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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH SINCLAIR, CHARLOTTE KLARKE, FELLOWSHIP OF CHRISTIAN ATHLETES, an Oklahoma corporation, and FELLOWSHIP OF CHRISTIAN ATHLETES OF PIONEER HIGH SCHOOL, an unincorporated association,

Plaintiffs,

v.

SAN JOSÉ UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, in its official capacity, NANCY ALBARRÁN, in her official and personal capacity, HERBERT ESPIRITU, in his official and personal capacity, PETER GLASSER, in his official and personal capacity, and STEPHEN MCMAHON, in his official and personal capacity,

Defendants.

CASE No. 5:20-cv-2798

JUDGE: Hon. Lucy H. Koh

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: October 14, 2021
Hearing Time: 1:30 PM PT
Courtroom: Courtroom 8 – 4th Floor
Judge: Hon. Lucy H. Koh

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REPLY IN SUPPORT OF PRELIMINARY INJUNCTION

The District has conceded or left unconstested everything this Court needs to grant an injunction. And an injunction is necessary because the District is once again discriminating against FCA by treating it differently from all ASB-approved groups due to its religious beliefs.

From the first day Defendants discovered that Pioneer FCA—a long-standing, well-respected student club led at the time by two young women—had religious views Defendants found objectionable, Defendants began using District power to stigmatize and exclude all student FCA chapters from District campuses because of those views. From in-class attacks by a teacher against Pioneer FCA's beliefs, to discussions at official school meetings about excluding Pioneer FCA because its beliefs offend school "values," to approving a "Satanic Temple Club" formed to protest Pioneer FCA's meetings, to allowing intimidating demonstrations that smeared Pioneer FCA's beliefs as "HATRED," to staff conspiring on school email both to exclude Pioneer FCA due to its "bullshit" beliefs and to accuse the club of *sexual harassment* based solely on those beliefs, the District's targeting of FCA's religious beliefs has been relentless. This newest round of targeting is of a piece with the rest.

Every neutral-sounding excuse the District offers is a pretext. That Pioneer FCA limits leadership? So does the National Honor Society club. That Pioneer FCA's limits are based in religion, which is a characteristic protected against discrimination? Big Sisters/Little Sisters' limits are based in sex, which is also supposedly prohibited. That Pioneer FCA is affiliated with an external organization? The Key Club, Red Cross Club, and National Honor Society are too. The District also throws up numerous double standards to excuse its inconsistency. For instance, it insists it's never managed to check whether Big Sisters/Little Sisters (despite its name and mission) has excluded an interested male student who applied for leadership. But Defendants *know* Pioneer FCA has never excluded an interested student who applied for leadership, and yet still they immediately excluded FCA.

The biggest double standard is how Defendants enforce the District's nondiscrimination policy, which they admit now having "labeled" an "All-Comers Policy" as part of their effort to exclude FCA. But the Policy doesn't come close to requiring "all" comers. As noted, it allows clubs to reject students from membership, leadership, and participation on numerous grounds, including many left entirely to the discretion of school officials. Worse, the District excuses itself and other student extracurricular

activities (such as sports and choir) not only from the entire "All-Comers Policy," but also from the nondiscrimination policy itself—allowing numerous student programs and activities to exclude students on grounds such as sex and ethnicity. Yet Defendants insist that allowing large, heavily funded school programs to discriminate against students is fine, while allowing a small private religious student club to ask its leaders to affirm the group's beliefs puts a "burden and stigma on other students."

Before this dispute started, Pioneer FCA had been ASB-recognized for years, and it received recognition all last academic year. Pioneer FCA students are eager to be recognized again. But due to the District's new policy (and its just-released ASB application materials first revealed in Defendants' response brief), Pioneer FCA can't even apply for recognition without having to agree to give up its rights. This Court should enjoin that unconstitutional burden.

LEGAL STANDARD AND ARGUMENT

The District attempts to "doubl[e]" FCA's burden by labeling its injunction request as "mandatory." Resp.4. Yet the injunction FCA seeks is instead "a classic form of prohibitory injunction" that "prevents future constitutional violations," *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017), and "prohibit[s] enforcement of a new … policy," *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). FCA seeks a return to the status quo before Defendants' unlawful actions occurred: restoration of its recognition as an ASB-approved club with the same benefits other ASB-approved clubs enjoy, without discrimination due to its religious leadership standards. In response to this litigation, the District has further altered the status quo with a new gerrymandered Policy that prevents FCA from even being able to apply for recognition without violating its First Amendment rights. FCA asks only for resumed access to ASB-approved status—the "last, uncontested status which preceded the pending controversy," *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009)—and one which Pioneer FCA held throughout this past academic year. That said, even under the mandatory-injunction standard, FCA has shown that the law and facts "clearly favor" its position, *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994), and absent relief, "very serious" constitutional harm will occur that is "not compensable in damages." *Hernandez*, 872 F.3d at 999; *BLinC v. Univ. of Iowa*, 2018 WL 4701879, at *15 (S.D. Iowa 2018) (granting preliminary injunction to restore a student group's recognized status).

