob and his attorneys, claiming that BLinC had violated the University's Human Rights policy. After several weeks of communications where the University pressured Jacob to change the club's religious leadership standards, the University revoked BLinC's registered status. Estell Decl. at 4–5, ECF No. 7-4, *Bus. Leaders in Christ v. Univ. of Iowa*, No. 3:17-cv-000-80-SMR-SBJ (S.D. Iowa Dec. 13, 2017).

Jacob's experience during the University investigation was very stressful and time-consuming. He and other BLinC leaders had to spend dozens of hours defending their religious beliefs against the University's actions, which distracted them from their studies, affected their grades, and made them feel like outsiders. As a small club, losing recognized status made it nearly impossible to recruit new members or function effectively. Jacob felt blindsided by the University's discrimination against his club because of their religious beliefs, especially when the University allowed other clubs to select leaders who agreed with their beliefs and messages. The University's discrimination splintered and ultimately destroyed the club, which was very disappointing because Jacob wanted to pass the club on to future students. Being deposed and going to court were very stressful for Jacob. He was especially concerned about how hostile newspaper articles from local press and the school newspaper would affect his future career. Jacob believes that this experience would be even more difficult as a high school student.

Amici submit this brief in support of the FCA students in the San Jose Unified School District, urging this Court to protect the rights of religious students under the First Amendment.

INTRODUCTION

"Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022). The Free Exercise and Free Speech Clauses of the First Amendment prohibit public school districts from being

hostile to religious expression or from targeting religion for unequal treatment, and the Establishment Clause provides no excuse for such actions. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993). These First Amendment protections extend to teenage students expressing their sincere religious beliefs through voluntary clubs. Yet the San Jose Unified School District flouted its First Amendment obligations, inflicting lasting damage on teenage students by targeting their religious beliefs for ridicule and perpetrating years of harassment that only intensified when the students pursued legal protection in court.

While the District accuses these students of "discrimination" because of their religious beliefs, the District committed intense religious discrimination against these same students. And two years of litigation have brought the students nothing but further harassment, violations of their privacy, and deterrence of new students who would gladly join the club but for intimidation from the District. As religious students who experienced similar discrimination, *amici* present additional facts about this case to this Court, which are publicly available but not briefed by the parties.

FACTUAL BACKGROUND

Plaintiffs-Appellants Charlotte Klarke and Elizabeth Sinclair originally sued under the pseudonyms Jane Doe and Jessica Roe because they were minors who had already experienced a year of hostility from District administrators and months of protests by fellow students and faculty. The students received minimal responses from their school district, despite numerous safety complaints by their parents. Yet

the District pressed hard to reveal the students' names, convincing the court to prevent the students from proceeding pseudonymously. 1-ER-35–37. The District's attorneys turned the discovery process into a grueling ordeal lasting nearly two years, demanding thousands of text messages between Charlotte and Elizabeth over three years regardless of whether they were related to the litigation, and demanding all communications between FCA-affiliated students and their mentor, Rigo Lopez. J. Disc. Br., Ex. I, No. 20-2798 (N.D. Cal. Mar. 7, 2022), ECF No. 159-1. District attorneys deposed Charlotte and Elizabeth for multiple days during their freshman years of college, interrogating them about their religious beliefs, their FCA affiliation, and unrelated personal matters, and stretching two hours past the agreed-upon time limit to question one plaintiff about her emotional distress and mental anguish. Klarke Dep., ECF No. 115-4; Sinclair Dep., ECF No. 115-5.

District attorneys even sought one plaintiff's counseling records from her freshman year of college. The plaintiffs eventually signed a court-approved stipulation to shield these privileged records from discovery, but in exchange, Charlotte and Elizabeth had to give up the ability to seek damages related to counseling and any ongoing harm after they graduated high school, and they agreed not to bring claims for negligent or intentional infliction of emotional distress. Stipulation re Counseling Rs., ECF No. 130; Order Granting Stipulation, ECF No. 134. The District's hostile actions unnecessarily prolonged and complicated the litigation, while causing severe emotional distress to the teenage plaintiffs and deterring other students from supporting them or FCA.

