

No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES, ET AL.,
Plaintiffs-Appellants,

v.

SAN JOSÉ 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
Honorable Haywood S. Gilliam, Jr.

**BRIEF OF THE JEWISH COALITION FOR
RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

The Jewish Coalition for Religious Liberty has no parent corporation and issues no stock. Accordingly, no publicly held corporation owns ten percent or more of its stock.

s/ Howard Slugh

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INTERESTS OF *AMICUS CURIAE*¹

The Jewish Coalition for Religious Liberty (“JCRL” or “*Amicus*”) is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to foster cooperation between Jews and other faith communities in order to protect the ability of all Americans to practice their faith freely. Its founders have filed *amicus* briefs in the Supreme Court of the United States and lower federal courts, published op-eds in prominent news outlets, and established an extensive volunteer network to promote support for religious liberty within the Jewish community.

SUMMARY OF ARGUMENT

In a 1790 letter to the Hebrew Congregation of Newport, Rhode Island, George Washington wrote: “May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amicus* represents that all parties have consented to the filing of this brief. And in accordance with Rule 29(a)(4)(E)(i)–(iii), undersigned counsel states: No party or party’s counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. Cooper & Kirk, PLLC paid to file paper copies of this brief; otherwise, no person, other than the *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting this brief.

Inhabitants; while every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.”² James Madison, “the leading architect of the religion clauses of the First Amendment”³ was likewise alert to the danger that “the majority may trespass on the rights of the minority” in religious matters.⁴ As he wrote, a “just Government” would protect “every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”⁵ The Framers’ commitment to religious liberty is enshrined in the First Amendment, which safeguards the rights of coreligionists to practice their faith together under their “own vine and fig tree.”

The San Jose Unified School District’s actions against the Fellowship of Christian Athletes (“FCA”) violate this constitutional commitment. The

² *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, FOUNDERS ONLINE, NATIONAL ARCHIVES, <https://bit.ly/3OBXc9z> (last visited July 1, 2022).

³ *Flast v. Cohen*, 392 U.S. 83, 103 (1968)

⁴ *Memorial and Remonstrance against Religious Assessments* (1785), in 8 PAPERS OF JAMES MADISON 301 (W. Rachal, R. Rutland, B. Ripel & F. Teute eds., 1973).

⁵ *Id.*

District barred FCA from becoming an approved student group because FCA requires its student leaders to affirm that they adhere to basic tenets of the group's faith. At the same time, the District exempts various other groups from the "All-Comers Policy" that FCA's religious leadership criteria apparently violate.

Plaintiffs' briefing thoroughly explains why the District's actions violate the First Amendment's speech and religion clauses, controlling precedent, and statutory protections. We agree with their excellent legal arguments. The purpose of this brief is to show why the freedom to select leaders who share a religious student group's faith is vital to the group's ability to exist *as a religious group*, and how forcing the acceptance of leaders who do not share that faith will significantly weaken the ability of such groups to safeguard their own religious identities. We do so through the lens of the Jewish community, similar points apply across faith communities and are especially pertinent to members of minority faiths.

Religious student groups are not identical to other affinity groups. It is not surprising that some other groups prefer leaders who possess traits that further their purpose, for example, based on characteristics like gender or interests like athletics. Doing so will generally make it easier for them to

further their goals. But for devout students, religion is not just an affinity; it is a guiding principle of day-to-day life. For such groups, choosing a leader who practices their faith may be more than a matter of convenience, it may be necessary for their very existence. Religious groups help students practice their faith and form a community with practicing coreligionists. Leaders who share the group's beliefs make it possible for the group to fulfill that purpose, in a myriad of ways, from serving religiously acceptable food at group events to ensuring proper observance of the Sabbath or holidays. It is therefore quite surprising that the District singles out religious student groups by refusing to allow them to choose the leaders necessary for their flourishing. Allowing the District's actions to stand would set a precedent that threatens religious groups' religious identity and, as a result, religious students' well-being. Jewish, Christian, Muslim, and other religious students all have a stake in FCA's success.

