IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

J.G.C. and J.N.C., by and through their parents and legal guardians, PAUL Y. CHUNG and IRIS J. CHUNG,

Plaintiffs,

v.

WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION,

Defendant.

Civil Action No. _____

MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR: AUGUST 30, 2019

ORAL ARGUMENT REQUESTED

THE BECKET FUND FOR RELIGIOUS LIBERTY
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INTRODUCTION

The baseline under the First Amendment's Religion Clauses is nondiscrimination: state actors may not discriminate, either by favoring one religious belief over another or by granting secular exemptions to laws while denying analogous religious exemptions. Defendant Washington Interscholastic Activities Association (WIAA) defies this basic obligation in scheduling interscholastic activities by favoring Sunday over Saturday Sabbatarians, allowing participants to withdraw from competitions for secular but not religious reasons, and, in some circumstances, leveraging *potential* conflicts with religious exercise to bar students from participating fully in extracurricular activities even when ultimately there may be *no conflict at all*.

Plaintiff J.G.C. is an avid tennis player and Seventh-day Adventist. In early 2019, J.G.C. faced a dilemma. Her high-school tennis team—led by J.G.C.—was expected to have a superb season and poised for a run at the state championship. WIAA, however, had scheduled the last day of the state championship tournament for a Saturday—J.G.C.'s Sabbath. Thus if J.G.C. made it that far—advancing through the preceding weeks' sub-district and district tournaments, as well as the first day of the state championship tournament itself—she would be barred because of her religious beliefs from playing on the last day.

Worse still, because J.G.C. couldn't play on the *last* day, she couldn't play on any other day of the postseason, either, because WIAA interprets its rules to prohibit players from participating at all in postseason competition if they are, or know they might be, unable to proceed through "completion of the championship event." The rule makes exceptions, however, for withdrawals attributable to "injury, illness or unforeseen events." Noting the exceptions, J.G.C.'s family asked that WIAA extend the same treatment to players who must withdraw for religious reasons. But WIAA refused. Because of the potential conflict between the last day of the tournament and J.G.C.'s Sabbath, J.G.C. was forced to sit out the entire postseason—even though

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there would have been no conflict at all for the entirety of the first two tournaments.

J.G.C. has now graduated. But her brother J.N.C., a rising sophomore and similarly devout Seventh-day Adventist, now faces the same dilemma. J.N.C. expects to qualify for postseason tennis play in the upcoming academic year. But WIAA has already scheduled the last day of the relevant state championship tournament for a Saturday. This means that because of WIAA's refusal to permit withdrawals in case of religious need, J.N.C. will have to sit out every preceding day of postseason matches, too—matches set to begin in about two months.

WIAA's steadfast refusal to accommodate easily accommodatable religious exercise, and its discrimination against religiously motivated conduct, violate the federal Free Exercise Clause, the Washington Constitution, and the Washington statute prohibiting religious discrimination by WIAA. And because J.N.C. will be harmed by those actions in only two months, the need for preliminary relief is clear. The Court should grant this motion.

BACKGROUND

A. J.G.C., J.N.C., and their faith

J.N.C. and J.G.C. are Seventh-day Adventists and avid tennis players. As Seventh-day Adventists, J.G.C. and J.N.C. observe the Sabbath from sundown Friday to sundown Saturday every week. J.G.C. Decl. ¶ 5; J.N.C. Decl. ¶ 5.

Sabbath observance is a central tenet of the Seventh-day Adventist faith: it "encompasses [Seventh-day Adventists'] entire relationship with God." *Sabbath Observance*, Seventh-day Adventist Church (July 9, 1990), https://perma.cc/9J3S-8GKK. During the Sabbath, Seventh-day Adventists like J.G.C. and J.N.C. dedicate their time to rest, prayer, and collective worship. J.G.C. Decl. ¶ 5; J.N.C. Decl. ¶ 5. They do not work during this time, nor do they participate in competitive sports. J.G.C. Decl. ¶ 5; J.N.C. Decl. ¶ 5. To do so—and thus to break the Sabbath—would lead "to the distortion and eventual destruction of [their] relationship with God." *Sabbath*

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Observance, *supra*.

B. WIAA and the state tennis tournament

WIAA is an organization "authorized under RCW [§] 28A.600.200 to control, supervise and regulate interscholastic activities in the State of Washington." *Jones v. Wash. Interscholastic Activities Ass'n*, No. 07-711, 2007 WL 2193751, at *1 (W.D. Wash. July 26, 2007). One of its primary functions is to organize and host state championship tournaments for sports and activities among its nearly 800 member schools. Davis Decl. ¶ 2, Ex. A.

J.G.C. and J.N.C.'s high school—William F. West—is one WIAA member school. Each year, W.F. West selects the top performers from its boys' and girls' tennis teams, based on their regular-season play, to participate in postseason tennis competitions culminating in state championship tournaments organized by WIAA. The competitions are divided into three sequential stages—sub-district; district; and the state championship. Paul Decl. ¶ 9. Only the top three players from W.F. West's district tournament advance to the state championship. *State Championship Allocations & Draw Criteria*, WIAA, https://perma.cc/6PA6-KR5C. Under WIAA regulations, if a player advances from the district tournament, but "is unable to compete" in the state championship, the "next qualified contestant" serves as a substitute. *2018–19 Bound for State Regulations* (Regulations) 2, WIAA, https://perma.cc/APX8-848M.