The District's bullying tactics have extended beyond Charlotte and Elizabeth to the students currently keeping the FCA club alive at Pioneer High School. As soon as the District's attorneys learned about a new student leader of Pioneer FCA in 2021, N.M., they attempted to depose her. Blomberg Decl. Ex. C at 15-17, Opp'n to Defs.' Mot. to Dismiss, ECF No. 137-8. To protect N.M. from a harassing and invasive deposition, FCA's attorneys signed a stipulation to ensure that she and other minors would not be deposed about their involvement in FCA, because of the obvious harassment and deterrent effect this would have on those students. *Id.* at 2-3; Defs.' Admin. Mot. for Leave to File Supp. Evid. at 5-6, ECF No. 180-2. In exchange, FCA had to give up its ability to call any FCA-affiliated students besides Charlotte and Elizabeth as witnesses or file written declarations from them in court. *Id.* at 6.

Two other students, M.H. and M.C., expressed that they wanted to be leaders in FCA as the 2021-22 school year began, and M.H. began filling out the paperwork to reapply for recognition in fall 2021. 3-ER-419; 4-ER-648–49; Lopez Dep. at 28-37, ECF No. 179-3 (text messages between M.H. and Lopez). But when Principal Espiritu found out she was interested, he required her to meet with him as a condition of participating in club rush, even though she was only a freshman. Klarke Decl. at 8, ECF No. 137-5. Two days later, just before the start of club rush, M.H. backed out of FCA leadership because of intense anxiety. 3-ER-422; Lopez Dep. at 51:19-20, ECF No. 186-1. M.C. also decided not to be a leader in FCA because of anxiety caused by the District's hostility. 3-ER-419–20; Notice of Errata re Reply to Opp. to Pls. Mot. for Prelim. Inj. at 115-16, ECF No. 186-1 at 115-116 (text message from

M.C. explaining that "due to the events of the past few years with FCA, it makes me more anxious than I initially realized"). The few teachers who supported FCA were likely strongarmed by District attorneys into filing declarations against FCA in court. Clarke Decl. at 1-4, Defs.' Mot. to Dismiss, ECF No. 127-5; Gatcke Decl., Defs.' Mot. to Dismiss, ECF No. 135.

During the last year, the District continued its antagonistic behavior. Pioneer FCA held multiple meetings attended by N.M. and two other students in spring 2022 but continued to face hostility from District officials. 2-ER-55–56. Indeed, Principal Espiritu monitored their activities with unusual scrutiny through the end of the last school year, including attending Pioneer FCA's last meeting in May 2022. 2-ER-56.

This hostility continued even after a panel of this Court ruled in favor of Pioneer FCA in August 2022. In response to the panel's opinion, the District ceased recognizing any student group across all schools in the District except for Pioneer FCA, thereby hollowing the victory Pioneer FCA fought so hard to achieve and inviting new antagonism from those adversely affected by the District's decision.[2] The climate at the school remains so toxic due to the administrators' action that the District was forced to appoint faculty advisors for FCA because no one would volunteer for fear of negative repercussions. *See* ECF 98-4 at 2–3, 98-5. N.M. and the other two members of Pioneer FCA are now seniors in high school but have yet to experience the District treating their club on equal terms with other clubs.

[2] Bob Egelko, *Christian club that challenged San Jose Unified is now the district's only official student group*, SAN FRANCISCO CHRONICLE (Nov. 18, 2022), https://www.sfchronicle.com/politics/article/Christian-club-San-Jose-school-17575850.php.

ARGUMENT

I. The District's overt hostility toward the FCA students' religious beliefs violates the Free Exercise Clause.

"A plaintiff may … prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise." *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)). When the Court finds such hostility, it "'set[s] aside' such policies without further inquiry," and without proceeding to strict scrutiny. *Id.* (citing *Masterpiece*, 138 S. Ct. at 1732); *see also Fulton*, 141 S. Ct. at 1877 ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.")

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held that Colorado's prosecution of a religious business owner violated the Free Exercise Clause and demonstrated "a clear and impermissible hostility toward the sincere religious beliefs" of the owner. *Masterpiece*, 138 S. Ct. at 1729. There, the Commissioner of the Colorado Civil Rights Commission disparaged the owner's faith as "despicable" and "merely rhetorical," comparing his beliefs to "defenses of slavery and the Holocaust." *Id.* at 1729. This hostility from the very public figures charged with providing a fair decision on the business owner's case led the Supreme Court to conclude that his Free Exercise rights were violated. *Id.* at 1732.

