Docket No. 22-15827

In the

United States Court of Appeals

for the

Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES, et al.,
Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 20-cv-02798
The Honorable Haywood S. Gilliam, Jr., U.S. District Judge

BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae California School Boards Association and its Education Legal Alliance states that it is a nonprofit corporation organized under Section 501(c)(4) of the Internal Revenue Code, and that it has no parent corporation and no publicly held corporation has an ownership interest of 10% or more.

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the California School Boards Association ("CSBA") and its Education Legal Alliance ("ELA") submit this brief supporting the granting or rehearing or rehearing en banc.[1]

CSBA is a non-profit association duly formed and validly existing under the laws of the State of California. As a part of the CSBA, the ELA is composed of nearly 700 CSBA member entities dedicated to addressing legal issues of statewide concern to school districts and county offices of education. As part of its activities, the ELA files *amicus curiae* briefs in litigation which impacts California public educational agencies as a whole.

School districts in California and across the nation are entrusted with educating students from innumerable cultures and backgrounds, including innumerable religious traditions, from pre-school through high school, all while navigating state and federal law that allows for discretion in some circumstances, respects the rights of individual

[1] All parties consented to the filing of this brief. (Ninth Circuit Rule 29-2(a).) No counsel for a party authored this brief in whole or in part, and no party or party counsel contributed money to fund this brief. No person other than *amici curiae* made any monetary contribution to fund the preparation or submission of this brief.

students, requires affirmative policies and actions that prohibit unlawful discrimination in schools, and that protect and promote equal opportunity and inclusion for all students in the public educational experience. CSBA and the ELA have a strong interest in ensuring that the resolution of the issues presented in this case will provide California public schools with reasonable, workable standards for navigating this network of state and federal requirements and will not impede or preclude California public schools from complying with state and federal non-discrimination requirements.

INTRODUCTION

CSBA and ELA support the Petition for Rehearing or Rehearing En Banc ("Petition"), and agree that this is a case of exceptional importance, for the reasons conveyed therein — that the panel majority: 1) deviated from Article III precedent in concluding that plaintiffs have standing, and that a defendant can waive the requirement of Article III standing; 2) contravened U.S. Supreme Court precedent regarding the standard for injunctive relief; 3) disregarded the district court's findings, then deviated from this Court's precedent by concluding that administrative mistake or oversight can support a claim of

unconstitutional selective enforcement; and 4) ordered a remedy that departs from this Court's precedent. CSBA and ELA support granting of the Petition for those reasons.

Here, CSBA and ELA address and expand on two aspects of the majority decision that are particularly concerning to public school entities in California and, we suspect, entities throughout the Ninth Circuit and nation. First, CSBA and ELA take issue with the panel majority's decision that statements by individual teachers or other school employees, who are *not* decision-makers or members of the decision-making body implementing the challenged action, can be imputed to the decision-makers or members of the decision-making body. Second, CSBA and ELA take issue with the majority's conclusion that the appropriate remedy when evidence establishes unconstitutional selective enforcement of an otherwise legally-valid policy is to order that the policy continue to be selectively enforced.[2]

[2] To be clear, CSBA and ELA contend that in *this* case the evidence did not establish selective enforcement of the school district's "all comers" policy, and that the district court's factual findings on that issue should not have been reversed on appeal. The concern is regarding the implications of establishing circuit precedent through the majority's decision, which is contrary to current circuit precedent.

