Reed N. Smith (VA BN 77334)*
Kimberlee Wood Colby (DC BN 358024)*
(*admitted *pro hac vice*)
CENTER FOR LAW & RELIGIOUS FREEDOM
8001 Braddock Road, Suite 302
Springfield, VA 22151
703-642-1070 tel / 703-642-1075 fax
rsmith@clsnet.org / kcolby@clsnet.org

Stephen C. Seto (CA SBN 175458)
Steven N.H. Wood (CA SBN 161291)
Christopher J. Schweickert (CA SBN 225942)
SETO WOOD & SCHWEICKERT LLP
1470 Maria Lane, Suite 300
Walnut Creek, CA 94596
925-938-6100 tel / 925-262-2318 fax
sseto@wcjuris.com / cjs@wcjuris.com

Attorneys for Plaintiffs
JANE DOE, JESSICA ROE, AND
FELLOWSHIP OF CHRISTIAN ATHLETES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE DOE, JESSICA ROE, and FELLOWSHIP OF CHRISTIAN ATHLETES, an Oklahoma corporation,

Plaintiffs,

vs.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, in its official capacity, NANCY ALBARRÁN, in her official and personal capacity, HERB ESPIRITU, in his official and personal capacity, and PETER GLASSER, in his official and personal capacity.

Defendants.

CASE NO. 5:20-cv-2798-LHK

JUDGE: Hon. Lucy H. Koh

PLAINTIFFS' RESPONSE AND OBJECTIONS TO DEFENDANTS' MOTION TO DISMISS (dkt. 25)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The Equal Access Act ("EAA") expressly prohibits the discrimination at issue. 20 U.S.C. §§ 4071-74. Congress passed the EAA in 1984 "by wide, bipartisan majorities in both the House and the Senate" "to address perceived widespread discrimination against religious speech in public schools." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990). For 36 years, the EAA has protected both religious and LGBT student groups seeking to meet for disfavored speech. *See, e.g.*, *Mergens* (protecting religious student group); *Straights and Gays for Equality v. Osseo Area Schools*, 540 F.3d 911 (8th Cir. 2008) (protecting LGBT student group). Defendants concede that schools in the San Jose Unified School District (the "District") are bound by the EAA. *See* Defendant's Motion to Dismiss ("Mot."), dkt. 25, at 14 & Exh. A, dkt. 25-1. Under clear, binding precedent, schools violate the EAA when they withhold official recognition and related benefits from religious student groups even if they allow the groups to meet informally. *Mergens*, 496 U.S. at 247; *see also Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002) ("[W]e hold that the School District violated … the Act … by denying [the] Bible club the same rights and benefits as other School District student clubs."); *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993) ("[Religious] students have a right to meet on school property on the same basis as other noncurriculum-related clubs.").

For many years and without incident, students formed groups of the Fellowship of Christian Athletes ("FCA"), a religious organization, at high schools within the District. However, when Peter Glasser, a teacher in the District, used his classroom to disparage Plaintiffs' religious beliefs, the District quickly revoked recognition from FCA. Defendants refused to reinstate recognition to the Fellowship of Christian Athletes while recognizing the Satanic Temple Club. Defendants coordinated with the Satanic Temple Club to subject Plaintiffs to a campaign of harassment and intimidation. Defendants' actions were based on the religious content of Plaintiffs' speech, which is a direct violation of the EAA. *See* 20 U.S.C. § 4071(a) (prohibiting denial of equal access to students "on the basis of the religious … content of the speech at such meetings"). "[A] school's decision to deny recognition to the club because of [its leadership criteria] is a decision based on 'the content of the speech at [the] meetings,' within the meaning of the Equal Access Act." *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 859 (2d Cir. 1996).

Separate and apart from the EAA's requirements, established precedent protects Plaintiffs' freedom of speech from discrimination based on religious content and viewpoint. The Supreme Court has consistently held that school officials cannot deny official recognition and its benefits to religious groups because of the officials' disagreement with a group's religious viewpoint or content of their speech. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("[S]peech … cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) ("[It is] viewpoint discrimination … [to] select[] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 393 (1993) ([A school district] discriminates on the basis of viewpoint [when it] permit[s] school property to be used for the presentation of all views about family issues … except those dealing with the subject matter from a religious standpoint."); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) ("Having created a forum generally open to student groups, the University [may not] enforce a content-based exclusion of religious speech.").

FCA student groups welcome all students to be members. Moreover, any student who affirms their agreement with FCA's religious beliefs and commits to live accordingly may become a student leader. Amended Complaint ("AC"), dkt. 14, at ¶ 36. Nonetheless, Defendants have denied recognition to Plaintiffs' student group while recognizing numerous student organizations that deny membership or leadership in violation of the District's policies. *Id*. at ¶¶ 91-92. Binding precedent in the Ninth Circuit establishes that Defendants may not, as here, attempt to rely on a selectively enforced policy to exclude religious speech. *See Alpha Delta Chi-Delta Chapter v. Reed,* 648 F.3d 790, 803 (9th Cir. 2011) ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly.").

Here, the District, perhaps sensing the weakness of its position, asks the Court to deny all of Plaintiffs' claims for prospective relief as moot due to its temporary suspension of in-person instruction related to COVID-19. Applying the standard principles for mootness, numerous federal courts in California have rejected claims of mootness based on temporary measures taken in response to COVID-19. The Court should do the same here.

ARGUMENT

I . Plaintiffs' claims present a live controversy.

This suit challenges Defendants' ongoing unlawful refusal to grant official recognition to FCA student groups and their campaign of harassment against Plaintiffs. *See, e.g.*, AC ¶¶ 1, 17-19, 53-59, 64-72. Defendants suggest that because the District "will be continuing distance learning until at least October 4, 2020," this case is now moot. Mot. at 5. Defendants offer no representation that they will officially recognize FCA student groups once on-campus instruction resumes, much less offer any assurances that meet the "'heavy burden' of making 'absolutely clear that [the District] could not revert to its policy of excluding religious organizations.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Srvs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Instead, Defendants continue to deny recognition to student FCA groups because of the groups' religious beliefs and speech.