I. Plaintiffs Have Shown a Substantial Likelihood of Success under the Equal Access Act.

A. Defendants do not dispute that the EAA applies to the District.

Defendants cannot and do not dispute that all of the triggers for the Equal Access Act's (EAA) protections are met here: the District's high schools are public secondary schools, receive federal funding, and accommodate many noncurriculum related student groups during noninstructional time. 20 U.S.C. § 4071; Resp.2, 21; *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002) (listing "triggers" for EAA protection); ECF No. 102-5 at 171-73 (admissions). And the District concedes that the EAA "requires the District to allow groups with political, ideological, and religious views to form and to meet on campuses on the same terms as other groups." Resp.14. Thus, the only question left under the EAA is whether Defendants have placed content-based limitations on FCA's speech. *Prince*, 303 F.3d at 1083.

Defendants, however, try to muddy the waters by treating the First Amendment's "limited *public* forum" and the EAA's "limited *open* forum" as interchangeable. *See, e.g.,* Resp.2, 5, 7, 8, 22 (emphasis added). But, as FCA has explained, Br.12 & n.2, these concepts are distinct—and this distinction simplifies the EAA analysis. A limited *public* forum is a constitutional concept familiar to any court that has adjudicated First Amendment speech claims. *E.g., CLS v. Martinez*, 561 U.S. 661, 679 (2010); *see also* Section II *infra* (explaining that the District fails First Amendment analysis as well). A limited *open* forum, however, is a concept unique to the EAA that does not require a student club to show viewpoint discrimination to prevail; once the EAA is triggered (as the District admits it is here), all a plaintiff must show is denial of access based on the content of her speech. *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 242 (1990) (Congress intended "limited open forum" to be different from limited public forum); 20 U.S.C. § 4071(b) (defining a limited open forum); *Prince*, 303 F.3d at 1078-79, 84 (distinguishing EAA and First Amendment analysis; noting there is no balancing test under EAA).

The District next tries to distract from the core issue by arguing that "the EAA's protections do not apply to FCA or its affiliate student chapters," because FCA's regional and national leaders supposedly exercise "heavy-handed outside control of student chapters' leadership selection." Resp.5. But here the District misunderstands both the law and the facts. On the law, the limitation on control by "nonschool persons" is actually part of a "safe harbor" provision schools can invoke; but the District hasn't argued that it enforces all five of the safe harbor's prerequisites "uniformly" against all student clubs. 20 U.S.C.

§ 4071(c); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000) (describing '"safe harbor"'); *Ceniceros v. San Diego Unified Sch. Dist.*, 106 F.3d 878, 880 (9th Cir. 1997) (describing § 4071(c) as a "safe harbor"). The District thus has not entered the safe harbor.[1]

The District's argument also fails on the facts. First, student FCA clubs are student-initiated, student-led, and student-controlled. ECF No. 102-6 at ¶¶ 15, 17, 23, 25 (describing leadership role of student leaders in each club, or "huddle," and confirming groups are "student-initiated and student-led"); ECF No. 102-5 at 176. Contrary to the District's assertions, student FCA leaders are approved by Pioneer FCA's student leaders, not FCA National's leaders. Lopez II Decl. ¶ 13. Each year, Pioneer FCA's current student leaders approve new, incoming leaders for the coming academic year. *Id*. And Pioneer FCA submits leadership applications to local, FCA support staff only to demonstrate that the school club meets FCA National's affiliation criteria. *Id*. In addition, testimony confirms that student FCA leaders planned, prepared, and led all student meetings. Klarke Tr. 19:2-4, 37:18-23; *see also id*. at 63:4-9 (confirming that Rigo Lopez never led student meetings, prayer, or Bible study). Nor did any District administrator express concern about student FCA clubs' relationship with the National organization in the previous decade-plus that the clubs have been on District campuses. ECF No. 102-6 at ¶ 4.