Here, statements and actions from the school administrators who revoked FCA's recognized status as a club evidenced their "clear and impermissible

hostility" toward the religious beliefs of FCA-affiliated students. *Id.* at 1729; Pls.' Br. at 39-42. FCA was one of the most popular clubs on campus, with no students or teachers ever complaining about their religious beliefs, until history teacher Peter Glasser posted what he thought to be FCA's Statement of Faith on his whiteboard, highlighting the beliefs he found objectionable. 3-ER-0415. This sent a clear message of hostility to Charlotte Klarke and the other FCA student leader in his class. Glasser's campaign to oust FCA from campus altogether was nearly successful, and his dismissal of co-leaders Charlotte and Elizabeth as "collateral damage" was prophetic. 3-ER-404. They were the teenagers whose names the District insisted on publicly exposing, who endured depositions stretching multiple hours past the agreed-upon time limits, whose text messages unrelated to the litigation were demanded by District attorneys, and whose counseling records District attorneys aggressively sought through a subpoena. These abnormally harsh litigation tactics "stem[med] from animosity to religion or distrust of its practices." *Masterpiece*, 138 S. Ct. at 1731. Instead of respecting Charlotte and Elizabeth's religious beliefs as "decent and honorable," the District made every effort to marginalize and stigmatize these courageous teens. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

The District has shown further hostility since new students have attempted to lead FCA. The District wasted no time in immediately noticing N.M. for a deposition as soon as it learned that she was even *interested* in leadership. Blomberg Decl. Ex. C at 15-17, Opp'n to Defs.' Mot. to Dismiss, ECF No. 137-8. This Court has held that mere government investigation into constitutionally protected activity chills

such activity and is sufficient to prove a constitutional violation. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

Given the District's aggressive tactics and the damaging chilling effect on any potential student leaders, FCA agreed to a stipulation to protect minor students from depositions. In exchange, the District required FCA to give up its ability to call any FCA-affiliated students besides Charlotte and Elizabeth as witnesses or ever file written declarations from them in court. Defs.' Admin. Mot. for Leave to File Supp. Evid. at 5-6, ECF No. 180-2. Yet the District now complains that minor students aren't testifying or submitting declarations—ignoring that the only reason for this is the District's overt hostility toward those same minors. Defs.' Resp. to Mot. for Inj. Pending Appeal at 11, No. 22-15827 (9th Cir. June 27, 2022), ECF No. 21-1. Forcing religious groups to accept leaders who do not share their faith "would cause the group as it currently identifies itself to cease to exist." *Christian Legal Society v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). So, too, would subjecting every new leader to the same invasive discovery tactics that Charlotte and Elizabeth endured.

Instead of supporting and guiding student clubs, or at least fairly deciding which clubs should be recognized, District administrators made their hostility clear in an effort to silence the religious expression of FCA-affiliated students and stamp their club out of existence. Yet "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Cox v. State of Louisiana*, 379 U.S. 536, 551 (1965) (internal citation omitted). The District's unapologetically hostile stance is much more pronounced than the opposition *amici* experienced at the University of Iowa—and the Eighth Circuit held those officials personally liable

because their "selective enforcement" based on "hostility to [the students'] speech" violated the First Amendment. *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 985 (8th Cir. 2021) (citing *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012)). Thus, the District's actions provide evidence of clear and impermissible hostility that violates the Free Exercise Clause. *Kennedy*, 142 S. Ct. at 2422 n.1; *Fulton*, 141 S. Ct. at 1877; *Masterpiece*, 138 S. Ct. at 1729.

II. The District targeted the FCA students' religious beliefs and excluded them from equal treatment in violation of the Free Exercise Clause.

Plaintiffs-Appellants provided the district court with ample evidence of religious targeting—and its effects—that occurred before litigation began. Pls.' Br. at 9-12, 17-19. But the targeting has intensified since the FCA students sought legal protection in court in two significant ways: the District imposed additional hurdles for FCA to overcome, and the District created a religious gerrymander by rewriting its "all comers policy" to exclude FCA. Both forms of targeting trigger strict scrutiny. *Lukumi*, 508 U.S. at 533, 542; *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Gerlich v. Leath*, 861 F.3d 697, 705-06 (8th Cir. 2017).