A. Defendants fail to demonstrate that either an Equal Access Act or First Amendment forum does not currently exist.

Defendants concede that "rights granted under the EAA extend *not just to physically meeting on school premises*, but also to being provided the perks associated with recognition as an official student group." Mot. at 4 (emphasis added). Defendants further acknowledge that the "ASB continues to exist." *Id.* at 5. Defendants, therefore, can have a forum for student organizations and provide benefits regardless of whether in-person meetings are occurring. If Defendants provide *any form* of official recognition and benefits to any noncurriculum-related group, then they must offer the same to religious student groups. *Mergens*, 496 U.S. at 247; *Prince*, 303 F.3d at 1090, 1094. Defendants do not assert that no noncurriculum-related student groups currently are officially recognized, but merely that the District is not accepting "new" applications. Mot. at 5.

Fora are not merely defined by physical location. *See Rosenberger*, 515 U.S. at 830 ("The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."). Plaintiffs allege they have been denied and continue to be denied benefits, such as recognition, funding, and inclusion in the yearbook, that are not dependent on in-person meetings. *See, e.g.*, AC ¶¶ 9, 55; *see also Prince*, 303 F.3d at 1090 ("[W]e hold that access to ASB funding,

the yearbook, the public address system, and the bulletin boards is required by the Act."). Indeed, nearby California school districts have resumed student organization activities while also practicing distance learning. *See* Declaration of Rigo Lopez at ¶ 3 (attached).

B. Defendants' temporary measures do not meet the "heavy burden" for mootness.

1. The standard for mootness is stringent.

But even if the Court were to accept that the District has temporarily closed its forum, the District's reliance on a temporary cessation is insufficient to render this case moot. The standard for mootness for prospective relief is "'stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013) (quoting *Laidlaw*, 528 U.S. at 189). Accordingly, "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307-308 (2012) (quotation marks and citations omitted). Courts are "less inclined to find mootness where the 'new policy … could be easily abandoned or altered in the future.'" *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (quoting *Bell*, 709 F.3d at 901).

Given the stringent standard for mootness, it is not surprising that a number of California federal courts have rejected arguments that temporary conditions related to COVID-19 render injunctive relief moot. *See Whitaker v. Sharky's Beverly Hills, Inc*., 2020 WL 3800419, at *4 (C.D. Cal. May 27, 2020) (holding stay-at-home order did not render case moot where "there is no indication that customers will *never* be able to dine-in again."); *Brandy v. Villanueva*, 2020 WL 3628709, at *3 (C.D. Cal. Apr. 6, 2020) (holding case not moot where sheriff could not indicate "how in the future the COVID-19 crisis is going to impact the County that [he] is sworn to protect.")

2. Defendants' concession that remote learning is temporary is fatal to its claims of mootness.

Any change in the District's policies regarding recognition of student organizations, and Defendants have identified none, is only temporary. The high schools at issue moved to distance learning "at this time" "because of the ongoing pandemic" and will revisit that decision as soon as

October 4, 2020. Mot. at 4-5. Moreover, they do not suggest any change in policy that would grant official recognition to Plaintiffs when in-person instruction resumes. Defendants have recognized many noncurriculum-related student groups for years (AC ¶¶ 7, 46-49, 59, 78-90). This temporary hiatus cannot serve as the basis for mootness any more than the closure of schools for summer vacation. See *Laidlaw*, 528 U.S. at 190 (noting that injunctive relief would not be mooted by a "moratorium [that] by its terms was not permanent.").

Examining Defendants' actions under the factors the Ninth Circuit considered in *White v. Lee* confirms that this case is not moot. 227 F.3d 1214 (9th Cir. 2000). In that case, the Ninth Circuit held that a policy change mooted the case where the policy change: (1) "is broad in scope and unequivocal in tone"; (2) "addresses all of the objectionable measures … officials took against the plaintiffs"; (3) "'confesses that [the litigation] was the catalyst' for the new policy"; (4) had been renewed for five years; and (5) officials did "not engage[] in conduct similar to that challenged by the plaintiffs." *Id*. at 1243; *see also Rosebrock*, 745 F.3d at 972 (discussing *White* factors). Here, Defendants do not point to *any* change in the relevant policies, much less one that "addresses all of the objectionable measures" raised by Plaintiffs. Moreover, Defendants indicate the move to virtual learning is temporary and was caused by factors unrelated to this litigation. Finally, Plaintiffs' opposition to injunctive relief indicates that they intend to continue refusing recognition to the FCA student groups. *See Knox*, 567 U.S. at 307 ("[S]ince the union continues to defend the legality of the Political Fight–Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future."). "Ultimately, the question remains whether the party asserting mootness 'has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.'" *Rosebrock*, 745 F.3d at 972 (quoting *White*, 227 F.3d at 1244). Defendants have fallen far short of making absolutely clear that they will not continue to deny recognition to student FCA groups or subject their students to targeted harassment. Plaintiffs' claims are not moot.

C. This case is ripe for review.

Defendants further suggest that this case is not ripe for review. Mot. at 4. The basis for Defendants' ripeness challenge is unclear, but it appears that Defendants contend Plaintiffs lack imminent injury based on the District's suspension of athletic team meetings. *See* Mot. at 5-6. The

District's voluntary, temporary suspension of athletic activities is irrelevant to the issues before the Court. "FCA chapters meet regularly to advance the religious mission of FCA … to transmit and reinforce the religious beliefs of FCA as stated in the FCA Statement of Faith." AC ¶ 45. The EAA protects groups regardless of whether they are related to the District's curriculum or extracurricular activities. *Mergens*, 496 U.S. at 237 ("'noncurriculum-related student group[s]' … are those that are not related to the body of courses offered by the school"). Defendants' continued refusal to recognize FCA student groups is injury irrespective of whether sports teams are meeting.