ARGUMENT

I. STATEMENTS OF TEACHERS SHOULD NOT BE IMPUTED TO A SCHOOL DISTRICT ITSELF ABSENT CLEAR EVIDENCE THAT THE TEACHER WAS THE DECISION-MAKER OR A MEMBER OF THE DECISION-MAKING BODY

The majority opinion but especially Judge Lee's concurring opinion focuses heavily on the statements of a teacher at one of the District's six high schools, Peter Glasser. (Op. 11-14, 16-17, 48-50.) The majority opinion, relying almost exclusively on Glasser's statements, concluded "the *School District* targeted FCA because of its religious-based views about marriage and sexuality, not merely because of its alleged violation of non-discrimination policies." (Op. 34, emphasis added.)[3] In his concurrence Judge Lee states it was "Glasser's open hostility towards FCA's religious beliefs" expressed to a school principal and a school committee that brought it to the District's attention that FCA was violating the Non-Discrimination Policy, noting but then discounting the evidence that the ultimate decision to derecognize FCA was a District-level decision and was implemented District-wide. (Op.

[3] Thus, the majority concluded that Glasser's views, along with *perhaps* the views of two more of the District's more than 1,400 teachers, constituted the District's views.

51 and n. 2.)

Judge Lee discounts that Glasser and other teachers did not make the decision by noting that under *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719 (2018), "animus" is not limited to "decisionmakers," because "we may assess 'the historical background' and 'specific series of events leading' to the decision in question." (Op. 50-51.) However, in *Masterpiece Cakeshop* and its line of cases, it was the contemporaneous "statements of decisionmakers" that was most relevant to the Court's neutrality assessment. Specifically, for imputed animus in the context of the Free Exercise Clause:

> Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements *made by members of the decisionmaking body*.

Masterpiece Cakeshop, 138 S.Ct. 1719, 1722, emphasis added. The Court focused on statements of decisionmakers "in public and on the record." *Id.* at 1729-30, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-541 (1993) (Court focused on "statements by council members" and the "deputy city attorney" critical

of religion, as it was these entities who passed the ordinances criminalizing the plaintiff's religious practice), and citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977) (focusing on a "*official* actions taken for invidious purposes"). In *Personnel Adm'r of Massachusetts v. Feeney* the Supreme Court noted that "'[d]iscriminatory purpose' … implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 442 U.S. 256, 279, fn. 25 (1979); see also *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 807 (9th Cir. 2009) (involvement of presumably biased supervisor in discipline process was so minimal that it negated any inference that decision was First Amendment retaliation).

The Ninth Circuit in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022) observed that *Masterpiece Cakeshop* concerned "[p]ublic, on-the-record comments by Colorado Civil Rights Commission members" and that these "commissioners' statements about the plaintiff and his religious beliefs were made during the *adjudication of the plaintiff's specific case* before the commission"; and further, that the "Court

in *Masterpiece* acknowledged the distinction between hostile comments made by an adjudicatory body when deciding a case in front of it, and comments made by a legislative body when debating a bill. In *Masterpiece*, the Court could not 'avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of [the plaintiff's] case.'" *Tingley,* 47 F.4th at 1086, citing *Cakeshop,* 138 S.Ct. at 1729–30. In *Tingley*, the plaintiff alleged that Washington's law penalizing the practice of conversion therapy on minors violated his free exercise rights, and specifically, that "comments made by Washington legislators ... show the law is 'tainted with anti-religious animus.'" *Id.* at 1063, 1085. In rejecting this claim, the Court explained it is generally "reluctant" to attribute "[s]tray remarks of individual legislators" to "the legislative body as a whole" because "'[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.'" *Id.* at 1087. The Ninth Circuit has also observed that a teacher's "statements in the classroom that were allegedly hostile to religion" have "never" been the basis for "inhibiting religion in violation of the Establishment Clause" nor have they ever been the basis for a Free

Exercise violation. *Sabra v. Maricopa Cnty. Community College District*, 44 F.4th 867, 887, 891 (9th Cir. 2022) (dismissing Plaintiff's First Amendment claims that were based on allegedly "inflammatory statements" about Islam throughout the teacher's PowerPoint slides and other material), quoting *C.F. ex rel. Farnan v. Capistrano Unified School Dist.*, 654 F.3d 975, 986 (9th Cir. 2011).[4]

The majority here relied exclusively on the statements of non-decision-makers, attempting to plug those statements into the "historical background" and "specific series of events leading to the enactment or official policy in question," ignoring the absence of *any*