A. The District's blatant targeting of the FCA students' religious beliefs triggers strict scrutiny.

The District's actions show an obvious lack of neutrality before and during this litigation. The Free Exercise Clause prohibits even "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534 (citing *Gillette v. United States*, 401 U.S. 437, 452 (1971)), and the District's non-neutrality has been anything but subtle. District officials openly disparaged FCA's religious beliefs, comparing the club to the

"KKK," calling them "charlatans" and labeling their religious beliefs "bull****." 5-ER-815; 10-ER-1897; 3-ER-404. Such actions are inappropriate for government officials. *Lukumi*, 508 U.S. at 541 (concluding that councilmember acted inappropriately when he accused worshippers of "violat[ing] … everything this country stands for").

Pioneer's history teacher Glasser vowed to "ban FCA completely from campus" even if it meant accusing teenage girls of sexual harassment. 3-ER-348–49. This is eerily similar to the councilmember in *Lukumi* who asked, "What can we do to prevent the Church from opening?" 508 U.S. at 541. Additionally, the school's employee-run Climate Committee, which included Principal Espiritu and Glasser, decided that FCA's religious beliefs go "against the core values of" Pioneer. 7-ER-1273.

The District is excluding Pioneer FCA from official recognition because it objects to its religious beliefs. *See* 10-ER-1912 (Gay-Straight Alliance faculty advisor told school newspaper that FCA must choose between "hold[ing] events on campus" and its "statement of faith"); 6-ER-918-20 (Principal Espiritu testified that the "fact that [FCA's beliefs] existed" was alone "enough" to derecognize FCA); 9-ER-1750-52 (District representative testified that FCA could neither ask its leaders to hold Christian beliefs nor ask them to follow Biblical standards if it wanted recognition); *see also InterVarsity Christian Fellowship v. Univ. of Iowa*, 408 F. Supp. 3d 960, 983 (S.D. Iowa 2019, *aff'd*, 5 F.4th 855 (8th Cir. 2021) (stating that strict scrutiny is triggered when University made impermissible "value judgment

that its secular reasons for deviating from the Human Rights Policy are more important than InterVarsity's religious reasons" for selecting leaders who share its beliefs). Yet "[t]he First Amendment does not require that Plaintiffs' members choose between risking their continued access to public education and their right to select spiritual leaders who share their beliefs." *See InterVarsity Christian Fellowship v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 813 (E.D. Mich. 2021) (declaring that strict scrutiny is triggered where University enforced non-discrimination policy to prevent religious club from choosing Christian leaders who share their religious beliefs).

The District's targeting intensified once the FCA students sought legal protection in court. The District strongarmed two of the only teachers to show support for FCA, former faculty advisors Gary Clarke and Milara Gatcke, into filing declarations in court against FCA's interests. Clarke Decl. at 1-4, Defs.' Mot. to Dismiss, ECF No. 127-5; Gatcke Decl., Defs.' Mot. to Dismiss, ECF No. 135. The District can hardly claim that FCA still has "faculty support" when it is actively undermining that support during litigation. Defs.' Resp. to Mot. for Inj. Pending Appeal at 3, ECF No. 21-1. *See Hsu v. Roslyn Union Free Sch. Dis.*, 85 F.3d 839, 861 (2d Cir. 1996) (finding that because "faculty sponsors … promote institutional stability, help guarantee that new leaders are committed to the club's cause, and ensure that the club remains true to its purpose," Christian club that lacked faculty

advisor faced hostility on campus); *Boyd Cty. High Sch. GSA v. Bd. of Educ. of Boyd Cty.*, 258 F. Supp. 2d 667, 674 (E.D. Ky. 2003) (citing example of "harassment" toward Gay-Straight Alliance club when its faculty advisor received "threatening notes"); *see also Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (holding that Equal Access Act permits faculty monitors of student-intiated religious groups, but not "day-to-day surveillance … of religious activities"). Indeed, FCA's struggle to find faculty advisors has continued into this year, with potential advisors backing out based on fears of repercussions from the school. *See* ECF 98-4 at 2–3. The current climate is so hostile that the District was forced to appoint advisors for FCA to ensure compliance with this Court's panel opinion. *See* ECF 98-5.