For prospective relief, a plaintiff need only establish "that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable." *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 642 (9th Cir. 2008) (*overruled on other grounds by Los Angeles Cnty, Cal. v. Humphries*, 562 U.S. 29 (2010)). "[A] plaintiff may demonstrate that an injury is likely to recur by showing that the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy." *See Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations omitted). An alleged pattern or practice of officially sanctioned behavior also establishes likely future harm. *See B.K. by next friend Tinsley v. Snyder,* 922 F.3d 957, 974 (9th Cir. 2019).

In *Truth*, the Ninth Circuit held that a school district's reliance on its nondiscrimination policy to deny recognition to a religious student group "strongly suggest[s] that no similar applications will ever be approved," and the group had standing to seek prospective relief. 542 F.3d at 642. Plaintiffs allege that the Defendants cited and relied on written policies to support their actions. *See* AC ¶¶ 47, 107, 108, 112, 116-17, 129. Indeed, Defendants themselves claim to be enforcing written District policies. *See* Mot. at 14; *see also* Levine Declaration, Ex. A (dkt. 25-1).

Plaintiffs have alleged injuries that have already occurred and will continue to occur without court intervention. *See, e.g.*, AC ¶ 9 ("Defendants have violated and *are violating* the EAA and the First and Fourteenth Amendments through their revocation *and continued denial* of club recognition" (emphasis added)); *id.* at ¶ 17 ("[T]he harassment of FCA students *has continued unabated*" (emphasis added)); *id.* at ¶ 19 ("Defendants *will continue* to target Plaintiffs for

discrimination and harassment without intervention of the Court." (emphasis added)).[1] Plaintiffs have formed student groups at District high schools for years to promote their religious mission. AC ¶¶ 2, 45, 46, 59. Even after the District revoked recognition from all FCA student groups, students re-applied for recognition, and continued to meet after recognition was again denied and despite being faced with repeated harassment. *Id*. at ¶¶ 54, 58, 63-72. Defendants' ongoing approval and facilitation of harassment and threats to Plaintiffs for resisting harassment demonstrate official practice. *See, e.g.*, AC ¶¶ 1, 10, 18-19, 63-72, 109.

Moreover, "there is no ripeness barrier" where a plaintiff "has already suffered constitutional injury." *See, e.g.*, *United States v. Purvis*, 940 U.S. 1276, 1278 (9th Cir. 1991).

II. Plaintiffs' claims survive Defendants' claims for Sovereign Immunity.

A. Congress has abrogated sovereign immunity for claims under the Equal Access Act.

Defendants may not claim Eleventh Amendment immunity with respect to Plaintiffs' claims under the EAA. *See* AC ¶¶ 48-58, 122-32; *see also Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 976 (1994) ("[T]he Eleventh Amendment does not apply if Congress has abrogated its scope with respect to a given issue."). Congress abrogated Eleventh Amendment immunity for claims arising under any "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1); *see also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (noting that "42 U.S.C. § 2000d-7[] expressly abrogate[s] States' sovereign immunity."); *J.C. by and through W.P. v. Cambrian Sch. Dist.*, 2014 WL 229892, at *5 (N.D. Cal. Jan. 21, 2014) (holding that Eleventh Amendment immunity is abrogated by 42 U.S.C. §§ 2000d-7). By its express terms, the EAA prohibits "any public secondary school which receives Federal financial assistance" from "discriminat[ing] against" students like Plaintiffs and thus falls within Congress's abrogation of Eleventh Amendment immunity in § 2000d-7(a)(1). Plaintiffs may seek damages for their EAA claims against Defendants in their official capacities.

[1] Defendants suggest that Plaintiffs only allege harassment of Doe and Roe. However, several of Plaintiffs' allegations speak to harassment of FCA members generally. *See* AC ¶ 94 ("Defendants' actions … including harassment toward FCA and its students, have caused emotional distress to FCA students."); *see also* AC ¶¶ 60-76 (alleging incidents of harassment against members).

B. Sovereign immunity does not apply to suits for prospective relief.

Defendants acknowledge they are not entitled to the dismissal of prospective relief in their official capacities under the *Ex parte Young* doctrine. Mot. at 20. Sovereign immunity "does not bar claims seeking prospective injunctive relief against state officials to remedy a state's ongoing violation of federal law." *Az. Students' Ass'n v. Az. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (citing *Ex parte Young*, 209 U.S. 123, 149–56 (1908)).

Further, "[t]he *Young* doctrine allows individuals to pursue claims against a state for prospective equitable relief, including any measures ancillary to that relief." *Az. Students Ass'n*, 824 F.3d at 865 (citing *Green v. Mansour*, 474 U.S. 64, 68–71 (1985); *Hutto v. Finney*, 437 U.S. 678, 689–92 (1978)). Accordingly, the Court may award FCA injunctive relief, declaratory relief, costs, and attorney's fees. *See id.* ("prospective injunctive relief"); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 848 (2002) ("[T]he *Ex Parte Young* exception to Eleventh Amendment immunity applies to declaratory relief against state officials, just as it applies to injunctive relief."); *see also Missouri v. Jenkins by Agyei*, 491 U.S. 274, 279 (1989) ("[I]t must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment."). Therefore, FCA's claims for prospective relief against state officials in their official capacity are not subject to the Eleventh Amendment.