C. The impact of WIAA's actions on J.G.C. and J.N.C.

J.G.C. and J.N.C. have been dedicated tennis players since childhood. J.G.C. Decl. ¶ 8; J.N.C. Decl. ¶ 7. As they entered high school, they focused on tennis over other sports in which they had previously participated, in part because high-school tennis matches (unlike, say, football games) are typically played outside the Sabbath. Paul Decl. ¶ 7. J.G.C. played on W.F. West's girls' tennis team all four years of her high-school career. J.N.C. is a rising sophomore and member of W.F. West's boys' team.

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J.G.C. and the 2018–19 postseason competition.

At no point in J.G.C.'s four-year high-school tennis career did she face a conflict between a regular-season match and the Sabbath. J.G.C. Decl. ¶ 10. WIAA's postseason competitions, however, were a different story.

J.G.C. was selected to represent W.F. West in postseason play for the first time in 2017–18, her junior year. *Id.* ¶ 11. That year, J.G.C. advanced out of the sub-district tournament, but had to withdraw before the district tournament and allow an alternate to take her place because a district match was scheduled for the Sabbath. *Id.* Opposing coaches complained to WIAA, however, asserting that withdrawal from postseason play for religious reasons was barred by WIAA Rule 22.2.5, which provides that—absent "injury, illness or unforeseen events"—athletes who enter postseason play must be able to complete it:

> By entering participants in postseason competition, each member school certifies that, barring injury, illness or unforeseen events, the team or individuals representing the school will participate in every level of competition through the completion of the state championship event.

2018–19 Official Handbook (Handbook) 48, WIAA, https://perma.cc/P67U-GCPH. Rule 22.2.6 adds that "[a]ny withdrawal or intentional forfeiture shall be considered a violation of WIAA rules and regulations, and shall be subject to penalties as determined by the WIAA Executive Board." *Id.*

The next year, J.G.C. was again expected to qualify for postseason play. So the Chung family preemptively asked WIAA for an accommodation. In February 2019, J.G.C. and J.N.C.'s parents asked that WIAA "change rule 22.2.5 to allow religious observances as a valid reason to drop out of the tournament" so Sabbatarians "can play as far as they are able until Sabbath becomes an issue." Paul Decl. ¶ 14, Ex. A. They also asked that WIAA "move the 2A state tennis tournament" to weekdays beginning in 2019–20. *Id.* That same week, the Chungs' pastor wrote to WIAA, verifying their religious beliefs and explaining the importance of Sabbath observance, *id.* ¶ 15,

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Ex. B; and the Northwest Religious Liberty Association wrote to WIAA seconding the Chungs' concerns, *id.* ¶ 16, Ex. C. On March 4, 2019, WIAA confirmed its receipt of the rescheduling request. *Id.* ¶ 17, Ex. D.

Meanwhile, J.G.C. had a banner regular season: she went undefeated. J.G.C. Decl. ¶ 13. Her coaches therefore again selected her to represent W.F. West in postseason play. *Id.*

The 2018–19 sub-district and district tournaments were scheduled outside the Sabbath. *Id.* ¶¶ 14-15. The state championship tournament, however, was scheduled for Friday, May 24, and Saturday, May 25, 2019—with the Saturday matches to be played before sundown. Davis Decl. ¶ 3, Ex. B. This meant that, if J.G.C. advanced to the state championship, she would be religiously obligated not to play on the last day. Moreover, because—as the Chungs had learned the year before—Rule 22.2.5 generally prohibits players from withdrawing from postseason competition, the potential conflict between the last day of the competition and the Sabbath meant that J.G.C. would not be able to play in the postseason at all.

In April, WIAA rejected the Chungs' accommodation request. In its letter, WIAA said allowing religious tournament withdrawals would "violate specific WIAA rules and cannot be granted." Paul Decl. ¶ 20, Ex. G (citing Rules 22.2.5 and 22.2.6). According to WIAA, those "provisions are strictly enforced and have not been waived in the past." *Id.* Moreover, WIAA said, religious withdrawals would (1) be "unfair to the athlete who would have qualified" but for the withdrawing athlete; and (2) "create a competitive advantage for the athlete scheduled to play the forfeiting athlete, who now has the luxury of a bye while the other competitors must continue playing." *Id.* Finally, the letter referred to "surveys" WIAA purportedly was conducting about whether the tournament could be moved to weekdays going forward, but also indicated that WIAA had already come to a conclusion: "this format change is not possible." *Id.*

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J.G.C. was therefore barred from all postseason play in 2018–19 because of her religious convictions—even though a Sabbath conflict would have arisen only had she made it to the final day. Without its top player, W.F. West finished two points shy of first, Davis Decl. ¶ 4, Ex. C—the equivalent of victory in a single match. Regulations 4. J.G.C. was devastated that she had been unable to help her team win the state championship in her final season. J.G.C. Decl. ¶¶ 19-20. Just weeks after the season ended, J.G.C. graduated—without being able to attend the graduation ceremony, because it was held on a Saturday. *Id.* ¶ 7.

J.N.C. and the 2019–20 postseason competition.

J.N.C. now faces the same dilemma his sister did. J.N.C. expects to be selected to represent W.F. West in the 2019–20 boys' tennis postseason. But WIAA has already scheduled the final day of the state championship to be played on Saturday, May 30, 2020. Davis Decl. ¶ 5, Ex. D. Thus, if J.N.C. advanced to the final day of the competition, he would not be able to finish it. This, in turn, means that under Rule 22.2.5, WIAA will not allow him to *begin* the competition either—even if, as for J.G.C. last year, there is no Sabbath conflict at the sub-district and district stages.