Part I shows why religious student groups, and in particular minority religions such as Judaism, must have the ability to select leaders who share their beliefs in order to properly serve their student-members. Religious leadership criteria are not, as the District purports, tools of impermissible discrimination; they are an essential means of maintaining the religious

identity of these groups. Simply put, if religious groups are to exist on equal footing with other student groups, as the First Amendment requires, they must be allowed to select leaders who adhere to their faiths.

Part II highlights some of the harms that Jewish groups and students could suffer if the District's actions are allowed to stand. Forcing Jewish student groups to forgo the ability to choose only practicing Jewish leaders renders those groups less capable of upholding Jewish practices and attracting Jewish students, thereby depriving those groups of their uniquely Jewish character and depriving Jewish students of the opportunity to observe the tenets of their faith together.

ARGUMENT

I. The Ability To Select Practicing Coreligionists As Leaders Preserves Group Identity and thus Campus Diversity.

Under the guise of a policy purporting to make “campus communities . . . welcoming to all students,” the District has made its campuses unwelcoming to religious groups, Opening Br. of Pls.-Appellants, Doc. 23, at 14 (June 27, 2022) (record citations omitted). Prohibiting such groups from selecting leaders who practice their faith has denied them an important element in their ability to flourish. As a result, the District's actions may

ultimately render its campuses less diverse.

A group's criteria for selecting its leaders are part of what make the group a *group* with a coherent identity. It is uncontroversial to say that a sports club should be allowed to select leaders who play the sport, or that singing clubs should be permitted to select leaders who sing. The District reasonably allows such clubs to do so. *See* Opening Br. at 14, 37–38. The benefits of such a selection are obvious, and no one would assert that those groups preferred such leaders because they harbored animus toward non-athletes or the tone-deaf. Similarly, it is vital that a religious student group be allowed to select leaders who share the group's deeply held beliefs and who are committed to the group's shared practices. These beliefs and practices are essential to the students' identities and the identity of the group as a coherent entity. But the unprecedented way that the District has enforced its “All-Comers Policy” against FCA would undermine those benefits by forcing religious student groups to accept leaders who do not share their convictions or practice their faith.⁶

⁶ In fact, as the Plaintiffs highlighted in their opening brief to the panel, the FCA is the only ASB-approved club in the District to be derecognized for its leadership requirements. Among others, the District allows girls' clubs, academic clubs, and sports teams to select leaders on the basis of criteria that further their mission and purpose, such as sex, academic standing, and

The plaintiff in this case happens to be a Christian group, but the policy applies to all faiths. Especially at risk are minority religious groups with unique practices, including, but not limited to, Jewish groups. The need for cohesive faith groups is acute for Jewish students. History is replete with persecution of Jews, and anti-Semitic prejudice unfortunately persists today,⁷ including in the United States and in communities close to San Jose.⁸ Even if not motivated by such prejudices, and we do not assert that the policy is motivated by antisemitism, actions like the District's risk undermining Jewish student groups and ignore the important role that such groups can play in mitigating or even eliminating the effects of antisemitism.

athletic ability, respectively. In particular, the National Honor Society club is allowed to exclude students based on GPA and "good character," the Senior Women club can exclude students based on sex, and the Asian Heritage club can exclude students based on ethnicity. The allowance for these distinctions would be impermissible under the strict reading of the non-discrimination policy that the District applied to the FCA. Opening Br. of Pls.-Appellants, Doc. 23, at 14-15, 34-39 (June 27, 2022) (record citations omitted).

⁷ See generally, e.g., Anti-Defamation League, "A Brief History of Antisemitism," <https://bit.ly/3R3DQvt> (last visited June 22, 2022).

⁸ See American Jewish Committee, *The State of Antisemitism in America 2021* (Oct. 25, 2021), <https://bit.ly/3OGiuD0>; see also Keri Brenner, *Jewish high school students in Marin County targeted in online attacks*, MARIN INDEPENDENT JOURNAL (Sept. 11, 2020, 10:31 AM), <https://bayareane.ws/3NBaD8c>.

Although, we do not suggest that this policy is motivated by antisemitism, we condemn the animus laden anti-Christian remarks and behavior that members of the FCA have been subjected to. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1083-84 (9th Cir. 2022), *vacated*, No. 22-15827, 2023 WL 248320 (9th Cir. Jan. 18, 2023) (including calling Christian beliefs “bullshit” with “no validity,” and describing “evangelicals like FCA” as “charlatans” who “choose darkness over knowledge and perpetuate ignorance”). We are all too familiar with this sort of intolerance, and this court should not ignore the hateful remarks and actions of the government employees tasked with enforcing this policy.