Second, the record shows that the District has failed to apply its supposed direction-and-control rules "uniformly." 20 U.S.C. § 4071(c). Indeed, except for Pioneer FCA, Defendants are entirely uncurious about whether any other ASB-recognized clubs are "affiliated with national organizations," since they don't think "that's relevant" to ASB-recognition. ECF No. 102-1, 118:10-119:4. No wonder, since Defendants themselves have enforced rigorous national-affiliation requirements for other ASB clubs. For instance, Pioneer's ASB-recognized National Honor Society was run by Defendant Glasser for 17 years. As a teacher and club advisor, he was personally involved in selecting members based on their ability to meet NHS's national qualifications, including "character," "honesty," and "integrity." Glasser Tr. 101:10-102:22. To this end, Glasser ensured potential members were upperclassmen, had substantial leadership experience, received two teacher recommendations, and had a GPA of 3.2 or higher, all to

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[1] Of course, the EAA preempts school district policies, not vice versa. "The EAA provides religious student groups a federal right. State law must therefore yield." *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993) (holding EAA preempts state constitution).

comply with the "national standard." Glasser Tr. 96:9-13, 101:10-19, 102:5-22, 103:1-19, 104:18-23, 106:2-11, 107:14-21 (testifying that he turned students away "[f]or not meeting the leadership requirements" or the "character requirement").

Further, numerous other student clubs are affiliated with national organizations that impose national standards, including approval authority over leadership selection. For example, the Leland Red Cross club members must sign a code of conduct and follow the mission statement of the global Red Cross network, and officers "may be removed" for "not acting in accordance with the American Red Cross Code of Conduct." Blomberg II Decl. Ex. A. Members of the Interact Club at Pioneer "must possess good character and leadership potential," and officers must be elected "with the approval of the sponsoring Rotary club." Blomberg II Decl. Ex. B ("all decisions, policies and actions … of the club shall be subject to the authority of the sponsoring Rotary club … and policy established by Rotary International"). Such lack of uniformity has long been a basis for showing that a public school cannot claim a "safe harbor" to discriminate against a disfavored student group. *Colin*, 83 F. Supp. 2d at 1146-47 (finding that differential treatment between the Gay Straight Alliance and the Red Cross Club and Key Club meant the District failed to reach the EAA's safe harbor). Defendants' effort to defeat the EAA's application based on supposedly heavy-handed control by outsiders thus fails.

B. The District derecognized FCA clubs based on the content of their religious speech.

Because the EAA applies to the District, Defendants are stuck arguing that the student FCA clubs were derecognized based on their leadership criteria, not on the "religious 'content of [their] speech.'" Resp.7. But that is both irrelevant and factually wrong.

Courts have repeatedly explained that controlling leadership selection *is* controlling content of speech, because controlling *who* speaks on behalf of a group affects *what message* the group conveys. Br.14-15, 23-24 (collecting cases). This "principle applies with special force with respect to religious groups," as their "very existence is dedicated to … expression," and "the content … of a religion's message depend[s] vitally on the character" of its leaders. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 200-01 (2012) (Alito, J., joined by Kagan, J., concurring). Moreover, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 170 (2015) ("laws favoring some speakers over others" often "reflect[] a content

preference," which is "presumptively unconstitutional"); *accord Boyer v. City of Simi Valley*, 978 F.3d 618, 621 (9th Cir. 2020). So too in the EAA context, where courts have recognized that leadership selection restrictions are limitations on speech. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 858 (2d Cir. 1996); Br.14.[2] The leaders at issue in this case are those selected by Pioneer FCA specifically to lead the group in its religious teaching, worship, and prayer. ECF No. 102-6 at 3-4. The District's ban on asking those leaders to affirm Pioneer FCA's faith inherently alters the content of the club's speech. ECF No. 102-6 at 25; Br.8 (Defendants' testimony admitting student leaders are "essential" to the "direction and tenor" of club and "should represent the club's purpose" and "viewpoints").

The record shows two additional ways the District derecognized the student FCA clubs based on the content of their religious speech. Br.14-15. First, Defendants' Policy and justifications all expressly turn on the content of the student FCA group's speech: leadership selection is permissible or impermissible based on the reason for the selection. Br.4-6. Content-based regulation is demonstrated when a policy controls speech "on its face" or when the "justification" itself is "content based." *Reed*, 576 U.S. at 163-67. Either is enough; both establish an "obvious" example of "content-based regulation of speech." *Id.*; Br.14-15; *Colin*, 83 F. Supp. 2d at 1148-49.