The boys' regular season begins in September, with the sub-district tournament set to take place in early-to-mid-October. *See 2019-20 Varsity Boys Tennis Schedule,* 2AEvergreen.com, https://perma.cc/3LEJ-FAWF. By the time trial in this case runs its course, J.N.C. will already have been forced to sit out the postseason. For this reason, and because of the manifest illegality of WIAA's actions, J.N.C. seeks preliminary relief through this motion.

ARGUMENT

A party is entitled to a preliminary injunction if it shows "(1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the public interest.'" *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir.

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2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

I. J.N.C. has a strong likelihood of success on the merits.

J.N.C. challenges two WIAA actions: (1) scheduling the last day of the 2019–2020 2A Boys Tennis State Championships on the Sabbath; and (2) refusing to allow Sabbath observers to participate in any postseason play *at all* unless they agree in advance to violate their beliefs if a conflict arises. J.N.C. has a strong likelihood of success on the merits that both actions violate his rights under the federal Free Exercise Clause, the free-exercise provision of the Washington Constitution, and the Washington statute prohibiting religions discrimination by WIAA.

A. WIAA's actions likely violate the federal Free Exercise Clause.

Under the First Amendment's Free Exercise Clause, state action burdening religious exercise is subject to strict scrutiny if it is not "neutral" and "generally applicable." *Employment Div. v. Smith*, 494 U.S. 872, 880 (1990). This test is plainly satisfied if the action is based on official "hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). "[B]ut the Free Exercise Clause is not confined to actions based on animus"; rather, it "protect[s] the 'free exercise of religion' from unwarranted governmental inhibition whatever its source." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006). Accordingly, "[t]here are … many ways of demonstrating that" state action is not neutral and generally applicable and thus triggers strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

Two are particularly relevant here. First, state action burdening religion isn't neutral and generally applicable if it is undertaken under a system of "individualized governmental assessments." *Smith*, 494 U.S. at 884. Such action—unlike official action undertaken pursuant to "an across-the-board" rule—risks that officials will exercise their discretion to discriminate against religion or particular religious practices, warranting strict scrutiny. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

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Second, state action burdening religious conduct isn't neutral and generally applicable if it exempts "nonreligious conduct that endangers" the purported state interests "in a similar or greater degree than" the religious conduct does. *Lukumi*, 508 U.S. at 543. When the state permits secular exceptions while refusing religious ones, it "of necessity devalues religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons," presumptively violating the Free Exercise Clause. *Id.* at 537.

State action that isn't neutral and generally applicable for these (or any other) reason is subject to strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To survive, it "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (citation omitted). "[O]nly in rare cases" is this standard satisfied. *Id.*

1. WIAA's scheduling of the state championship tournament on the Sabbath likely violates the Free Exercise Clause.

Under these principles, WIAA's scheduling the last day of the 2019–2020 state championship on a Saturday likely violates the Free Exercise Clause.

a. WIAA's scheduling decision triggers strict scrutiny under the Free Exercise Clause.

WIAA's decision triggers strict scrutiny as action taken according to a system of "individualized governmental assessment[s]." *Smith*, 494 U.S. at 884. There is no neutral and generally applicable policy requiring WIAA to schedule tournaments on Saturdays. Rather, WIAA exercises broad discretion to schedule postseason play on a case-by-case basis. As WIAA's handbook explains, WIAA's Executive Board determines all "sites, dates, formats, schedules, and rules and regulations for" postseason play. Handbook 48. The handbook identifies no "particularized, objective criteria" by which WIAA decides whether to schedule postseason play on weekdays or weekends,

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instead "afford[ing WIAA] unfettered discretion." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081-82 (9th Cir. 2015).

Moreover, WIAA's own actions demonstrate it has abundant discretion over where and when to schedule postseason play. Postseason tournaments will be held in at least 20 cities next academic year. Davis Decl. ¶ 5, Ex. D. They are scheduled to last anywhere from one day (*e.g.*, cross country) to four (*e.g.*, basketball). *Id*. Most importantly, while some are scheduled to include weekend play, others—including the 1B and 2B girls' volleyball and 1B, 2B, 1A, 2A, 3A, and 4A boys' and girls' golf state championships—are scheduled to take place entirely during the week. *Id.*

And indeed, WIAA has recently exercised its discretion to change the dates of a postseason tournament in response to a suit—like this one—alleging that scheduling postseason play on a Saturday violates the religious freedom of Saturday Sabbath observers. In 2015, Jewish and Seventh-day Adventist volleyball players sued WIAA in state court for scheduling girls' volleyball championship play on Saturdays. WIAA initially resisted, asserting, among other things, that weekday play would harm ticket sales. Defs.' Tr. Br., *Jacobson v. WIAA*, No. 15-2-25734-0 SEA (Wash. Super. Ct. May 15, 2017). But after trial, WIAA settled, and rescheduled to avoid Sabbath conflicts. *See* Jayda Evans, *Parents Settle Religious Discrimination Lawsuit with WIAA over Volleyball State Tournament*, Seattle Times (June 23, 2017), https://perma.cc/QFP4-VYRM.