[4] CSBA and ELA also assert the majority's approach is irreconcilable with the standard and logic in decisions interpreting Title VII of the Civil Rights Act, where the standard of proof is dependent on "the status of the harasser" or employee who makes allegedly hostile remarks. *Vance v. Ball State University*, 570 U.S. 421, 421 (2013). "Statements by subordinates normally are not probative of an intent to retaliate by the decisionmaker." *Willis v. Marion Cnty. Auditor's Office*, 118 F.3d 542, 546 (7th Cir. 1997); see *Williams v. Williams Electronics, Inc.*, 856 F2d 920, 924-25 (7th Cir. 1988) ("the alleged … discriminatory comments were attributable to individuals who were not involved in the layoff decision [and therefore] fall short of forming a basis for demonstrating that the non-discriminatory explanations for decisions made by other individuals were pretexts"); *Vance, supra*, 570 U.S. at 440 ("The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control.... Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates").

contemporaneous statements by the *actual* decision-makers and ignoring that the relevant decision is the application of the current policy, not the past decision to derecognize FCA.

There are more than 300,000 public school teachers in California.[5] This is a massive number of individuals for school districts to oversee, none of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and therefore have the constitutionally protected right of free speech. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). However, separate from the question of whether Glasser and others engaged in constitutionally-protected speech in this case, the impact on public schools and other public agencies of imputing the statements of individual non-management employees to the organization itself, when the employees were not decision-makers or part of the decision-making body, cannot be overstated. And, it is not hyperbole to envision other analogous scenarios. For example, California school district governing boards are required to make most decisions regarding policies and

[5] https://www.ed-data.org/state/CA (Ed-Data website, a partnership of the California Department of Education, EdSource, and the Fiscal Crisis Management Assistance Team (FCMAT)).

initiatives in public meetings, with a pre-posted agenda and a requirement to hear public comment before or during the board's consideration of the agenda item. See Cal. Govt. Code §§ 54953(a) [public meetings], 54954(a) [agenda], 54954.3(a) [public comment]; *Baca v. Moreno Valley Unified School Dist.*, 936 F.Supp. 719 (E.D. Cal. 1996) (California school board meetings are limited public fora, permitting comment on any item of interest to the public that is within the subject matter jurisdiction of the governing board). Under the majority's reasoning, comments by members of the public (or by teachers who decide to attend a meeting and express their opinion) could be considered part of the "historical background" and "specific series of events leading to the enactment or official policy in question," imputed to the school district and its governing board, even in the absence of any contemporaneous statements made by members of the decision-making body expressing support for the comments or similar opinions.

School administrators, not teachers, possess the unique responsibility to act on behalf of a school district. See, e.g. *Hentschke v. Sink* (1973) 34 Cal.App.3d 19, 22-23 ("a second or third level administrator bears to his superiors a relationship of the most intimate

nature, requiring complete trust by the top administrators in the judgment and cooperative nature of the subordinate"). To be clear, CSBA and ELA are not asserting that statements by individual teachers can *never* be relevant to alleged constitutional violations, when they actually make a final, challenged decision, but the majority's singular reliance on individual statements by teachers in *this* case, to conclude that "the School District targeted FCA because of its religious-based views about marriage and sexuality," and that "animus against FCA students' religious-based views infected the School District's decision" (Op. 53), is not supported by the facts and is contrary to Supreme Court and circuit precedent. If it stands, it would place California schools and their governing boards in an untenable position.

