

Eric S. Baxter (DC BN 479221)*
Daniel H. Blomberg (DC BN 1032624)*
Nicholas R. Reaves (DC BN 1044454)*
Kayla A. Toney (DC BN 1644219)*
Abigail E. Smith (CA SBN 330347)
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave., Suite 400
Washington, DC 20006
202-955-0095 tel / 202-955-0090 fax
ebaxter@becketlaw.org / dblomberg@becketlaw.org

Kimberlee Wood Colby (DC BN 358024)*
CENTER FOR LAW & RELIGIOUS FREEDOM
8001 Braddock Road, Suite 302
Springfield, VA 22151
703-642-1070 tel / 703-642-1075 fax
kcolby@clsnet.org

*Attorneys for Plaintiffs (*admitted pro hac vice)*

[Additional Counsel listed on Signature Page]

**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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20 U.S.C. § 40713, 4

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

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

11 **LEGAL STANDARD AND ARGUMENT**

12 The District attempts to “doubl[e]” FCA’s burden by labeling its injunction request as “mandatory.”
 13 Resp.4. Yet the injunction FCA seeks is instead “a classic form of prohibitory injunction” that “prevents
 14 future constitutional violations,” *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017), and
 15 “prohibit[s] enforcement of a new ... policy,” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061
 16 (9th Cir. 2014). FCA seeks a return to the status quo before Defendants’ unlawful actions occurred:
 17 restoration of its recognition as an ASB-approved club with the same benefits other ASB-approved clubs
 18 enjoy, without discrimination due to its religious leadership standards. In response to this litigation, the
 19 District has further altered the status quo with a new gerrymandered Policy that prevents FCA from even
 20 being able to apply for recognition without violating its First Amendment rights. FCA asks only for
 21 resumed access to ASB-approved status—the “last, uncontested status which preceded the pending
 22 controversy,” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th
 23 Cir. 2009)—and one which Pioneer FCA held throughout this past academic year. That said, even under
 24 the mandatory-injunction standard, FCA has shown that the law and facts “clearly favor” its position,
 25 *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994), and absent relief, “very serious”
 26 constitutional harm will occur that is “not compensable in damages.” *Hernandez*, 872 F.3d at 999; *BLinC*
 27 *v. Univ. of Iowa*, 2018 WL 4701879, at *15 (S.D. Iowa 2018) (granting preliminary injunction to restore
 28 a student group’s recognized status).

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

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

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

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

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

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

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

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

26
27 ¹ Of course, the EAA preempts school district policies, not vice versa. “The EAA provides religious
28 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).

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

4 Further, numerous other student clubs are affiliated with national organizations that impose national
5 standards, including approval authority over leadership selection. For example, the Leland Red Cross
6 club members must sign a code of conduct and follow the mission statement of the global Red Cross
7 network, and officers “may be removed” for “not acting in accordance with the American Red Cross
8 Code of Conduct.” Blomberg II Decl. Ex. A. Members of the Interact Club at Pioneer “must possess
9 good character and leadership potential,” and officers must be elected “with the approval of the
10 sponsoring Rotary club.” Blomberg II Decl. Ex. B (“all decisions, policies and actions ... of the club
11 shall be subject to the authority of the sponsoring Rotary club ... and policy established by Rotary
12 International”). Such lack of uniformity has long been a basis for showing that a public school cannot
13 claim a “safe harbor” to discriminate against a disfavored student group. *Colin*, 83 F. Supp. 2d at 1146-
14 47 (finding that differential treatment between the Gay Straight Alliance and the Red Cross Club and
15 Key Club meant the District failed to reach the EAA’s safe harbor). Defendants’ effort to defeat the
16 EAA’s application based on supposedly heavy-handed control by outsiders thus fails.