WIAA therefore makes "individualized governmental assessments" whether to schedule any given tournament on a Saturday in any given year—meaning it "may not refuse to" exercise its discretion to avoid "'religious hardship' without compelling reason." *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

b. WIAA cannot satisfy strict scrutiny.

WIAA will not be able to meet its burden of proof under strict scrutiny.

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First, "a law cannot be regarded as protecting an interest 'of the highest order' …. when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547. This principle undercuts any compelling interest WIAA might assert in scheduling postseason play on Saturdays. This year alone, at least 15 state championship tournaments will be played entirely during the week. And the volleyball tournaments were moved from Saturday in response to a lawsuit seeking a religious accommodation just like this one. This "underinclusiveness … undermine[s]" any argument that WIAA's scheduling of the tennis tournament on a Saturday advances a compelling interest. *Carey v. Brown*, 447 U.S. 455, 465 (1980).

Likewise, WIAA could not assert a more general compelling interest in minimizing school days missed for tournament play. If that were the interest, "the logical response" (*Lukumi*, 508 U.S. at 539) would be playing on Saturday *and Sunday*. Yet WIAA does not schedule competition on Sundays. *See* Davis Decl. ¶ 5, Ex. D (120 different tournaments, none scheduled for Sunday). Regardless whether this preference for Sunday over Saturday Sabbath observers constitutes "an independent constitutional violation," *Lukumi*, 508 U.S. at 536 (citing *Larson v. Valente*, 456 U.S. 228, 244-46 (1982)); *see also infra*; it at minimum shows any interest in minimizing weekday play to be non-compelling.

Nor could WIAA's action be justified by the interest it asserted in the volleyball litigation—increased ticket sales. Accommodating religious liberty, like respecting other fundamental rights, "may in some circumstances require the Government to expend additional funds," so it's far from clear whether increased revenue could ever constitute an "interest of the highest order." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729-30 (2014). But here this contention would fail for a more fundamental reason: unlike the volleyball tournaments, the tennis tournament is unticketed, Paul Decl. ¶ 10—meaning there are no ticket sales to lose in playing on weekdays.

Finally, it is overwhelmingly likely there will be sufficient facilities available for

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the 2019–20 championship tournament to be held entirely during the week. Even if the current venue is unavailable (which WIAA has not alleged or shown), there are numerous venues in Washington with enough courts to host the tournament, at least some of which are certain to be available. *See* Paul Decl. ¶¶ 22-25, Ex. H (large venue in Seattle is available). To satisfy strict scrutiny, WIAA would have "to demonstrate that no alternative" available on weekdays would be feasible. *Sherbert*, 374 U.S. at 407; *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000) ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it[.]"). It will not be able to do so.

2. WIAA's prohibition of religiously motivated postseason withdrawals likely violates the Free Exercise Clause.

Independently, WIAA has likely violated the Free Exercise Clause by barring Sabbath observers like J.N.C. from withdrawing from competition in the event of a conflict between the tournament schedule and the Sabbath. Conflict will arise for J.N.C. only if he advances far enough in the tournament to reach the round scheduled for Saturday play (currently, only the last day). Under WIAA's interpretation of its rules, however, J.N.C.'s school would be "subject to penalties" if J.N.C. withdrew upon encountering a Sabbath conflict—even though Rule 22.2.5 allows withdrawals for secular reasons, like "injury, illness or unforeseen events." These exceptions render the rule not neutral and generally applicable, and it cannot satisfy strict scrutiny.

a. Application of Rule 22.2.5 to J.N.C. triggers strict scrutiny under the Free Exercise Clause.

First, Rule 22.2.5 isn't neutral and generally applicable because it includes categorical exceptions for secular conduct but not analogous religious conduct. *See Lukumi*, 508 U.S. at 542 ("[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.").

Rule 22.2.5 expressly permits players to withdraw from postseason competition if

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they cannot play for reasons of "injury" and "illness." Yet WIAA refuses to permit players to engage in exactly the same conduct if they cannot play because they are religiously bound to observe the Sabbath. Paul Decl. ¶ 20, Ex. G. That is precisely the sort of "devalu[ing] [of] religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons" that presumptively violates the First Amendment. *Lukumi*, 508 U.S. at 537.

Indeed, in an instructive case, the Third Circuit held that an exception indistinguishable from WIAA's "injury" and "illness" exceptions rendered a prohibition non-neutral and generally applicable. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.). There, a police department's policy prohibited officers from wearing beards, but exempted beards grown for medical reasons. *Id.* at 360. The Third Circuit held that this exception required strict scrutiny of the department's decision to prohibit beards for Muslim officers religiously obligated to grow them. "[A]llow[ing] officers to wear beards for medical reasons … undermines the Department's interest in fostering a uniform appearance" just as religious beards would. *Id.* at 365-66. The exception thus "indicate[d] that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not," triggering strict scrutiny. *Id.* at 366.

So too here. WIAA says Rule 22.2.5 serves two interests: (1) avoiding "competitive advantage" for the player who would have faced the withdrawing player but instead gets a bye; and (2) avoiding alleged unfairness for the player who would have advanced in the tournament but for the withdrawing player. Paul Decl. ¶ 20, Ex. G. But these interests are undermined to precisely the same extent by withdrawals for reasons of illness or injury as by withdrawals for reasons of Sabbath observance. Rule 22.2.5 thus "fails to include in its prohibitions substantial, comparable secular con-

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duct that would similarly threaten the government's interest," rendering it "not generally applicable." *Stormans*, 794 F.3d at 1079; *cf. id.* at 1080-81 (finding no evidence that secular conduct undermining the government's interest was in fact "permitted" or "exempted … from enforcement").