Defendants further argue that the District is not a proper party to this litigation. However, Plaintiffs did not sue the District, but rather the Board of Education, the District's governing body. AC ¶ 25. Governing boards can be sued under 42 U.S.C. § 1983. *See, e.g.*, *Harding v. City and County of San Francisco*, 602 Fed. Appx. 380, 383 (2015) (noting that Section 1983 applies when "the governing body itself caused the injury by adopting an unconstitutional policy or practice."); *see also Cal. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945, 950 (C.D. Cal. 1999) ("Because the Plaintiffs are suing only for prospective injunctive relief, and because the State Board of Education is the state governmental body responsible for the enforcement and administration of Proposition 227, the suit is not barred by the Eleventh Amendment.").

III. Plaintiffs' causes of action are based on clearly established rights.

A. Standard of Review

For purposes of ruling on a motion to dismiss, a court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). "In assessing the sufficiency of a complaint, "'[t]he role of the court ... is not in any way to evaluate the truth as to what really happened, but merely to determine whether the plaintiff's factual allegations are sufficient to allow the case to proceed.'" *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 947-48 (9th Cir. 2020) (quoting *Doe v. Columbia Univ.*, 831 F.3d 46, 59 (2d Cir. 2016)). As to Plaintiffs' Fifth, Sixth, Seventh, and Eighth Causes of Action, which are the only ones where Plaintiffs challenge sufficiency of the pleadings, a claim must be plausible on its face. *Caviness v. Horizon Community Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010).

Qualified immunity attaches if an official's alleged conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Nicholson v. City of Los Angeles*, 935 F.3d 685, 690 (9th Cir. 2019). "However, '[i]n order to find that the law was clearly established ... we need not find a prior case with identical, or even 'materially similar' facts. Our task is to determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful.'" *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006) (quoting *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136–37 (9th Cir. 2003)). In the Ninth Circuit, "[a] right can be clearly established even though there was no binding precedent in this circuit." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989). Where there is no binding precedent, the court should look "to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." *Id*.

B. Qualified immunity does not apply to prospective relief.

Importantly, qualified immunity does not affect Plaintiffs' claims for prospective relief. *See Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012) ("[C]laims for injunctive and declaratory relief are unaffected by qualified immunity."); *see also Am. Fire, Theft, & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991)) ("[A] simple and well-established principle disposes

of this appeal. 'Qualified immunity … does not bar actions for declaratory or injunctive relief.'" (quoting *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir.1989))).

C. Plaintiffs have a clearly established right to not be denied official recognition because of their religious viewpoint or beliefs.

1. The Equal Access Act – First Cause of Action

Defendants' refusal to recognize the FCA student groups because of their religious beliefs is clearly foreclosed under the plain text of the EAA and binding precedent applying the EAA. 20 U.S.C. § 4071(a) ("It shall be unlawful for any public secondary school … to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting … on the basis of the religious … or other content of the speech at such meetings."); *see also Mergens*, 496 U.S. at 238 ("[T]he purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other."); *Prince*, 303 F.3d at 1086 ("The School District also unlawfully discriminates against the World Changers, based on their viewpoint, when it prohibits them from engaging in … activities ... on an equal basis with other ASB groups."). The EAA applies even if a school allows "only one 'noncurriculum-related student group' to meet … on school premises during noninstructional time." *Mergens*, 496 U.S. at 236; *compare with* AC ¶¶ 48-49, 80-83.

Here, the alleged facts are nearly identical to those in *Prince* and *Mergens*. The school district denied recognition to a religious club, while allowing it to meet. *See Mergens*, 496 U.S. at 247 (requiring official recognition for religious student group despite the fact that the "school apparently permits [the religious students] to meet informally after school"); *Prince*, 303 F.3d at 1077 (requiring full recognition for religious student group that was otherwise allowed to meet); *see also* AC ¶¶ 53-59 (alleging that Defendants revoked and denied recognition due to Plaintiffs' religious speech); *id*. at ¶¶ 63-64 (acknowledging that student FCA chapters continued to meet). As in *Prince* and *Mergens*, the district granted favored student organizations benefits, such as ASB funding and inclusion in the school yearbook, that it denied to the religious student group; indeed many of the same benefits at issue in *Prince* are at issue in this case. *See Mergens*, 496 U.S. at 247 ("Official recognition allows student clubs to be part of the student activities program"); *Prince*, 303 F.3d at

1086 (" The School District discriminates against Prince and the World Changers by denying them equal access to [ASB] funds … [and] charging them advertising fees to appear in the school yearbook."); *see also* AC ¶ 56 ("[D]enial of recognition results in the loss of numerous benefits associated with recognition, including: access to faculty advisors; inclusion in the school yearbook; access to Associated Student Body ("ASB") funds). In *Prince,* as here, the school district relied on a policy against "sponsoring" the student group's activities, *see* Mot. at 14, and Defendants concede that "the recognition (or non-recognition) of any club does not involve government sponsorship of any particular type of speech or viewpoint." Mot. at 8; *see also Mergens*, 496 U.S. at 250 ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."); *Prince*, 303 F.3d at 1084 ("Like the Supreme Court in *Mergens*, we reject the argument that simply because of a limited approval and oversight process by the district, the district impermissibly sponsors the club within the meaning of the Act or as proscribed by the First Amendment.").

Moreover, *Prince* acknowledges that a long line of Supreme Court precedent establishes that schools cannot deny recognition or benefits to students because of their religious viewpoint:

> Like the church in *Lamb's Chapel*, the World Changers seeks to address a subject otherwise permitted under this forum, the teaching of personal, social, civil and cultural growth, from a religious standpoint. See *Good News*, 121 S. Ct. at 2101. That these more secular goals are pursued through a religious perspective or religious means cannot form the basis of excluding them from the ASB forum. *See, e.g., id.* (holding that denying access to school facilities to Bible club that sought to teach "morals and character" from an evangelical religious perspective was viewpoint discrimination); *Rosenberger*, 515 U.S. at 831 (holding that refusing student funds to a newspaper that wrote from a religious perspective was viewpoint discrimination); *Lamb's Chapel*, 508 U.S. 393–94, (finding that it was viewpoint discrimination to prohibit use of school facilities for a film exhibit that addressed family values from a religious viewpoint).