Second, the record confirms and the District admits that Defendants derecognized Pioneer FCA in response to the *message* conveyed by its religious beliefs—specifically its beliefs regarding sexuality and marriage, which District teachers and administrators deemed "of a discriminatory nature" and "bullshit." ECF No. 102-1 at 345; ECF No. 102-5 at 104; *see also* Glasser Tr. 174:24-175:14, Ex. 126; ECF No. 102-2, 161:20-162:15; ECF No. 102-1, 98:22-23, 140:20-22. District officials' actions also fail content neutrality because they effectuated a heckler's veto; caving to pressure is just another form of content discrimination. *Compare* Resp.16 (confirming that District's enforcement actions taken in response to complaints) *with Ctr. for Bio-Ethical Reform v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 787-88 (9th Cir. 2008) (regulations that open the door to a heckler's veto are "content-restrictive").

The District argues that restoring access to FCA would "exalt[]" FCA over "political and

[2] Defendants fault *Hsu* for "fail[ing] to apply the limited-public forum analysis that [*Martinez*] requires[.]" Resp.8. The fault is theirs: *Hsu* is an EAA case; *Martinez* is a First Amendment case.

philosophical groups." Resp.10. That's false. It would simply create parity. The Policy's allowance for "non-discriminatory" leadership criteria allows restrictions based on political or philosophical viewpoints, but not religious beliefs. Br.8. The District allows clubs to screen for "competency" in their leaders using secular criteria related to the club's secular purpose, but prohibits Pioneer FCA from using religious criteria to screen for "competency" critical to lead its religious discussions, worship, and prayer. *Id.*; ECF No. 102-3, 155:11-20. No club in the District has suffered the same content-based hostility that Pioneer FCA has endured, and which Congress enacted the EAA to proscribe. *Mergens*, 496 U.S. at 239.

The District remarkably argues that by allowing *other* religious speech, it is not discriminating against student FCA clubs on the basis of *their* religious speech. Resp.9. But religions are not fungible, and the District's suggestion otherwise reflects its troubling pattern of accepting only religious views that District employees perceive as "healthy and unifying," and not those deemed "bullshit." Glasser Tr. 174:24-175:14; ECF No. 102-5 at 104. That discrimination among religions violates the "clearest command of the Establishment Clause … that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Which is why the EAA forbids such state-enforced religious conformity, but instead ensures space for "clubs of a most controversial character" even when administrators would prefer to give "access" and "official recognition" "only to clubs of a more conventional kind." *Mergens*, 496 U.S. at 259 (Kennedy, J., concurring).

II. The District's Refusal to Recognize FCA Violates the Free Exercise Clause.

A. The Policy and its enforcement are not generally applicable.

As FCA explained in its opening brief, *Tandon v. Newsom* said that it was "clear" that "regulations are not … generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021). And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.*; *accord Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543-44 (1993) (regulations that infringe government's asserted interests "in a similar or greater degree" than the prohibited religious activity not generally applicable). Yet the District not only fails to distinguish *Tandon*, it fails to cite

1 *Tandon* at all. Instead, the District tries to narrowly cabin the comparator analysis, repeating the error
2 that the Supreme Court recently corrected for "the fifth time," *Tandon*, 141 S. Ct. at 1297-98.
3 Start with the governmental interest at stake. The District admits its interest is in "ensuring equal
4 access for all students in all programs." ECF No. 102-4, 195:1-3; ECF No. 102-1 at 385 (Policy requires
5 that "all of our campus communities" are open to "all students"); Resp.1, 12 (Policy "allow[s] all
6 students to participate" and "be eligible to seek leadership positions"). "All" means "all." So the next
7 question is whether the District allows students to be excluded anywhere else.
8 The District concedes that it does. *Numerous* other clubs, student activities, and District programs
9 are permitted to exclude students, and on a variety of bases. For instance, the District's primary defense
10 of Big Sister/Little Sister's gender exclusivity is that gender-exclusive Big Brother/Little Brother *also*
11 existed (with Glasser as advisor, Glasser Tr. Ex. 117). ECF No. 111-1 at ¶ 30; *see also* Glasser Tr. 78:2-
12 17 (saying it is problematic for a club even to appear to discriminate). Other clubs exclude students not
13 only from leadership but also from membership and participation based on characteristics such as GPA,
14 character, experience, skills, and commitment. *See, e.g.*, Blomberg II Decl. Ex. C (student must "apply
15 for membership" in California Scholarship Federation, meet GPA criteria, and "may be disqualified" if
16 "in the judgment of the advisor and the principal [the student] is an unworthy citizen"). Indeed,
17 Defendant Glasser himself excluded students from the National Honor Society based not only on their
18 experience and GPA, but also on his assessment of their character. Glasser Tr. 101:10-102:22. NHS and
19 California Scholarship Federation also remain ASB-approved, even though they use the same
20 membership and leadership requirements to exclude student applicants. Blomberg II Decl. Ex. D.
21 It doesn't stop there. The District admits several District programs and activities are expressly
22 permitted to "target[] specific types of students" on the basis of characteristics barred by its non-
23 discrimination policy. Resp.17-21. The District concedes it allows sex discrimination and "eligibility
24 criteria" to exclude students from participation in "sports and extracurricular activities" like "choir and
25 cheerleading." Resp.17, 20 n.11; Br.9. It "permits students to be separated by sex for sex education" and
26 overnight field trips. Resp.20 n.12. And it provides "school-sponsored program[s]" like the "Latino Male
27 Mentor Group" that discriminate on ethnicity and gender. Resp.20 n.12 (further conceding that District
28 programs discriminate based on disability, pregnancy, parental status, and immigration status, even