Second, Rule 22.2.5 isn't neutral and generally applicable because its remaining, open-ended exception—"unforeseen events"—renders it effectively a system of "individualized exemptions." *Lukumi*, 508 U.S. at 537-38. When a rule has a broad exception giving officials discretion to make "individualized … assessment[s] of the reasons for the relevant conduct," refusal to make religious exceptions is subject to strict scrutiny. *Smith*, 494 U.S. at 884. The "*opportunity*" for "disparate treatment" of religion created by "open-ended" exceptions suffices to trigger heightened review. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208, 210 (3d Cir. 2004) (Alito, J.) (emphasis added).

Sherbert illustrates the point. There, the state denied unemployment compensation to a Seventh-day Adventist who wouldn't work on the Sabbath under a statute that allowed the state to award benefits to applicants who had refused work for "good cause." 374 U.S. at 399-401. This open-ended exception gave the state discretion to prefer secular claims of good cause to religious ones, triggering strict scrutiny. *Smith*, 494 U.S. at 888; *see also Lukumi*, 508 U.S. at 537-38 (exception permitting "necessary" animal killings); *Blackhawk*, 381 F.3d at 209-10 (exception permitting keeping animals for reasons "consistent with sound game or wildlife … activities").

The same analysis applies here. Plainly not all "unforeseen events" count for purposes of Rule 22.2.5's exception; after all, it wasn't "foreseen" in 2019 that J.G.C. would necessarily make it to the last day of the 2019 tournament. The exception therefore gives WIAA officials discretion to prefer secular claims of "unforeseen events" (death in the family? A pop quiz?) over religious claims (Sabbath observance). That discretion triggers strict scrutiny for WIAA's failure to extend a religious accommodation.

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Third, Rule 22.2.5 triggers strict scrutiny because it produces "differential treatment of two religions"—"an independent constitutional violation" under the Religion Clauses. *Lukumi*, 508 U.S. at 536; *see also Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Because WIAA accommodates most Christians' Sabbath by not scheduling state championships on Sundays, only Saturday Sabbatarians need religious withdrawals to be allowed under Rule 22.2.5 to avoid the forced choice between postseason play and their faith. Thus, WIAA's refusal to allow such withdrawals "effects the *selective* … imposition of burdens and advantages upon particular denominations," *Larson*, 456 U.S. at 253-54, triggering strict scrutiny.

b. WIAA cannot satisfy strict scrutiny.

WIAA thus would have to show that its refusal to permit religious withdrawals is narrowly tailored to a compelling government interest. It cannot do so.

First, WIAA's alleged interests aren't implicated at all for one category of withdrawals—those occurring between stages of postseason play. Again, per WIAA, the harms caused by religious withdrawals would be (1) "competitive advantage" for the player who would have faced the withdrawing player but instead gets a bye; and (2) alleged unfairness for the player who would have advanced but for the withdrawing player. Paul Decl. ¶ 20, Ex. G. But WIAA's regulations *already provide* a mechanism for avoiding these alleged harms when a player advances through district but "is unable to compete" in the state championship: "the next qualified contestant" takes his place. Regulations 2. With this mechanism already in place, there is no relationship whatsoever between the harms WIAA has identified and allowing religious withdrawals between tournaments. WIAA's prohibition on inter-tournament Sabbath withdrawals thus fails even to satisfy rational-basis review, much less strict scrutiny—meaning it would violate the Free Exercise Clause even if Rule 22.2.5 were neutral

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and generally applicable (which it isn't). *See Merrifield v. Lockyer*, 547 F.3d 978, 986, 988-91 (9th Cir. 2008); *Stormans*, 794 F.3d at 1075-76.

Second, even with respect to withdrawals occurring *within* a tournament rather than between them, Rule 22.2.5's exceptions nonetheless demonstrate that WIAA lacks a compelling interest in prohibiting religious withdrawals. Intra-tournament withdrawals for reasons of "injury, illness or unforeseen events" create precisely the same alleged harms (byes, "unfairness" to losing players) as religious withdrawals—yet Rule 22.2.5 expressly allows them. When a rule restricts religious conduct but does not "restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546-47.

In any event, even if these interests were compelling, barring religious withdrawals isn't the least restrictive means of satisfying them. Rather, WIAA could simply extend the substitution procedure to intra-tournament withdrawals, allowing the last player the withdrawing player defeated to advance instead of the withdrawing player—thus again avoiding both allegedly unfair byes and the alleged harm to the player who loses to the player who ultimately withdraws. Courts "must not 'assume a plausible, less restrictive alternative would be ineffective'"; the state actor must *prove* as much. *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (quoting *Playboy Entm't*, 529 U.S. at 824)). WIAA has not, because it cannot, offer any rationale why this commonsense solution wouldn't suffice to address the harms it has identified here.