Id. at 1092. The parallels between Defendants' denial of recognition and the binding precedents in *Prince* and *Mergens* vividly demonstrate that Defendants' actions violate clearly established law. As discussed *infra*, Defendants rely on narrow, inapplicable exceptions to the clear precedents in *Mergens* and *Prince*; but the cases cited by Defendants further support that Defendants' actions violate Plaintiffs' clearly established rights.

2. The First Amendment's Free Speech and Expressive Association Rights – Second and Third Causes of Action

As discussed above, *Prince* acknowledges a long line of cases holding that a school's refusal to recognize a religious student group not only violates the EAA but constitutes viewpoint discrimination in violation of the First Amendment. *See Prince*, 303 F.3d at 109 ("The School District's restriction on access to facilities is based purely on the World Changer's religious viewpoint in violation of the First Amendment."); *see also* page 2, *supra*. As in *Prince*, Defendants have refused to recognize religious student groups because they disagree with their religious viewpoint. *Compare id*. at 1086 *with* AC ¶¶ 1, 53-59. In *Good News Club*, the Supreme Court "reaffirm[ed its] holdings in *Lamb's Chapel and Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 111-12. Against these clear precedents, the District officially recognizes other student groups that speak on the same topics but refuses to recognize the student FCA groups due to their religious viewpoint. *See* AC ¶¶ 53-59; 85-90; 135.

Numerous federal courts have recognized religious student groups' free speech and free exercise rights to select their leaders. In *InterVarsity Christian Fellowship/USA v. University of Iowa,* 408 F. Supp. 3d 960, 990-994 (S.D. Iowa 2019), *appeal filed,* No. 19-3389 (8th Cir., Nov. 5, 2019), the court *denied qualified immunity* to university administrators who had withdrawn recognition from a religious student group because, like Plaintiffs, it required its leaders to agree with its religious beliefs, including about matters of sexual conduct. *Id*. at 994. *Cf. Business Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 899 (S.D. Iowa 2019), *appeal filed,* No. 19-1696 (8th Cir., Apr. 3, 2019) ("The University allows groups to speak about religion, homosexuality, and other protected traits through their leadership criteria, but BLinC may not express its views on these subjects."); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 413 F. Supp. 3d 687, 697 (E.D. Mich. 2019) (denying dismissal of claim regarding "the forced inclusion of leaders who do not share with InterVarsity a Christian faith").

Defendants' interference with FCA's message also infringes on Plaintiffs' associational rights. AC ¶¶ 53-59, 95-106, 143-148. It is well-established that Defendants "may not restrict speech or

association simply because it finds the views expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 187–88 (1972). This is especially so for the expression of the beliefs of Plaintiffs' religious associations like FCA. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."); *see also* AC ¶¶ 2-3, 36, 39-45. The right to associate includes the right to select leaders who will preserve the group's message. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *see also* III.C.3.c & III.D.2, *infra*.

3. Defendants' cases do not justify failure to comply with the Equal Access Act or the Constitution.

FCA welcomes all students to join its student groups, and any student who affirms their commitment to FCA's religious values can be a student leader. AC ¶ 36. Yet, Defendants argue that the District's unlawful actions did not violate clearly established law: *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), and *Alpha Delta*, 648 F.3d 790. However, both cases reinforce that Plaintiffs' claims for recognition and its benefits are supported by clearly established law.

a. Even if *Martinez* were applicable, which it is not, it prohibits selective enforcement of a policy against religious student groups.

As Defendants acknowledge (Mot. at 15), *Martinez* addressed enforcement of an "all-comers" policy, not a nondiscrimination policy. *See* 561 U.S. at 678 (the Court "considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution"); *id.* at 678 n.10 ("declin[ing] to address" "arguments about the Nondiscrimination Policy"). Therefore, *Martinez* is not applicable because Defendants are not enforcing an "all-comers" policy. Mot. at 15 ("The Supreme Court left open the question of whether the same result would ensue if the school enforced a nondiscrimination policy instead of an 'all comers' policy.").[2] Instead, *Martinez* reinforces Plaintiffs' claim for relief because the Court

[2] Plaintiffs do not concede that Defendants are in fact enforcing the District's nondiscrimination policy or that the District's nondiscrimination policy would apply to a religious student group's requirement that its leaders agree with its religious beliefs. Defendant Espiritu's email states that "San José Unified does not sponsor programs and activities with discriminatory practices," but then immediately and accurately disclaims sponsorship of FCA when it states that "FCA meetings are not sponsored by Pioneer High School nor any San José Unified staff member." Mot. Ex. A.

remanded the question of whether the all-comers policy had been selectively enforced against the religious group. 561 U.S. at 697; *id.* at 694 (policy was facially viewpoint neutral because it "require[ed] *all* student groups to accept *all* comers"); *id.* at 706 (Kennedy, J., concurring) (school could not "adopt[] or enforce[] its [all-comers] policy with the intent or purpose of discriminating or disadvantaging a group on account of its views").

b. *Alpha Delta* and *Truth* also stand for the proposition that a school district cannot selectively enforce a policy against a religious student group.

Since *Prince*, the Ninth Circuit has twice examined whether an educational institution can refuse to recognize a religious student group due to violations of its nondiscrimination policy. *See Alpha Delta*, 648 F.3d at 795; *Truth*, 542 F.3d 634. In both cases, the Ninth Circuit held that the school may do so *only if the nondiscrimination policy is uniformly enforced*. *See Alpha Delta*, 648 F.3d at 803 ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly."); *Truth*, 542 F.3d at 650 ("[T]o the extent Truth argues that it was denied an exemption from the non-discrimination policy based on the content of its speech, we hold it has raised a triable issue of fact, and reverse the district court's summary judgment."). The selective enforcement of a nondiscrimination policy was an issue of fact that precluded summary judgment.