II. THE COURT'S ORDERED REMEDY, IF IT IS ALLOWED TO STAND AS CIRCUIT PRECEDENT, WILL REQUIRE SCHOOL DISTRICTS TO ALLOW DISCRIMINATION THAT VIOLATES STATE LAW

The majority concluded the District selectively enforced its policy and directed "the district court to enter an order reinstating FCA's ASB recognition" (Op. 45-46), but it did not conclude (nor could it) that the policy is facially invalid. Even if one assumes for the sake of argument

that the majority is correct that the District selectively enforced its nondiscrimination policy (and the district court erred in reaching the opposite conclusion), the Court's remedy should have been to order the District to apply the nondiscrimination policy equitably, not direct the District to authorize student clubs that openly violate the facially-valid policy. Such effect "would make little sense," because "only [the policy's] implementation is defective" and not the policy itself. *Hoye v. City of Oakland*, 653 F.3d 845, 848 (9th Cir. 2011).

This Court's decision in *Hoye* is logical even when addressing a purely discretionary policy — if the policy is lawful on its face, but is being selectively *enforced*, the logical remedy is to order consistent enforcement of the lawful policy, not to judicially sanction *more* selective enforcement. CSBA and ELA assert this conclusion transforms from logical to mandatory when one considers the policies of literally every school district in California that arise from and are products of the requirements of state and federal law. For example, the California Education Code provides:

> It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other

> characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, equal rights, and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

Cal. Educ. Code § 200. Immediately following, the "Declaration of Purpose" of the above-quoted policy states, among other things, that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment," that "California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity," and that "the intent of the Legislature [is] that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." Cal. Educ. Code § 201. Tying in other state law, and federal law, the same section articulates the following legislative intent:

> ….[T]his chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972

> (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.

Among the provisions of state law incorporated into this statement of legislative intent is Government Code section 11135, which states that "[n]o person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." Cal. Govt. Code § 11135(a). Additionally, and regarding student clubs specifically, the adopted regulations of the California State Board of Education affirmatively and definitively state that "[m]embership in

student clubs must be open to all students regardless of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability." Cal. Code of Regulations, tit. 5, § 4926;[6] see also Cal. Educ. Code §§ 220 ("[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid"), 230, 33315(a)(1)(F).

Thus, the majority's ordered remedy — directing the district court to require the District to recognize FCA as a District-approved and sanctioned club, *and* allow it to openly violate the District's facially-

[6] California Education Code section 33031 authorizes and directs the State Board of Education to "adopt rules and regulations not inconsistent with the laws of this state … for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state," and the California Supreme Court has routinely confirmed the authority of the State Board of Education to adopt regulations that have the force of law. See, e.g. *Hartzell v. Connell*, 35 Cal.3d 899, 917 (1984).

valid non-discrimination policy as written — not only defies this Court's precedent and defies logic, but would require the District to violate state and federal law by authorizing FCA to discriminate on the basis of sexual orientation.

Should this Court not change its ordered remedy on the enforcement of non-discrimination policies, it would put the District in the untenable position of allowing (though under the umbrella of a court order) District-sponsored discrimination in violation of state law. It would cause statewide negative implications through precedent confirming that one instance of unlawful discrimination justifies judicial sanction of further unlawful discrimination in violation of law. It would undermine the codified public policy of this State that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment," that "California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity," and that "the intent of the Legislature [is] that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to

minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." This Court should not establish precedent that the remedy for a finding of unlawful discrimination in the implementation of a facially valid policy is to order more unlawful discrimination — discrimination that violates not only the policy but violates the law as well.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing or Rehearing En Banc should be GRANTED.

Date: October 13, 2022

Atkinson, Andelson, Loya, Ruud & Romo

/s/ Mark R. Bresee
Mark R. Bresee
Attorneys for California School Boards Association and its Education Legal Alliance

CERTIFICATE OF COMPLIANCE

I am counsel for amicus curiae California School Boards Association and its Education Legal Alliance. This brief contains 3,415 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I certify that this brief is an amicus brief and complies with the 4,200 word limit of Ninth Circuit Rule 29-2(c)(2) [as authorized by Federal Rule of Appellate Procedure 29(b)(1)].

Signature */s/* Mark Bresee **Date** October 13, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: October 13, 2022

/s/ Mark Bresee
Mark Bresee