when not required by law).[3] All these exclusive clubs, sports, and programs may reasonably support the District's desire to serve its various populations, but all are equally prohibited under the same nondiscrimination policy the District applies to Pioneer FCA. That is not "generally applicable."

The District's express reservation of discretion separately undermines general applicability. Br.15-16. A regulation that creates discretion to individually exempt some, but not others, from its requirements is not generally applicable, even if the discretion has not been exercised before. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1878 (2021) ("A law is not generally applicable if it … provide[s] a mechanism for individualized exemptions." (cleaned up)). Here, the District does not contest that the Policy lets clubs exclude students from participation, membership, and leadership based on any "non-discriminatory" criteria that school officials deem reasonable. Br.8-9. Further, the District concedes that while the Policy *governs* "[a]ll San Jose Unified programs, activities" as a "comprehensive, district-wide policy" to forbid discrimination, ECF No. 102-3, 70:2-8, the District retains enforcement discretion such that the Policy "does not *apply* to all District programs and activities, or to all in precisely the same way." Resp.17-18 (emphasis added). The District argues this discretion to create "targeted programs" based on race or sex is "sometimes necessary" to achieve "fair access," and is thus permitted. Resp.18. But *why* the District might exercise discretion is beside the point; when it has authority to make individualized exemptions, it cannot deny a religious exemption without satisfying strict scrutiny, especially where it has exercised that discretion to favor some groups over others.

The District offers three counter-arguments. First, that its programs should not be held to the same standard it applies to FCA, because the activities it favors—mentoring programs, club sports, separate men's and women's choirs, cheerleading, and so forth—differ in some ways from the religious student clubs it disfavors. Resp.17-20. But so too did "hair salons, retail stores, personal care services, … and indoor restaurants" differ in some ways from "at-home religious exercise" in *Tandon*. 141 S. Ct. at 1297.

[3] Defendants suggest that student club voters are free to secretly select leaders on grounds barred by the Policy. Resp.7, 22. This suggestion, which exists nowhere in the Policy, only hurts them. It indicates the Policy is not reasonable, still fails Free Exercise scrutiny (since many other clubs and activities can be express in their leadership criteria), and is untrue: the District admitted that an applicant rejected by voters can file a complaint, and that the school will process that complaint under the same nondiscrimination policies that led to Pioneer FCA's derecognition. ECF No. 102-4, 234:16-236:4. Even if it were true, it would be yet another exemption that triggers strict scrutiny.

The relevant question is whether they are comparable with respect to the relevant government interest: allowing "all students" to access "all communities" equally. ECF No. 102-1 at 385. And they are. If anything, the District has *more* reason to apply the Policy to its own programs. It admits that unlike student clubs, its own sports programs and extracurricular activities "bear the imprimatur of the school," Resp.19, and "represent the District within the school community or to outsiders." *Compare* ECF No. 111-9 (McMahon Decl.) at ¶¶ 6, 10 *with* ECF No. 111-8 at 9 (by granting ASB recognition, "the District is not endorsing any statement, opinion, viewpoint, activity, or conduct of any … student group").