This disposition necessarily indicates that the non-uniform application of the school's nondiscrimination policy, if proven at trial, *would violate the student group's rights*. Thus, a school violates a religious student group's clearly established rights when it applies its nondiscrimination policy against a religious student group more strictly than other student groups. Other federal courts have likewise held that the selective application of a nondiscrimination policy violates the First Amendment rights of religious student organizations. *InterVarsity Christian Fellowship*, 413 F. Supp. 3d at 699; *Business Leaders in Christ*, 360 F. Supp. 3d at 899; *InterVarsity Christian Fellowship*, 408 F. Supp. 3d at 969-70, 979-83.

Defendants have granted official recognition to groups that have membership and leadership requirements that violate the District's nondiscrimination policies. AC ¶¶ 91-92, 136. Plaintiffs' allegations, at a minimum, entitle Plaintiffs to discovery into whether Defendants have enforced a

nondiscrimination policy against other noncurriculum-related student groups to the same extent they have enforced it against the FCA student groups.

c. *Alpha Delta* and *Truth* involved a religious club's membership requirements, not its leadership requirements.

Moreover, *Truth* and *Alpha Delta* both involved *membership* criteria, rather than *leadership* criteria. *See Truth,* 542 F.3d at 644 ("[W]e … limit our analysis to the general membership restrictions."); *see also Alpha Delta*, 648 F.3d at 796 ("These membership requirements conflict with San Diego State's nondiscrimination policy[.]"). As Plaintiffs have alleged, FCA does not have membership requirements only leadership requirements. AC ¶¶ 3, 36; *see also id*. at ¶ 56.

Leadership affects an organization's message. In *Truth*, the Ninth Circuit expressly noted that its opinion was consistent with the Second Circuit's ruling in *Hsu v. Roslyn Union Free School District* that the EAA *prohibited* a school district from applying its nondiscrimination policy to deny recognition to a religious club that required its leaders to agree with its religious beliefs. *See id.* at 647 ("Our decision is not inconsistent with that of the Second Circuit.") (citing *Hsu*, 85 F.3d 839 (2d Cir. 1996)). As the Ninth Circuit explained, "In *Hsu*, a Christian group was seeking to impose a religious test for all of its *leadership* positions. … In contrast, we are only concerned with Truth's *general* membership requirements." *Id*. at 647. As the Second Circuit held in *Hsu*:

> [W]hen an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school's decision to deny recognition to the club because of the exclusion is a decision based on "the content of the speech at [the] meetings," within the meaning of the Equal Access Act.

85 F.3d at 859. The Second Circuit noted that religious leadership criteria are "calculated to make a certain type of speech possible, and will affect the 'religious ... content of the speech at [the] meetings,' within the meaning of the Equal Access Act." *Id*. at 858 (quoting 20 U.S.C. § 4071(a)). "Christian leaders necessarily shape[] the content of the religious speech at their meetings, because the nature and quality of the speech at the meetings is dependent upon the religious commitment of the officers." *Id.* at 857. This is especially so for religious groups. *See* III.D.2, *infra*.

4. Plaintiffs have a clearly established right to not be denied a generally available benefit because of their religious beliefs.

As the Supreme Court held in *Trinity Lutheran*, requiring a religious organization to "disavow its religious character" to obtain "'even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights.'" 137 S. Ct. at 2022 (quoting *Sherbet v. Verner*, 374 U.S. 398, 404 (1963)). "[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Id.* at 2015 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Regardless of the penalty or disability imposed, a policy that discriminates based on religion has always been, and remains, "odious to our Constitution." *Id.* at 2025. The Court has recently noted that the Free Exercise Clause's "'basic principle[s]'" "'protect[ing] religious observers against unequal treatment'" have "*long guided* this Court." *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran*, 137 S. Ct. at 2019) (emphasis added)); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)). Here, Plaintiffs have been denied official recognition and its benefits because of their religious identity. *See* AC ¶¶ 1, 7-9, 53-59, 156-62.

5. Defendants' selective enforcement of policy violates Plaintiffs' clearly established Equal Protection rights – Ninth Cause of Action

Defendants' refusal to recognize Plaintiffs' religious student groups, as indicated above, also violates the Equal Protection Clause. *See* AC ¶¶ 19, 53-59, 85-94. In the Ninth Circuit, "[a] showing that a group 'was singled out for unequal treatment on the basis of religion' may support a valid equal protection argument." *Alpha Delta*, 648 F.3d at 804 (quoting *Truth.*, 542 F.3d at 650); *see also Christian Science Reading Room v. City & County of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986) (holding airport's refusal to rent space to religious groups violates the Equal Protection Clause). Additionally, "[p]ublic school administrators who fail to take protective measures against religious harassment may be held liable for religious discrimination in violation of the equal protection guarantees of the California and federal constitutions if a plaintiff can show that the defendants either intentionally discriminated against the plaintiff or acted with deliberate

indifference." *Mosavi v. Mt. San Antonio Coll.*, 805 F. Appx. 502, 505 (9th Cir. 2020) (citing *Flores*, 324 F.3d at 1135) (2003); *see also* III.D.3, *infra*; *compare with* AC ¶¶ 1, 60-76; 120.