Jews who overtly practice their faith by, for example, covering their heads, wearing fringed garments, or eating different food from their peers, are more likely to experience a feeling of “otherness” and may feel like they do not belong. They also stand out as visible targets for antisemitism. Allowing Jewish students in that situation to form a club led by others with shared experiences can help those students feel supported and foster a sense of community that can minimize those feelings of isolation. Additionally, allowing such groups to have a clear identity and coherent message, can help

educate other students as to the meaning, and even the beauty of such practices.

The ability to choose leaders who practice the faith is also important to the group's ability to exercise its religious beliefs. *See infra* Part II. It is part of what enables a religious Jewish group to engage in *Judaism*. There are, of course, various ways of practicing Judaism. A student group should be allowed to choose for itself, for example, whether it will be Ashkenazic or Sephardic, Orthodox or Reform; and it should be allowed to choose leaders who can facilitate that decision.

Religious leadership criteria are thus not arbitrary or invidious means of exclusion and certainly not a sign of animus. *See Hsu By and Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). In addition to providing a home for coreligionists, religious student groups can serve the important function of educating other interested students about the faith. But to do so, a Jewish group must be Jewish, just as a Christian group must be Christian. And that is impossible without the ability to select a leader who practices the faith. Imagine a Christian student who joins a Jewish group to learn about Judaism. If such a student were sincere, he could not possibly intend to immediately become the group's leader. Doing

so would necessarily change the group's message, making it more difficult, if not impossible, for the group to teach him about Judaism as he intended.

Indeed, JCRL understands why Jews are excluded from FCA leadership: FCA is a Christian organization. A Jewish person who does not practice Christianity would simply be ill-suited to lead such a group and to advance its objectives. Its religious leadership criteria do not evince animus toward Jews or students of any other religion; they simply preserve the group's right and ability to establish its identity and express its faith. Jewish leadership criteria would likewise not evince ill will toward Christians. Similarly, a Reform Jewish group requiring adherence to the tenets of Reform Judaism would not betray animus toward Orthodox Jews, just as an Orthodox Jewish group requiring Orthodox leaders would not demonstrate animus toward reform Jews. If there is enough interest, the students can create an Orthodox and a Reform group; let a thousand flowers bloom. Taking punitive measures that make it more difficult for any such group to flourish is misguided, doing so in the name of diversity is perverse. Other student groups can choose leaders based on criteria like athletic ability or academic achievement; Jewish groups must be allowed to choose leaders based on their practice of Judaism. Neither case constitutes invidious discrimination.

Refusing to allow a Jewish, Christian, or Atheist student to lead a club that has nothing to do with religion, a math club for instance, would clearly be invidious discrimination. The student's faith, or lack therefore, has nothing to do with his ability to be a good leader for the math club. Such exclusion evidences the bigoted idea that a person is somehow less qualified to engage in mathematics or, perhaps in society in general, because of his faith. That same reasoning does not apply when the club's very purpose involves religion. In those cases, a student's religion is manifestly related to his ability to serve as an effective leader of the club. If, for example, an Atheist club excludes Jewish leaders, or a Jewish club rejects Christian leaders, it is doing so because those students are ill-qualified to be that particular club's leader. Much like a student who has never played or even watched baseball in his life is a poor choice to become the leader of the baseball club. The decision to reject such leadership bids does not signal any sort of animus.

But *banning* Jewish groups from adopting religious leadership criteria *does* discriminate against those groups. Such a ban could eliminate Jewish student groups' ability to serve their primary purpose as religious groups. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). This

concern is not hypothetical. Several public schools in California and across this Circuit have Jewish student groups.⁹ If a Jewish student group chooses to allow non-Jewish members, or is forced to do so under policies like the District's, a non-Jewish majority could select a non-Jewish leader who might unintentionally or even intentionally subvert the group's purpose. Jews are, after all, a minority in the U.S. population.¹⁰ The group's ability to adopt religious criteria for its leaders is therefore a bulwark for its unique religious identity. Removing that bulwark undermines religious groups' capacities to maintain their unique religious identities, and risks transforming these groups into homogenized replicas of the student body at large. That would, in turn, render Jewish groups less able to attract and provide a spiritual home for observant Jewish students.