Second, the District claims that a footnote in *Martinez* collapses Free Exercise analysis into Free Speech analysis. Resp.10. But *Martinez* says the opposite: Free Exercise asks precisely the question of "general application" the District is trying to dodge. 561 U.S. at 697 n.27. While associational rights derived from the Free Speech Clause are subject to forum analysis, *id.* at 680-81, that's not applicable to Free Exercise claims. *See BLinC v. Univ. of Iowa*, 360 F. Supp. 3d 885 (S.D. Iowa 2019); *InterVarsity v. Wayne State Univ*., 2021 WL 1387787, at *22-24 (E.D. Mich. Apr. 13, 2021); *see also Koala v. Khosla*, 931 F.3d 887 (9th Cir. 2019) (analyzing Free Press claim independent of forum analysis).

Third, the District tries to distinguish *Fulton* as "narrow" and "fact-based," and argues that proving animus is necessary to defeat general applicability. Resp.23. But *Fulton* unanimously held that a law granting a government official authority to grant individual exemptions is not generally applicable, "regardless whether any exceptions have been given." 141 S. Ct. at 1878-79; *accord Lukumi*, 508 U.S. at 537. Here, the District indisputably grants individualized exemptions. That is enough to render the policy "not generally applicable," thus triggering strict scrutiny. *Fulton*, 141 S. Ct. at 1879.

B. The Policy and its enforcement are not neutral.

Defendants' actions are not "neutral," and the targeting is the tell: "regulations are not neutral" when they treat "*any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. "A double standard is not a neutral standard." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

And here, the record supplies a wealth of undisputed evidence proving non-neutrality: Glasser disparaged FCA's beliefs on his whiteboard in front of two Pioneer FCA leaders in his class. Glasser Tr. 174:24-175:14; Espiritu II Tr. Ex. 131. District employees with authority over FCA's student leaders participated in and helped enforce the school's decisions to derecognize FCA just weeks before the end

of the school year, and called FCA's religious beliefs "bullshit," "of a discriminatory nature," and "a hurtful message and a problem." Br.6, 19. Espiritu told the Pioneer "Climate Committee" (which included Glasser) that it "need[s] to take a united stance" because FCA's Statement of Faith "goes against core values" of Pioneer. ECF No. 102-2, at 257. Principal Espiritu himself admitted that the mere existence of FCA's religious beliefs was sufficient in his mind to deny FCA recognition. Espiritu I Tr. 200:21-201:2. And on the same day District staff denied Pioneer FCA's application, they approved the Satanic Temple Club's, knowing it intended to "openly mock" FCA. ECF No. 102-1, 84:11-20, 122:13-15; ECF No. 102-1 at 353; Blomberg II Decl. Ex. E; ECF No. 102-2, 106:20-108:1.

The District's answer is to cite non-Free Exercise caselaw for the proposition that "stray remarks" aren't relevant. Resp.13. But the Free Exercise Clause forbids "subtle departures from neutrality," and "even slight suspicion" that the government's actions "stem from animosity to religion." Br.19 (quoting *Lukumi* and *Masterpiece*). Thus, courts must assess "the historical background of the decision under challenge, the specific series of events leading to the … official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Far from being just a few "stray remarks" with no influence on the derecognition decision, Glasser's and others' derogatory and hostile statements were essential to the District's complaint-driven enforcement scheme and were made specifically to have FCA derecognized. The District acknowledges that Espiritu and his staff share responsiblity for the initial derecognition decision and for future recognition decisions. ECF No. 102-3, 29:9-30:5, 42:1-7, 56:22-57:1, 112:15-16. Espiritu's initial investigation into Pioneer FCA was instigated by Glasser. ECF No. 102-1 at 390; Espiritu II Tr. 11:6-12:12. Glasser quickly sent another email to Espiritu during the short decisional process arguing to derecognize Pioneer FCA due to its "bullshit" beliefs. Glasser Tr. Ex. 126. Glasser also continuously disparaged Christian beliefs to Espiritu and other District employees in a successful effort to persuade them to derecognize and marginalize Pioneer FCA. Glasser Tr. 174:24-175:14, 189:11-22, 227:2-22; *see also* Glasser Tr. Ex. 126, 127 (suggesting accusing Pioneer FCA of sexual harassment to "gain leverage to push the FCA into getting rid of the leadership requirements" and to "ban FCA completely from campus"). Espiritu not only admits he never took any steps to correct Glasser, despite Glasser's