B. WIAA's actions likely violate the free-exercise provision of the Washington Constitution.

J.N.C.'s likelihood of success on the merits of his claim under the Washington

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Constitution's free-exercise provision, Wash. Const. art. 1, § 11, is even more straightforward.* In *Smith*, the U.S. Supreme Court "repudiated" protection it had previously afforded under the federal Free Exercise Clause, holding that strict scrutiny would generally no longer apply to all government burdens on religious exercise but only those imposed by state action that is not "neutral" and "generally applicable." *Holt*, 135 S. Ct. at 859. But the Washington Supreme Court has "eschew[ed]" *Smith* in interpreting Washington's free-exercise provision. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992) (*First Covenant II*). That provision extends "broader protection than the first amendment to the federal constitution" as interpreted in *Smith*. *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009) (quoting *First Covenant II*, 840 P.2d at 189).

The Washington Supreme Court reached this conclusion after looking to factors including art. 1, § 11's text, history, and structure. *First Covenant II*, 840 P.2d at 185-87 (citing the "[s]ix nonexclusive factors" identified in *State v. Gunwall*, 720 P.2d 808 (Wash. 1986)). Article 1, § 11's text, the *First Covenant* court explained, is "significantly different and stronger than the federal constitution": it protects the "absolute freedom of conscience" as long as religious practices are not "inconsistent with the peace and safety of the state." *Id.* at 186. Likewise, art. 1, § 11 "contained the same active, broad language" when first adopted in 1889, *id.*, and it reflected the Washington constitution's framers' intent not to leave "any avenue … open for the invasion of" this right. *State v. Frazier*, 173 P. 35, 35 (Wash. 1918). In short, art. 1, § 11 "exhibits a long history of extending strong protection to the free exercise of religion,"

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* That provision provides in full:

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Wash. Const. art. 1, § 11.

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First Covenant II, 840 P.2d at 187, especially for religious minorities—like the Chungs—whose "sole reliance" is the courts. *Bolling v. Superior Court*, 133 P.2d 803, 807 (Wash. 1943).

Under art. 1, § 11, then, Washington courts apply a four-prong analysis to state free-exercise claims: Once the plaintiff shows that (1) his sincere religious beliefs are (2) substantially burdened by the challenged action, the state must show that it (3) has a compelling interest and (4) is using the least restrictive means to achieve that interest. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1233 (Wash. 2019); *see also City of Woodinville*, 211 P.3d 406 at 410. This analysis focuses not on whether the state action is neutral and generally applicable, but simply on the burden on religious exercise and the feasibility of an accommodation. *First Covenant II*, 840 P.2d at 187.

1. WIAA's scheduling of the state championship tournament on the Sabbath likely violates art. 1, § 11.

Under this analysis, WIAA's scheduling of the state championship tournament on the Sabbath likely violates art. 1, § 11.

Sincere religious exercise. First, there is no question that J.N.C.'s "religious convictions" about the Sabbath "are sincere and central to [his] beliefs." *Munns v. Martin*, 930 P.2d 318, 321 (Wash. 1997). Keeping the Sabbath holy is a core tenet of the Seventh-day Adventist faith, and J.N.C. and his family observe the Sabbath from sundown Friday to sundown Saturday every week. J.N.C. Decl. ¶¶ 3-5. J.G.C. abstained from participating in 2018–19 postseason play because she was unwilling to break the Sabbath, and J.N.C. is prepared to do the same because of his sincere commitment to Sabbath observance. J.N.C. Decl. ¶¶ 10-11.

Substantial burden. WIAA's scheduling of the championship tournament on a Saturday substantially burdens J.N.C.'s sincere Sabbath observance.

To impose a substantial burden, "the challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief." *Witters v. State*

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Comm'n for the Blind, 771 P.2d 1119, 1123 (Wash. 1989). When the state actor "conditions receipt of an important benefit upon conduct proscribed by a religious faith," that test is met. *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). WIAA's scheduling decision does just that: it conditions J.N.C.'s ability to obtain an important benefit—"compet[ing] on an equal footing" for the state tennis championship, *see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (internal quotation marks omitted)—on his violating his beliefs by breaking the Sabbath. That is a substantial burden under art. 1, § 11. *See Sherbert*, 374 U.S. at 405-06 (Seventh-day Adventist forced to choose between declining work on Saturdays and receiving unemployment benefits); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987) ("the forfeiture of unemployment benefits for choosing [religious belief] over [employment] brings unlawful coercion to bear on the employee's choice").

And indeed, in related factual contexts, both the Ninth Circuit and other courts have held that conditioning a student's equal participation in school activities on forgoing a religious exercise cognizably burdens free exercise. In *Gonzales v. Mathis Independent School District*, No. 18-43, 2018 WL 6804595 (S.D. Tex. Dec. 27, 2018), for instance, the court held that plaintiffs who were "bann[ed] from participation in [their school's] extracurricular activities" because they couldn't cut their religiously motivated long hair suffered a substantial burden. *Id.* at *1, 5. And in *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995), the Ninth Circuit held it was "unquestionably" a substantial burden when students were "exclu[ded] from the classroom" because they would not leave their articles of faith at home. *Id.* at 884-85. Here too, WIAA's actions bar J.N.C. from participating in an important school activity; as WIAA itself emphasizes, its programs "provide students with valuable life skills and are an integral part of the total education process." Davis Decl. ¶ 2, Ex. A. That is a substantial burden.