Although a given group might not presently choose to restrict its leadership to Jewish students, the question is whether it may do so. A group might not yet have faced a situation where someone unqualified or even

⁹ See, e.g., JEWISH STUDENT UNION, *Clubs*, <https://bit.ly/3uklhcS> (last visited June 30, 2022).

¹⁰ Less than 2% of U.S. Children are raised exclusively Jewish by religion. See PEW RESEARCH CTR., *Jewish Americans in 2020*, <https://pewrsr.ch/3R2DPrJ> (last visited July 1, 2022).

hostile attempts to become a group leader, and therefore it might not recognize how important this right is, but it might face that situation tomorrow. In fact, in this case, virtually “every FCA meeting during the 2019-20 school year was protested” by students who disagreed with their faith’s teachings. *FCA*, 46 F.4th at 1085. On one occasion, members of a student organization that holds views that differ from the FCA “tried to enter an FCA meeting but were blocked by a school police officer.” *Id.* It seems likely that, if given the chance, those same students would attempt to subvert the FCA by electing leaders who do not share its religious views. The students who engaged in protests and attempted disruptions admitted that their goal was to force the FCA to “reassess” their “statement of faith.” *Id.* In 2019, their target happened to be a Christian group, but under the District’s policy every religious group would be vulnerable—especially a religious minority like Jews.

Actions like the District’s will ultimately dilute diversity on school campuses. Student bodies may remain religiously diverse, but in order for students to meaningfully *express* that diversity—and afford the school community the benefits that come with it—they require varied, thriving religious groups. If religious student groups like Jewish student groups and

the FCA are deprived of the ability to exist as such, then the District will be deprived of meaningful diversity. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (diversity means “exposure to widely diverse people, cultures, ideas, and viewpoints”). If the District chooses to maintain its policy, the First Amendment requires it to adhere to the stated purpose of that policy and to encourage the diversity of religious student groups, rather than discriminatorily implementing the policy in a way that forces the homogenization of religious groups.

II. Prohibiting Religious Leadership Criteria Is Particularly Harmful to Religious Jews.

Leaders serve a particularly important role in Jewish student groups.¹¹ Features of the Jewish faith—such as intricate rules surrounding Sabbath observance and kosher food preparation—make it essential that Jewish religious student groups be allowed to ensure that their leaders practice Judaism.

Appreciating Judaism fully requires experiencing it firsthand. One could read a book about observing the Sabbath, or repenting on the holiday

¹¹ Howard Slugh, *Religious Groups Led by Co-Religionists — It Shouldn’t Be Controversial*, NATIONAL REVIEW ONLINE, (Nov. 23, 2018), <https://tinyurl.com/2p98bmna>.

of Yom Kippur, or reenacting the Jewish national origin story on Passover, but one must participate in those practices as a member of the community with a shared sense of history, obligation, and belonging to truly internalize them. In fact, that is a tenet of Judaism. The Passover service, or seder, emphasizes that every participant should see himself as if he were personally taken out of Egypt. Services on the fast day known as Tisha b'Av include mourning rituals to commemorate the destruction of the Jewish temples and the exile from Israel. Jews spend the day acting as if a close family member had recently died. There is no substitute for experiencing these rituals firsthand—particularly if one is to lead such a community. It would be impossible for a leader to convey the meaning of these practices, either to members of the group or the larger community, unless he had personal firsthand experience observing them.

Given the importance of lived experience in the Jewish faith, an observant Jewish person is uniquely suited to lead a religiously Jewish student group. Consider compliance with the complex laws of keeping Kosher. These laws relate not only to the types of food that can be eaten, but to food preparation and heating and to the appliances and utensils that can be used to cook and eat it. Religious Jewish students will not eat food served

at group events unless they are confident that such laws were strictly followed. Such confidence will be hard to come by if those responsible for providing the food are either not dedicated to or unfamiliar with Kosher practices. Given the central role of food at group events, leadership by observant Jewish students enhances the group's ability to attract students who adhere to the Jewish faith—students who would otherwise be less likely to participate in the group and who would thus be deprived of an opportunity to practice their faith with their classmates.