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

written view that he was "professionally bound" to do the same to FCA again in the future, but testified that Glasser's actions were permitted by District policy. Espiritu II Tr. 14:17-15:1, 23:8-17, 23:24-24:6, 39:18-39:24, Ex. 132; Blomberg II Decl. Ex. F. District employees testified that they targeted and derecognized FCA because of the group's religious beliefs, specifically "two beliefs" about marriage and sexuality. Glasser Tr. 174:24-175:14, 203:25-204:22 (admitting that the statements he attacked were "statement[s] of religious belief"); ECF No. 102-1, 195:10-19 ("The FCA sexual purity statement is what prompted us to derecognize FCA as an official club."). And the District's newly "labeled" All-Comers Policy, Resp.1, is admittedly a direct result of its decision to derecognize FCA and to keep FCA derecognized by raising the barriers to entry for ASB recognition. Resp.17; ECF No. 102-3, 66:5-8; ECF No 102-4, 79:2-10.

Indeed, Glasser drew up the blueprint for the District's actions against FCA. To send the message to students that Pioneer rejected FCA's beliefs, Glasser pressured "Herb [Espiritu] and SJUSD" to publicly speak out against FCA and to exclude them from club activities like the yearbook, both of which Pioneer did almost immediately. ECF No. 102-1, 202:1-9; Espiritu II Tr. 11:6-12:12, Glasser Tr. Ex. 126. And he suggested that Pioneer drive a wedge between Pioneer FCA and "the national FCA organization," so that the students can "have the same club, but under a different name" and with religious beliefs he found more agreeable, Espiritu II Tr. Ex. 132, which the District has also repeatedly pressured Pioneer FCA to do and continues to do in their briefing before this Court. Resp.4-5.[4]

The District has also doubled down on its complaint-driven enforcement scheme, which further targets FCA and other groups with unpopular views. The District admits that "[t]here is no ongoing monitoring of club practices" and the principal and District staff only get involved if "a matter is brought directly to the attention of a principal." Resp.15. The District also admits that the District never "affirmatively investigated all clubs" and that the school Activities Director "never conducted in-depth

[4] The District's briefing likewise demonstrates religious targeting by repeatedly attacking the specific content of certain FCA beliefs, beliefs which the Supreme Court has recognized as being "decent and honorable," held "in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 576 U.S. 644, 672, 657 (2015). *See* Resp.1 (describing FCA's beliefs as "target[ing] lesbian, gay, bisexual, and transgender students in a discriminatory way"), 7 (describing FCA's beliefs as "discriminatory"), 8 n. 5 (stating FCA's beliefs "target[] and demean[] LGBTQ students" and are "coercive").

investigations into any student clubs when they applied for recognition." *Id.* Exactly. The only ASB-approved group to be subject to a lengthy investigation, multiple student leadership meetings with the principal, phone calls between school staff and District superintendents, and the involvement of District legal counsel was FCA. No other group at Pioneer, or in the entire District, has ever been scrutinized, criticized, publicized, protested, or derecognized like FCA was—even though the District admits that other clubs have openly advertised that they exclude students based on sex. ECF No. 111-1 at ¶¶ 26-28 (acknowledging that school newspaper advertised Simone Club's meetings and that it participated in club rush, all while excluding male students). Under the District's enforcement scheme, groups that engage in socially-acceptable discrimination are safe, while unpopular views that are never actually expressed on campus will be hunted down by school staff. That further demonstrates non-neutrality.

III. The District's Actions Violate FCA's Freedom of Speech and Freedom of Association.

The District's attempt to control FCA's speech and association by preventing it from asking its leaders to share its faith violates the free speech and association protections of the First Amendment. Nor can the District hide behind *Truth*, as *Truth* only permits restrictions that are "'viewpoint neutral and reasonable in light of the purpose served by the forum.'" *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 651 (9th Cir. 2008) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Viewpoint neutrality. As the District now admits, its "All-Comers Policy" allows numerous clubs, District programs, sports teams, and extracurricular activities to deny many "comers," in order to advance their secular missions. *Supra* 7-10. Moreover, the District permits sports teams, cheerleaders, and other District programs subject to the Policy to select members and participants based on race, sex, and ethnicity. Resp.20 n.11-12. But FCA, under the same Policy, can no longer advance its mission by asking its leaders to agree with its own religious beliefs, precisely because the beliefs are religious in nature. That is viewpoint discrimination. *Martinez*, 561 U.S. at 696 (regulation on student speech must be "justified without reference to the content or viewpoint of the regulated speech" (cleaned up)); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (viewpoint discrimination where "some non-religious but officially recognized groups appear to discriminate on prohibited grounds"); *BLinC*, 2018 WL 4701879, at *14 (granting preliminary injunction because possible exemptions for a few groups showed "selective enforcement").