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

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

21 Courts have repeatedly explained that controlling leadership selection *is* controlling content of
22 speech, because controlling *who* speaks on behalf of a group affects *what message* the group conveys.
23 Br.14-15, 23-24 (collecting cases). This “principle applies with special force with respect to religious
24 groups,” as their “very existence is dedicated to ... expression,” and “the content ... of a religion’s
25 message depend[s] vitally on the character” of its leaders. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 200-
26 01 (2012) (Alito, J., joined by Kagan, J., concurring). Moreover, “[s]peech restrictions based on the
27 identity of the speaker are all too often simply a means to control content.” *Reed v. Town of Gilbert*, 576
28 U.S. 155, 163, 170 (2015) (“laws favoring some speakers over others” often “reflect[] a content

1 preference,” which is “presumptively unconstitutional”); *accord Boyer v. City of Simi Valley*, 978 F.3d
 2 618, 621 (9th Cir. 2020). So too in the EAA context, where courts have recognized that leadership
 3 selection restrictions are limitations on speech. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 858
 4 (2d Cir. 1996); Br.14.² The leaders at issue in this case are those selected by Pioneer FCA specifically
 5 to lead the group in its religious teaching, worship, and prayer. ECF No. 102-6 at 3-4. The District’s ban
 6 on asking those leaders to affirm Pioneer FCA’s faith inherently alters the content of the club’s speech.
 7 ECF No. 102-6 at 25; Br.8 (Defendants’ testimony admitting student leaders are “essential” to the
 8 “direction and tenor” of club and “should represent the club’s purpose” and “viewpoints”).

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

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

25 The District argues that restoring access to FCA would “exalt[]” FCA over “political and
 26

27 _____
 28 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.

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

9 The District remarkably argues that by allowing *other* religious speech, it is not discriminating
10 against student FCA clubs on the basis of *their* religious speech. Resp.9. But religions are not fungible,
11 and the District’s suggestion otherwise reflects its troubling pattern of accepting only religious views
12 that District employees perceive as “healthy and unifying,” and not those deemed “bullshit.” Glasser Tr.
13 174:24-175:14; ECF No. 102-5 at 104. That discrimination among religions violates the “clearest
14 command of the Establishment Clause ... that one religious denomination cannot be officially preferred
15 over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). Which is why the EAA forbids such state-
16 enforced religious conformity, but instead ensures space for “clubs of a most controversial character”
17 even when administrators would prefer to give “access” and “official recognition” “only to clubs of a
18 more conventional kind.” *Mergens*, 496 U.S. at 259 (Kennedy, J., concurring).

19 **II. The District’s Refusal to Recognize FCA Violates the Free Exercise Clause.**

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

21 As FCA explained in its opening brief, *Tandon v. Newsom* said that it was “clear” that “regulations
22 are not ... generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause,
23 whenever they treat *any* comparable secular activity more favorably than religious exercise.” 141 S. Ct.
24 1294, 1296 (2021). And “whether two activities are comparable for purposes of the Free Exercise Clause
25 must be judged against the asserted government interest that justifies the regulation at issue.” *Id.*; *accord*
26 *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543-44 (1993) (regulations that
27 infringe government’s asserted interests “in a similar or greater degree” than the prohibited religious
28 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

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

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

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

24 _____
 25 ³ Defendants suggest that student club voters are free to secretly select leaders on grounds barred by
 26 the Policy. Resp.7, 22. This suggestion, which exists nowhere in the Policy, only hurts them. It indicates
 27 the Policy is not reasonable, still fails Free Exercise scrutiny (since many other clubs and activities can
 28 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.

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

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

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

21 **B. The Policy and its enforcement are not neutral.**

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

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

1 of the school year, and called FCA’s religious beliefs “bullshit,” “of a discriminatory nature,” and “a
2 hurtful message and a problem.” Br.6, 19. Espiritu told the Pioneer “Climate Committee” (which
3 included Glasser) that it “need[s] to take a united stance” because FCA’s Statement of Faith “goes
4 against core values” of Pioneer. ECF No. 102-2, at 257. Principal Espiritu himself admitted that the mere
5 existence of FCA’s religious beliefs was sufficient in his mind to deny FCA recognition. Espiritu I Tr.
6 200:21-201:2. And on the same day District staff denied Pioneer FCA’s application, they approved the
7 Satanic Temple Club’s, knowing it intended to “openly mock” FCA. ECF No. 102-1, 84:11-20, 122:13-
8 15; ECF No. 102-1 at 353; Blomberg II Decl. Ex. E; ECF No. 102-2, 106:20-108:1.