Compelling interest and least restrictive means. WIAA's showing will fail at

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the compelling-interest step. Consistent with art. 1, § 11's provision that only religious practices "inconsistent with the peace and safety of the state" may be overridden by state action, the Washington Supreme Court has interpreted the compelling-interest requirement strictly: the state actor must show that its action would "prevent[] a clear and present, grave and immediate danger to public health, peace, and welfare." *First Covenant II*, 840 P.2d at 187 (internal quotation marks and citations omitted); *see id.* at 187 (landmark preservation "further[s] cultural and esthetic interests, but [it] do[es] not protect public health or safety"). WIAA's convenience interest in its current schedule is thus "not of sufficient magnitude to outweigh the free exercise of religion." *Id.* at 188 (internal quotation marks and citation omitted).

Moreover, as explained above, any "compelling interest" WIAA might assert for scheduling the tournament on a Saturday is undermined by the fact that it leaves substantial damage to that interest unprohibited. Nor could WIAA have any compelling interest in generating increased ticket sales or ensuring venue availability; the tournament is unticketed and many of Washington's numerous adequately sized tennis courts are overwhelmingly likely to be available.

2. WIAA's prohibition of religiously motivated postseason withdrawals likely violates art. 1, § 11.

For similar reasons, WIAA has likely violated art. 1, § 11 by applying Rule 22.2.5 to bar Sabbath observers like J.N.C. from participating in any postseason play unless they agree to violate their beliefs in the event of a conflict.

First, the burden on J.N.C.'s sincere religious exercise of Sabbath observance is even more substantial than that imposed by the schedule alone. Absent Rule 22.2.5, J.N.C. would at least be able to participate in postseason play until the schedule conflicts with the Sabbath; under it, he can't participate in postseason play *at all*.

Second, WIAA's interest in refusing religious postseason withdrawals is even less compelling than its interest in maintaining the current tournament schedule. The

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only interests WIAA has identified in prohibiting religious withdrawals—avoiding forfeits and protecting against the alleged unfairness of participants having to observe a player to whom they lost later drop out of the tournament—hardly rise to the level of a "grave and immediate danger to public health, peace and welfare." *First Covenant II*, 840 P.2d at 187 (cleaned up). They don't apply at all to withdrawals between the various stages of the postseason, where substitution for unavailable players is already provided for under WIAA rules. And for intra-tournament withdrawals, the current secular exceptions undermine these interests to the same extent.

Regardless, a less restrictive means is available for WIAA to accomplish these interests with respect to intra-tournament withdrawals—it could allow the player who would have advanced but for the player who withdraws to advance anyway. If a constitutional provision encouraging state actors to "make every effort to accommodate religious freedom, rather than uncompromisingly enforce [their] ordinances," means anything, it means that WIAA should have to attempt a commonsense accommodation like this rather than enforce Rule 22.2.5 against religious objectors. *See First Covenant II*, 840 P.2d at 188.

C. WIAA's actions likely violate Wash. Rev. Code § 28A.600.200.

Finally, J.N.C. also has a likelihood of success under Wash. Rev. Code § 28A.600.200, which prohibits WIAA from discriminating, "in connection with any function it performs, on the bas[i]s of … creed."

Section 28A.600.200 does not specify the standard for whether "creed" discrimination has occurred, and the Washington courts haven't yet had occasion to interpret it. But two other Washington statutes prohibit "creed" discrimination in other contexts in similar terms. *See* Wash. Rev. Code § 49.60.180(3) (prohibiting employers from "discriminat[ing] against any person in … terms or conditions of employment because of … creed"); *Id.* § 28A.642.010 (prohibiting "[d]iscrimination in Washington public schools on the basis of … creed [or] religion"). And Washington has interpreted both

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to require the defendant to "reasonably accommodate … religious practices," unless it would be an "undue hardship." *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 203-04 (Wash. 2014) (employers); see also *Prohibiting Discrimination in Washington Public Schools: Guidelines for School Districts to Implement Chapters 28A and 28A.642.640 RCW and Chapter 392-190 WAC*, Office of Superintendent of Pub. Instruction (2012), http://bit.ly/2KgHEIr (schools). Because Washington courts read state statutes "relating to the same subject matter" "in pari materia," *see, e.g., In re Yim*, 989 P.2d 512, 518-19 (Wash. 1999), the Washington Supreme Court would likely interpret Wash. Rev. Code § 28A.600.200 to contain the same requirement. *See Matsuura v. Alston & Bird*, 166 F.3d 1006, 1008 n.3 (9th Cir. 1999) ("In the absence of a [state] Supreme Court decision on point, we must predict how the Court will decide the issue[.]").

Applying that standard here, WIAA's actions violate Wash. Rev. Code § 28A.600.200. It would not be an "undue hardship" to accommodate J.N.C. by scheduling the state championships to avoid the Sabbath. The golf and some girls' volleyball state championships are *already* scheduled on weekdays, and the tennis championship is unticketed, meaning that there are no potential ticket revenues to lose. Moreover, numerous venues in Washington with sufficient capacity will surely be available on the relevant weekdays even if the current venue were not.

Still less would it be an undue hardship merely to permit J.N.C. to withdraw from postseason competition when a Sabbath conflict arises. Whatever harm is suffered by other competitors when a player withdraws, that's the same harm WIAA already tolerates with withdrawals for "injury, illness or unforeseen events." And even *that* alleged harm would evaporate if WIAA simply allowed the player who would have advanced but for the withdrawing player to advance in the withdrawing player's stead.