6. Defendants' Actions Compel Speech – Tenth Cause of Action

Defendants' attempts to force inclusion of leaders on Plaintiffs' expressive association forces Plaintiffs to adopt a message other than the one they intend. *See Dale*, 530 U.S. at 656; *Hsu*, 85 F.3d at 861 ("[Students] may try to preserve the content of the religious speech at their meetings by discriminating in a way that ensures that the Club's leaders will be committed to both its cause and a particular type of expression."); *see also* III.C.3.c *supra*. AC ¶¶ 2-3, 36, 39-45, 53-59, 101-106, 143-154. Defendants would also impose a policy on Plaintiffs that requires them to forsake their beliefs. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) ("By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.").

D. Plaintiffs' Fifth, Sixth, Seventh, and Eighth Causes of Action state causes of action for violation of clearly established rights.

1. Plaintiffs do not challenge the District's creation of a forum, but rather its unlawful discrimination against Plaintiffs' Religious Beliefs.

Defendants challenge the sufficiency of the pleadings only as to Plaintiffs' Fifth, Sixth, Seventh, and Eighth Causes of Action. Mot. at 6-7. Plaintiffs agree that the District's creation of a forum for student groups does not violate the Establishment Clause. Plaintiffs' claims are not based on such recognition violating the Establishment Clause.

2. Sixth Cause of Action: Ministerial Exception and Internal Autonomy.

The Supreme Court has unanimously affirmed that "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012). Government intrusion into a religious entity's choice of leaders violates both the Free Exercise Clause and the Establishment Clause:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's

> right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188–89; *see also id*. at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."). Concurring, Justices Alito and Kagan stressed that "the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression … applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Id.* at 200 (Alito, J., concurring).

FCA is a religious organization (AC ¶¶ 2-3, 39-45) and Defendants have unlawfully interfered with or attempted to influence FCA members' selection of those who will "personify their beliefs." *Hosanna-Tabor*, 565 U.S. at 188; *see also* AC ¶¶ 36, 56, 95-106, 179-83. Student leaders in FCA "educat[e] young people in their faith, inculcat[e] its teachings, and train[] them to live their faith[—]responsibilities that lie at the very core of" the FCA mission. *Id*.; c*ompare with* AC ¶¶ 95-106. The religious autonomy of religious organizations is deeply rooted in constitutional jurisprudence and goes back at least as far as 1872. *See id.* at 185 (citing *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666 (1872)). The Court confirmed that these principles were clearly established when it reiterated that *Hosanna-Tabor* protected religious organizations' autonomy in determining matters of "faith," "doctrine," and "church government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor*, 565 U.S. at 186). This includes "the selection of the individuals who play certain key roles." *Id.* Government officials' interference in such matters "would *obviously* violate the free exercise of religion, and any attempt by government to dictate *or even to influence such matters* would constitute one of the central attributes of an establishment of religion." *Id.* (emphases added). Even the two dissenting justices agreed that the ministerial exception applies to anyone "with a leadership role 'distinct from that of most of [the organization's] members'" or who "personif[ies] the organization's 'beliefs' and 'guide[s] it on its way.'" *Id.* at 2073 (quoting *Hosanna-Tabor*, 565 U.S. at 188). Similarly, the Ninth Circuit has frequently held that many "aspects of the minister-church relationship" are beyond government

officials' ken. *Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1181 (9th Cir. 2012) (citing cases); *see also Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835-36 (6th Cir. 2015) ("[T]he government cannot dictate to a religious organization who its spiritual leaders would be."). When determining which "key roles" are protected, the Court has noted that "[w]hat matters, at bottom, is what an employee does." *Our Lady*, 140 S. Ct. at 2064. Indeed, in public schools, these roles must fall to students to avoid potential Establishment Clause violations. *Mergens,* 496 U.S. at 253.

3. Targeting Religious Beliefs - Fifth Cause of Action

Defendants violate Plaintiffs' clearly established Free Exercise rights by targeting them for different treatment based on their religious beliefs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."); *see also Trinity Lutheran*, 137 S. Ct. at 2024 n.4 ("[A] law targeting religious beliefs as such is never permissible."). It has long been clearly established that government officials "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citing *Lukumi*, 508 U.S. at 534).

Here, Defendants have targeted Plaintiffs for their religious beliefs in at least three different ways. First, by denying them official recognition for their student club despite allowing other clubs that speak to the same subjects. Second, by discriminatory, non-uniform application of its club recognition policies. Defendants' denial of recognition reflects a disparity in treatment that reflects hostility toward FCA's religious viewpoint. AC ¶¶ 1,19, 48-59, 85-92; *see also*, *e.g., Lukumi*, 508 U.S. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."); *Alpha Delta,* 648 F.3d at 803 ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly."). Where the government grants individualized exceptions, it must have a compelling reason to deny such exception to religious groups. *Lukumi*, 508 U.S. at 537.

Third, Defendants have also knowingly and maliciously (AC ¶¶ 1, 19, 63, 120, 137) targeted Plaintiffs for harassment due to animus to Plaintiffs' religious beliefs. AC ¶¶ 1,10-19, 60-76. Plaintiffs' allegations align closely with the Ninth Circuit's decision in *Flores*, 324 F.3d 1130. *Flores* holds that school officials' "failure to enforce the District's disciplinary, anti-harassment and anti-discrimination policies to prevent physical and emotional harm to the plaintiffs," when combined with "intentional[] disciminat[ion]" or "deliberate indifference" violates the Constitution. *Id.* at 1135. Moreover, it is "clearly established" that in such instances the officials must "enforce District policies in cases of peer harassment [of religious students] in the same way that they enforce those policies in cases of peer harassment" for nonreligious students. *Id*. at 1137-38 (*citing City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Religion is such a constitutionally protected category. *See Masterpiece Cakeshop*, 138 S. Ct. at 1730 ("[T]his disparity in treatment reflected hostility on the part of the Commission toward [religious] beliefs."); *id.* at 1731 ("[E]levat[ing] one view of what is offensive over another … itself sends a signal of official disapproval."); *Lukumi*, 508 U.S. at 532 ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs[.]"). At minimum, Plaintiffs have alleged facts that would show Defendants violated Plaintiffs' clearly established rights under the Free Exercise Clause.