To further the District's strategy of stamping FCA clubs out of existence, then arguing that they lack standing to sue (*see* Defs.' Resp. to Mot. for Inj. Pending Appeal at 8, 10-12, ECF No. 21-1; Defs.' Mot. to Dismiss, ECF No. 127), Principal Espiritu has closely monitored potential new leaders. He "singled out" not only FCA but its individual student leaders "for disfavored treatment," requiring M.H. to meet with him as a condition of participating in club rush, when no other group was required to do so. 3-ER-421; *Kennedy*, 142 S. Ct. at 2423 (school district's "bespoke requirement specifically addressed to Mr. Kennedy's religious exercise" triggered strict scrutiny); *Trinity Lutheran*, 137 S. Ct. at 2020. The District brazenly faults Pioneer FCA for not participating in club rush, which has never been a requirement

for student clubs. Yet Principal Espiritu met with M.H. only two days before, and she backed out of FCA leadership minutes before club rush was scheduled to begin because of the District's hostility. 3-ER-422; Defs.' Resp. to Mot. for Inj. Pending Appeal at 8, ECF No. 21-1. The District's hostility also deterred another potential leader, M.C., from staying involved. 3-ER-419–20. These types of government actions inflict constitutional injury. *See Fulton*, 141 S. Ct. at 1876 (finding that government burdened religious exercise when it forced agency to choose between "curtailing its mission or approving relationships inconsistent with its beliefs"); *Masterpiece*, 138 S. Ct. at 1730 (finding that "disparity in treatment reflected hostility … toward [plaintiff's] beliefs," where Commission treated him differently than bakers who had different conscience-based concerns).

The "unique scrutiny" that the District has imposed on FCA and no other club shows impermissible viewpoint discrimination in addition to targeting. *Gerlich*, 861 F.3d at 705 (asserting that administrators' "discriminatory motive is evidenced by the unique scrutiny defendants imposed on" student club, including prior review and approval requirements which no other clubs had to follow). As the case law makes clear, policies "that target the religious for 'special disabilities' based on 'their religious status'" trigger strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2019 (citing *Lukumi*, 508 U.S. at 533, 542).

Unfortunately, the District's targeted efforts since litigation began largely succeeded. What was once a very popular club with meetings attended by hundreds of students has dwindled to three brave teens who meet without District recognition or support. 2-ER-55-56; 10-ER-2021-22.

When the University of Iowa revoked *amici*'s registered status in the *BLinC* case, although there were no protests or overtly hostile actions toward the students, their club disappeared altogether as they lost recruiting opportunities, funding, and their own school's support. Similarly unequal treatment here, with the added pressures of a hostile high school environment, has nearly "cause[d] the group as it currently identifies itself to cease to exist." *Walker*, 453 F.3d at 861, 863. A district's unequal treatment and denials of recognition cause lasting harm to student groups, in addition to the stigma and religious discrimination experienced by the students themselves. *See Intervarsity Christian Fellowship v. Univ. of Iowa*, 5 F.4th 855, 862 (8th Cir. 2021) (discussing how club struggled with recruiting and planning activities and lost "significant number of members" because of school's discrimination); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1300 (C.D. Cal. 2008) (acknowledging that school district's discrimination against religious club "sabotage[d] its efforts to recruit students when they are most available, permanently stunting the size of the group's membership"). Such targeting and imposing of

additional hurdles based on FCA's sincerely held religious beliefs trigger strict scrutiny. *Lukumi*, 508 U.S. at 546; *Trinity Lutheran*, 137 S. Ct. at 2021.

B. The District's religious gerrymander also triggers strict scrutiny.

The District created a religious gerrymander by rewriting its policy to specifically exclude FCA. *Lukumi* made clear that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." 508 U.S. at 547. Even facially neutral policies violate the Free Exercise Clause when they constitute "[o]fficial action that targets religious conduct for distinctive treatment," also known as "religious gerrymanders." *Id.* at 534; *see Carson v. Makin*, 142 S. Ct. 1987, 2000 (2022) (declaring that courts "must survey meticulously the circumstances of governmental categories to eliminate … religious gerrymanders" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))).