Similarly, the laws that govern activity on the Sabbath “are quite complex, requiring careful study and a qualified teacher.”¹² Derived from the Bible, these laws create a complex web of activities that are forbidden or required to be performed on the Sabbath. Jewish holidays also involve fasting (such as Yom Kippur), and other intricate celebratory practices such as the Passover seder, or eating meals in an outdoor booth (on a holiday called Sukkot). To host any sort of communal event on or related to these days, and to provide any guidance and support related to these rituals, a group's leadership must be intimately familiar with the relevant Jewish laws and

¹² *The Shabbat Laws*, CHABAD, <https://bit.ly/3y9IxD> (last visited July 1, 2022).

practices. Non-Jewish or nonobservant leaders would lack such familiarity. The Jewish character of such events would wane accordingly, once again rendering religiously adherent Jewish students less likely to participate and leaving them without an important source of peer support.

Not only would the District policy deprive Jewish groups of the ability to engage or model communal practice, it would also make it more difficult for students to personally observe their faith. Jewish students may rely on the leadership of their organizations to facilitate the practice of their faith. For example, Jewish student organizations may provide kosher food, instructions regarding how to wrap tefillin (phylacteries), matzoh on Passover, a lulav (palm branch) and etrog (citron fruit) on Sukkot, Megillah reading on Purim, and shofar blows on the High Holidays. Forcing religious organizations to accept leaders who are not intimately familiar with obligations such as these might deprive religious students of the opportunity to fulfill practices mandated by their faith.

Furthermore, Jewish students may rely on the leadership of the Jewish religious organization for advice and counseling regarding religious matters. The role of a religious mentor is central to the religious adherence of an observant Jew, and many Jewish religious students rely on the leadership of

their student group to fill this role on campus.

Of course, not all Jews keep Kosher or observe the Sabbath. However, even those groups who observe their faith in a different manner benefit from being allowed to choose leaders who match their faith. Imagine a group of progressive Jews who formed a club dedicated to a progressive understanding of Judaism. Such a group should also be able to select leaders who align with their views and to exclude more traditional Jewish students who oppose their interpretation of Judaism from leadership roles. For example, there is disagreement between different Jewish denominations regarding the role of women in certain ceremonial practices. If a more progressive Jewish group forms, they should be allowed to implement their vision of Judaism—even if Orthodox students would run such a group differently. The District's current policy would allow Orthodox Jews, perhaps with the support of members of other traditionally-minded faiths, to join the progressive Jewish group, obtain leadership positions and impose Orthodox ideals regarding gender roles on the group. Such a policy is more likely to produce a stifling conformity enforced by the majority rather than to protect diversity.

In the same vein, religious Jews who observe traditional practices need student leadership that is knowledgeable of and dedicated to the many

principles, traditions, and laws of the Jewish religion. Without such knowledge and experience, any individual would find it difficult if not impossible to lead the group's members through the rituals, celebrations, and daily practices of the faith. As a result, the group's capacity to offer uniquely Jewish spiritual opportunities, and its ability to attract Jewish students to its ranks, would suffer. Allowing schools to bar religious groups from requiring that their leaders subscribe to their faith would thus sap the groups of their spiritual identity, prevent them from implementing their most integral functions, and hamper the free exercise of religious students.

CONCLUSION

Ruling against FCA would harm minority religious groups, including Jews. Targeted antireligious policies like the District's, would force groups of religious Jewish students to choose whether to *exist* in any meaningful way—as an officially recognized but fundamentally secular group—or whether to be *Jewish* as they define it. Unable to ensure that they will be led by religious Jews, these groups would be unable to guarantee that Jewish students have a place to observe the many practices that define the Jewish faith. Students of other faiths, especially minority faiths, would suffer similarly, as would their schools as a whole due to the resulting loss in diversity. The First

Amendment prohibits that result in this case. The Court should rule for FCA.

Date: February 21, 2023

Respectfully submitted,

s/ Howard Slugh

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,144 words.

s/ Howard Slugh
Howard Slugh

Date: February 21, 2023

CERTIFICATE OF SERVICE

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

s/ Howard Slugh
Howard Slugh

Date: February 21, 2023