Unreasonable restriction. The District does not dispute that the purpose of the ASB is to help students "feel connected to other students that are like them, to staff, who are also like them, who have similar interests," ECF No. 102-2, 35:15-36:4, even to the point of uniting together *against* other District students in protest. ECF No. 102-1, at 353; Blomberg II Decl. Ex. E. That's a far cry from *Martinez*, where groups were required to "accept all comers as voting members even if those individuals disagree[d] with the mission of the group." 561 U.S. at 674, 689. Allowing the District to selectively ignore the forum's purpose fails to "respect the lawful boundaries [the forum] has itself set." *Rosenberger*, 515 U.S. at 829. Accordingly, once again, the District's actions must face strict scrutiny.[5]

Strict scrutiny. The District does not even attempt to meet its strict scrutiny burden for the First Amendment speech, association, and free exercise claims. Nor could it. The District's numerous exceptions undermine any claimed compelling interest, and it failed to "demonstrate[] that it … actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); Lopez II Decl. ¶ 12 (no other FCA chapters in California have been derecognized under similar policies).

IV. The District's Actions Violate the Religion Clauses.

The District doesn't just ban groups from asking their leaders to agree with their religious beliefs on marriage. It bans *any religious belief requirement at all*—even just the barest belief in God. That kind of bar on religious leadership unquestionably violates the First Amendment's church autonomy doctrine. The District's only response is to collapse the Religion Clauses into the "ministerial exception"—but the First Amendment protects internal management, not just ministers. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (First Amendment protects "autonomy with respect to internal management decisions"). The District freely admits that religious groups can be ASB-recognized. Resp.2. That being true, the District cannot entangle itself in a religious group's internal management by forbidding it from asking *any* of its leaders to believe in even the most rudimentary elements of its faith. *Wayne State*, 2021 WL 1387787, at *9, *15.

[5] The District effectively concedes that FCA is an expressive association entitled to First Amendment protection, but argues that clubs have no associational First Amendment rights under *Truth*. Resp.21. This argument fails for the same reasons the District's Free Speech argument fails.

V. The Remaining Preliminary Injunction Factors Favor Granting Injunctive Relief.

The loss of First Amendment rights is irreparable, *Tandon*, 141 S. Ct. at 1297, and the "serious First Amendment questions" here require finding the hardships and public interest favor FCA. Br.25.

Defendants' contrary arguments fail. *First*, placing a religiously discriminatory barrier on access to official club recognition is unconstitutional and inflicts irreparable harm. Br.25 (collecting cases); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2022 (2017). *Second*, the only "burden and stigma of discrimination" on students shown in the record, Resp.24, is the one that District officials are putting on FCA students. Defendants have conceded that no student has ever complained about being denied access to FCA's leadership, ECF No. 102-4, 232:14-17; Glasser Tr. 78:2-17, and so Defendants' argument confirms yet again their religious viewpoint discrimination—government officials cannot punish private student clubs for holding religious views others find offensive. In any event, the balance of equities and public interest merge when the government is the defendant, and both favor FCA here. Br.25. *Finally*, the District argues that FCA cannot receive injunctive relief under the EAA because FCA students haven't applied for ASB recognition. That's backwards. Pioneer FCA's leaders and members are eager to regain ASB recognition but face insurmountable barriers to receiving it *without* an injunction. Lopez Decl. ¶¶ 14-18. Defendants have testified and made admissions that FCA clubs are "not eligible for recognition," ECF No. 102-4, 223:13-225:3; ECF No. 102-5, 173-74 ¶¶ 18-20; claimed an obligation to keep Pioneer FCA from obtaining ASB recognition, Glasser Tr. Ex. 127, ECF No. 102-4, 223:13-224; promised to treat the club's new leaders and members just as badly as in the past, Espiritu II Tr. Ex. 132; and structured the new ASB application form so that it can only be executed by agreeing not to have religious leaders. ECF No. 111-8 at at 5-6. To either exercise or vindicate their EAA rights, Plaintiffs need injunctive relief.

CONCLUSION

The Court should enjoin the District's discriminatory restrictions on the ability of student FCA clubs to apply for ASB recognition and restore Pioneer FCA's ASB-approved status for the pendency of the case.

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Respectfully submitted,

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