Where the burden of a facially neutral ordinance falls only on religious adherents, or especially adherents of one particular faith, it is an impermissible "gerrymander." *Lukumi*, 508 U.S. at 535. The District's "policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. FCA has a "right to participate in a government benefit program without having to disavow its religious character," *id.* at 2022, and the District's policy may

not "discriminate against 'some or all religious beliefs.'" *Id.* at 2021 (quoting *Lukumi*, 508 U.S. at 532). In the student club context, a school district's "strategic behavior and viewpoint discrimination" in enforcing a policy against only religious clubs "is an anathema to the [Equal Access Act] and the First Amendment." *Bible Club*, 573 F. Supp. 2d at 1300.

Here, the District's newly minted "all comers policy" excludes FCA from the benefits of recognition that are otherwise generally available. 6-ER-1047-49; 4-ER-702. *Trinity Lutheran*, 137 S. Ct. at 2024; *Lukumi*, 508 U.S. at 542-43; *Bible Club*, 573 F. Supp. 2d at 1299-300. Notably, no other clubs have been derecognized or excluded from recognition because of their leadership or membership requirements. The National Honors Society can still choose members based on GPA, the Interact Club can choose members based on "good character and leadership," sports teams can still select based on "athletic competency," and Senior Women can continue to exclude based on sex and age. 2-ER-0155; 4-ER-660; 9-ER-1741-42; 2-ER-63–64. But FCA cannot even apply for recognition because to sign the "Affirmation Statement" would forfeit FCA's ability to ask its leaders to adhere to the club's belief in Jesus Christ. 4-ER-648–49. The District's "all comers policy" excludes FCA while allowing manifold other groups to select their leaders and members based on otherwise discriminatory criteria. *Fulton*, 141 S. Ct. at 1877 (finding that strict scrutiny is triggered where a policy "prohibits religious conduct while permitting

secular conduct that undermines the government's asserted interests in a similar way").

Under the District's interpretation of *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), *amici* D.B.'s religious club would not be allowed to meet unless she agreed to let an atheist lead her prayer meetings. Moreover, the District completely ignores the Eighth Circuit's and Southern District of Iowa's rulings in *Business Leaders in Christ*, where both courts rejected similar attempts to use a nondiscrimination policy to exclude *amici*'s club from campus. Indeed, Judge Kobes' concurrence drew precisely the same parallel with *Lukumi*, finding that "the individual defendants' choice to deny BLinC an exemption from the Human Rights Policy—while allowing exemptions for other secular and religious groups (that they approve of)—shows that they sought to advance their interests *only* against specific religious conduct." *Bus. Leaders in Christ*, 991 F.3d at 989 (Kobes, J., concurring); *see also Fulton*, 141 S. Ct. at 1877; *InterVarsity Christian Fellowship*, 408 F. Supp. 3d at 983 (finding that University made impermissible "value judgment that its secular reasons for deviating from the Human Rights Policy are more important that InterVarsity's religious reasons" for selecting leaders who share its beliefs). The District's religious gerrymander triggers strict scrutiny in violation of the Free Exercise Clause. *Lukumi*, 508 U.S. at 546; *Bus. Leaders in Christ*, 991 F.3d at 989.

Doubling down on its gerrymandered policy, the District blames FCA students for not turning in the paperwork to reapply for recognition in fall 2021. Defs.' Resp. to Mot. for Inj. Pending Appeal at 10-11, ECF No. 21-1. But M.H. had every intention of doing so, and even began filling out the application form—but could not turn it in because it would prevent Pioneer FCA from asking its leaders to agree with its faith. 3-ER-419; 4-ER-648-49. Yet victims of discrimination are not required to submit to a discriminatory process where they will be automatically denied. *See Gratz v. Bollinger*, 539 U.S. 244, 260-61 (2003) (stating that whether student plaintiff "actually applied" for benefit "is not determinative of his ability to seek injunctive relief" when discriminatory criteria are in place); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (declaring that a discriminatory policy actionably injures both those "who go[] through the motions of submitting an application" and those who refuse to "engage in a futile gesture" by submitting "a formal application"). To revoke FCA's recognition, change the recognition process so that FCA students cannot apply without giving up their constitutional rights, and then fault minor students for not applying is nothing more than impermissible targeting that triggers strict scrutiny under the Free Exercise Clause. *Bus. Leaders in Christ*, 991 F.3d at 990 (Kobes, J., concurring) (finding that "state organizations may not target religious groups for differential treatment or withhold an otherwise available benefit solely because they are religious); *see also*

Lukumi, 508 U.S. at 542-43, 546 (concluding that religious targeting triggers strict scrutiny).