Indeed, although no Washington court has yet applied state law prohibiting religious discrimination to the scheduling of high-school sports competitions, the Supreme Court of Oregon has done so, on facts analogous to those here. *See Nakashima*

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v. Or. State Bd. of Educ., 185 P.3d 429 (Or. 2008). There, Seventh-day Adventist basketball players sued the Oregon School Activities Association (OSAA), alleging that OSAA's scheduling of the state basketball championship tournament on the Sabbath violated an Oregon statute prohibiting "religious and other forms of discrimination in state-funded school and interschool activities." *Id.* at 431-32 (citing Or. Rev. Stat. § 659.850). OSAA argued that the suggested alternatives to Saturday play would undermine "the several goals that OSAA seeks to advance in scheduling … , such as maximizing revenue, maximizing participation by athletes and attendance by fans, minimizing expenses to fans and participants, [and] minimizing student time away from school." *Id.* at 442. The lower courts ruled in its favor. *Id.* at 432.

But the Oregon Supreme Court reversed and remanded. "[T]he foremost objective of the tournament is to give students the opportunity to *participate* in sports," the court explained—yet Saturday play foreclosed that objective for Saturday Sabbath-observers. *Id.* at 443. Moreover, OSAA's other alleged "goals are often competing ones," so any scheduling decision would "compromise[] each of them to some degree." *Id.* at 442. OSAA thus could not prevail simply by pointing out that any given alternative would have "downsides"; instead, it would have to demonstrate, with evidence, that the negative overall effect of the suggested alternatives "would jeopardize OSAA's ability to hold the tournament." *Id.* at 442-43.

These same principles demonstrate why WIAA's conduct likely violates Wash. Rev. Code § 28A.600.200. WIAA exists to give students the opportunity to participate in interscholastic activities—yet WIAA's scheduling decisions, combined with its application of Rule 22.2.5, exclude Seventh-day Adventists like J.N.C. from participating in any postseason play *at all*. Moreover, moving the tournament to weekdays would have minimal effect on any other scheduling objective—which is why WIAA already holds 15 other tournaments on weekdays only.

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II. The other preliminary-injunction factors are satisfied.

Irreparable harm. First, J.N.C. will be irreparably harmed absent preliminary relief. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Arevalo v. Hennessy*, 882 F.3d 763, 766-67 (9th Cir. 2018) (citation omitted). Indeed, simply "demonstrating the existence of a colorable First Amendment claim" allows "a party seeking preliminary injunctive relief [to] establish irreparable injury." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). Thus, because J.N.C. "has, at a minimum, raised a colorable claim that the exercise of his religious beliefs has been infringed, he has sufficiently established that he will suffer an irreparable injury absent" preliminary relief. *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005).

Moreover, the harm J.N.C. will suffer if he is forced to sit out postseason tennis competition is likewise irreparable—and indeed is just the kind of harm that preliminary injunctions are designed to prevent. *See* Wright & Miller, 11A *Federal Practice & Procedure* § 2947 (3d ed.) (preliminary injunction's purpose is "to preserve the court's power to render a meaningful decision after a trial on the merits"). W.F. West's sub-district tournament is slated to begin in October—far too soon for this litigation to run its course and for J.N.C. to obtain final relief. Thus, if J.N.C. cannot obtain a preliminary injunction, then part of the relief he seeks—the ability to participate in this year's postseason tennis competition—will become forever unavailable before his claims are ever adjudicated. That is paradigmatic irreparable injury.

Public interest. Preliminary relief is likewise in the public interest. The Ninth Circuit has "consistently recognized the significant public interest in upholding First Amendment principles," *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (quoting *Sammartano*, 303 F.3d at 974), and this case should be no exception.

Further, "[t]he public interest inquiry primarily addresses impact on non-parties," and here many nonparties stand to benefit from the requested relief. *Sammartano*,

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303 F.3d at 974. J.N.C.'s team itself includes another Seventh-day Adventist affected by WIAA's actions in the same way J.N.C. is, *see* Paul Decl. ¶ 15, Ex. B, and two Saturday Sabbath observers on a 1A boys' tennis team sought (unsuccessfully) a Sabbath accommodation last year. Lee Hughes, *Local Parent Requests WIAA Honor Saturday Sabbath for Student Players*, Cheney Free Press (May 23, 2019), https://perma.cc/R92K-E8WN. Meanwhile, a preliminary injunction entered now—more than nine months before the tournament is slated to begin—would give all other participating schools abundant opportunity to make any necessary additional preparations.

Balance of equities. Finally, "the balance of equities favors [J.N.C.], whose First Amendment rights are being chilled." *Doe*, 772 F.3d at 583. On one side of the ledger is J.N.C., who must abandon his faith to participate fully in the extracurricular life of his school. On the other is WIAA, which is being asked to (1) adjust the dates of a tournament more than nine months in the future and (2) extend an already-existent Rule allowing postseason withdrawals in cases of physical disability (because of "injury" or "illness") to one squarely analogous situation—withdrawals in cases of religious disability. That balance supports preliminary relief.

CONCLUSION

The Court should grant this motion and enter an order (1) enjoining WIAA from holding matches in the 2019–20 2A Boys State Tennis Championship during the Sabbath, unless an alternative solution could be reached that would allow J.N.C. to participate in any matches for which he is otherwise qualified; or, in the case of unavoidable conflict that satisfies strict scrutiny, (2) enjoining WIAA from enforcing its Rules 22.2.5 and 22.2.6 against J.N.C. to prevent him from withdrawing from postseason competition in the event of a conflict with the Sabbath.

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Respectfully submitted this 6th day of August, 2019.

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