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

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

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

11 Indeed, Glasser drew up the blueprint for the District’s actions against FCA. To send the message to
12 students that Pioneer rejected FCA’s beliefs, Glasser pressured “Herb [Espiritu] and SJUSD” to publicly
13 speak out against FCA and to exclude them from club activities like the yearbook, both of which Pioneer
14 did almost immediately. ECF No. 102-1, 202:1-9; Espiritu II Tr. 11:6-12:12, Glasser Tr. Ex. 126. And
15 he suggested that Pioneer drive a wedge between Pioneer FCA and “the national FCA organization,” so
16 that the students can “have the same club, but under a different name” and with religious beliefs he
17 found more agreeable, Espiritu II Tr. Ex. 132, which the District has also repeatedly pressured Pioneer
18 FCA to do and continues to do in their briefing before this Court. Resp.4-5.⁴

19 The District has also doubled down on its complaint-driven enforcement scheme, which further
20 targets FCA and other groups with unpopular views. The District admits that “[t]here is no ongoing
21 monitoring of club practices” and the principal and District staff only get involved if “a matter is brought
22 directly to the attention of a principal.” Resp.15. The District also admits that the District never
23 “affirmatively investigated all clubs” and that the school Activities Director “never conducted in-depth
24

25 ⁴ The District’s briefing likewise demonstrates religious targeting by repeatedly attacking the specific
26 content of certain FCA beliefs, beliefs which the Supreme Court has recognized as being “decent and
27 honorable,” held “in good faith by reasonable and sincere people.” *Obergefell v. Hodges*, 576 U.S. 644,
28 672, 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”).

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

11 **III. The District’s Actions Violate FCA’s Freedom of Speech and Freedom of Association.**

12 The District’s attempt to control FCA’s speech and association by preventing it from asking its
 13 leaders to share its faith violates the free speech and association protections of the First Amendment.
 14 Nor can the District hide behind *Truth*, as *Truth* only permits restrictions that are ““viewpoint neutral
 15 and reasonable in light of the purpose served by the forum.”” *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 651
 16 (9th Cir. 2008) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

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

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

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

15 **IV. The District’s Actions Violate the Religion Clauses.**

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

26
 27 ⁵ The District effectively concedes that FCA is an expressive association entitled to First
 28 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.

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

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

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

23 **CONCLUSION**

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

1
2 Dated: September 20, 2021

Respectfully submitted,

3 By: /s/ Daniel H. Blomberg

4 Daniel H. Blomberg (DC BN 1032624)*

5 Eric S. Baxter (DC BN 479221)*

Nicholas R. Reaves (DC BN 1044454)*

6 Kayla A. Toney (DC BN 1644219)*

7 Abigail E. Smith (CA SBN 330347)

THE BECKET FUND FOR RELIGIOUS LIBERTY

1919 Pennsylvania Ave., Suite 400

8 Washington, DC 20006

202-955-0095

9 ebaxter@becketlaw.org / dblomberg@becketlaw.org

10 Kimberlee Wood Colby (DC BN 358024)*

11 CENTER FOR LAW & RELIGIOUS FREEDOM

8001 Braddock Road, Suite 302

12 703-642-1070 tel / 703-642-1075 fax

13 kcolby@clsnet.org

14 Stephen C. Seto (CA SBN 175458)

Steven N.H. Wood (CA SBN 161291)

15 Christopher J. Schweickert (CA SBN 225942)

16 SETO WOOD & SCHWEICKERT LLP

2300 Contra Costa Boulevard, Suite 310

17 Pleasant Hill, CA 94523

925-938-6100 tel / 925-262-2318 fax

18 sseto@wcjuris.com / cjs@wcjuris.com

19 *Attorneys for Plaintiffs*

20 (*admitted *pro hac vice*)