C. The District cannot meet strict scrutiny.

The Supreme Court makes clear that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). This means that the District's actions "must be narrowly tailored to serve a compelling state interest." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020) (internal citations omitted). Yet the District has never tried to satisfy strict scrutiny. It never advanced a compelling interest for derecognizing FCA nor used the least restrictive means to do so.

Despite the District's halfhearted efforts to justify its actions, the Establishment Clause provides no excuse for marginalizing students' religious activity at school. *Trinity Lutheran*, 137 S. Ct. at 2024 (acknowledging that the Establishment Clause does not justify religious discrimination under the Free Exercise Clause); *Mergens*, 496 U.S. at 248 (upholding Equal Access Act because "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it … as subversive of American ideals and therefore subject to unique disabilities") (internal citation omitted). FCA has always been a voluntary,

student-led club. 10-ER-2018-19; 10-ER-2103-06; *Mergens*, 496 U.S. at 252 (declaring that school recognition of "student-initiated and student-led religious club … does not convey a message of state approval or endorsement").

As the Supreme Court just clarified, the Establishment Clause does not "require the government to single out private religious speech for special disfavor," nor does it justify "censor[ing] private religious speech." *Kennedy*, 142 S. Ct. at 2416, 2427 (citing *Mergens*, 496 U.S. at 250) (overruling *Lemon v. Kurtzman* and its "endorsement test offshoot"). The District's brazen exclusion of FCA's religious beliefs from the school environment "will strike many as aggressively hostile to religion," much like a government "tearing down monuments with religious symbolism and scrubbing away any reference to the divine." *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2084-85 (2019). Together, the Establishment Clause, Free Exercise Clause, and Free Speech Clauses of the First Amendment require "respect and tolerance for differing views," *id.* at 2089, and they prohibit "a hostility toward religion that has no place in our Establishment Clause traditions," *id.* at 2074 (citing *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment)). While some students may "take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection," "offense … does not equate to

coercion." *Kennedy*, 142 S. Ct. at 2430 (citing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 589 (2014)).

The irony in this case is that no student was ever turned away from leadership in FCA. 10-ER-2022; 7-ER-1266. *See Fulton*, 141 S. Ct at 1875 (revealing that although no same-sex couple was ever turned away, city officials still accused Catholic Social Services of "discrimination"). The "mere shadow" of such a potential conflict was enough for school officials to subject FCA-affiliated students to years of targeting and harassment. *Kennedy*, 142 S. Ct. at 2432 (quoting *Abington v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). And the District reinforces this contrast by raising concerns about potential, hypothetical "stigma" against some students, while ignoring the very tangible stigma that FCA students have continually faced and continue to face when school districts violate their First Amendment rights. Defs.' Resp. to Mot. for Inj. Pending Appeal at 20, ECF No. 21-1. "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 142 S. Ct. at 2432 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–846 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–119 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U. S. 384, 394–395 (1993); *Widmar v. Vincent*, 454 U.S. 263, 270–275 (1981)).

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The First Amendment guarantees that American students are treated equally and respectfully, regardless of their religious beliefs. Indeed, "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Lukumi*, 508 U.S. at 547. District administrators would do well to heed that warning, and this Court should enforce it by providing legal protection to FCA and its affiliated students while their case is pending. If school districts in California can target and intimidate religious clubs nearly out of existence with impunity, other school districts will do the same.

CONCLUSION

Amici urge this Court to reverse the district court's denial of FCA's preliminary injunction and grant these courageous students the legal protection that the First Amendment requires.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it was prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because the motion contains 6997 words, including footnotes, according to the count of Microsoft Word.

Dated: February 22, 2023.

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CERTIFICATE OF SERVICE

I, Keisha Russell, do 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 22, 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.

Dated: February 22, 2023.

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