4. Government Hostility Toward Religion - Eighth Cause of Action

Defendants' violated the Free Exercise and Establishment Clauses when they, as government officials, expressed direct hostility toward Plaintiffs' religious beliefs. The First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1054 (9th Cir. 2010); *Lukumi*, 508 U.S. at 532 (citing cases). Mr. Glasser posted disparaging comments about the FCA Statement of Faith in his classroom where he taught FCA students. AC ¶¶ 5-7, 50-52, 198-200. The remaining Defendants adopted this message as their own. *Id*. ¶¶ 7-8, 53-59, 60-66. As Plaintiffs have specifically alleged, Mr. Glasser's Statement was "specifically targeted at FCA's religious beliefs and expressed disapproval of FCA's religious beliefs." AC ¶198; *see also id*. ¶¶ 50-52. Defendants' "statements and actions were intended to and had the effect of making

Plaintiffs feel like outsiders in their own community." AC ¶ 51, 115, 199; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (holding it "impermissible" for a school to indicate that students' religious beliefs make them "outsiders, not members of the political community").

Mr. Glasser's statement, and the District's adoption thereof, clearly violate the Establishment Clause. A teacher is a government speaker when addressing students in the classroom. *See Kennedy v. Bremerton*, 869 F.3d 813, 824 (9th Cir. 2017). Courts must be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools … [so that] the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 972 (9th Cir. 2011) ((quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)). Plaintiffs' alleged facts closely parallel those that the Court found constitute impermissible government hostility in *Masterpiece Cakeshop*. Defendants did not require Mr. Glasser to take down the statements, but rather adopted the statements as their own "judgment upon … the illegitimacy of [the FCA students'] religious beliefs and practices." 138 S. Ct. at 1731. The District continued to signal its disapproval of Plaintiffs' religious beliefs by not only allowing but encouraging students to harass and intimidate students at FCA meetings. AC ¶¶ 10, 11, 18,19, 60-76. When FCA students objected to this harassment, the District threatened the FCA students with punishment. *Id*. at ¶¶ 68, 71. Defendants' actions were intended to stigmatize and discourage FCA students in order to drive their views off-campus. *Id*. at ¶¶ 10-12, 57, 62-71.

The District relies heavily on *C.F. ex. rel. Farnan v. Capistrano Unified Sch. Dist.* to argue that Plaintiffs have not stated a cause of action. 654 F.3d 975 (9th Cir. 2011). However, the Court in *C.F.* did "not reach the constitutionality of any of [the teacher's] statements." *Id*. at 988. Moreover, *C.F.* was decided on *summary judgment*, after Plaintiff was allowed to probe into the motivations of the teacher. Indeed, the district court *denied* the school district's motion to dismiss. *C.F. ex. rel. Farnan v. Capistrano Unified Sch. Dist.*, No. 8:07-cv-1434, slip op., Document 15 (C.D. Cal. Mar. 10, 2008) (attached to Smith Declaration as Exhibit A). The court agreed with Plaintiffs that a statement by the government "sending primarily a message of … disapproval of religion" would state a cause of action. *Id*. at 3 (quoting *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir.

1994)); *see also* AC ¶¶ 5-10, 50-52, 135, 198. The court noted that "it cannot be said that [the statements] are inconsistent with an improper non-secular purpose." *Id*. Here, Defendants go beyond the pleadings to characterize Mr. Glasser's statements as "secular." Mot. at 10. Much as in *C.F.*, Defendants "offer alternative motivation, … but that is a factual matter for another day." Smith Declaration, Exhibit A, at 3. Mr. Glasser's statement that FCA's Statement of Faith and Sexual Purity Statement "deeply sadden[]" him does not speak to a secular motivation on its face.

Furthermore, the Ninth Circuit noted that the teacher's statements at issue were connected to the curriculum and arguably had a pedagogical purpose. *C.F.*, 654 F.3d at 988 ("Both parties agree that AP Euro could not be taught without discussing religion.). Here, there was no apparent pedagogical purpose or intent behind Mr. Glasser's statement. The statement was not raised as a part of a lesson, and instead remained posted in the classroom for a week. There is little difference between the facts as alleged and a teacher posting in his classroom, "I condemn the Five Pillars of Islam. Do you?" In short, there is a wide gulf between the statements at issue in *C.F.* which may "challenge students to foster critical thinking skills and develop their analytical abilities," *id.*, and statements like the one at issue, where the statement itself and the District's subsequent actions indicate that the intent was not to educate but to condemn students' specific religious beliefs.

5. Denominational Discrimination - Seventh Cause of Action.

In *Larson v. Valente*, the Supreme Court noted that "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. 228, 244 (1982). Here, Plaintiffs have alleged that the District has granted official recognition to other religious clubs, including Christian, Jewish, Muslim, and Satanic clubs, as well as at least one club that promotes religious pluralism and the Communist Club that presumably promotes atheism. AC ¶¶ 11, 85-86, 190. Yet the District revoked the FCA student groups' recognition because of their religious beliefs. This governmental preference among religious groups—as illustrated so strikingly by District officials granting recognition to the Satanic Temple Club while simultaneously denying recognition to the FCA student group—sufficiently states a cause of action for violation of a clearly established right under the Free Exercise and Establishment Clauses.

E. The Government cannot retaliate against the exercise of constitutional rights or condition benefits on foregoing constitutional rights– Twelfth and Eleventh Causes of Action.

Plaintiffs have alleged that Defendants subjected them to a campaign of harassment because they exercised First Amendment rights. *See* AC ¶¶ 10-19, 60-76 (describing harassment); *see also id*. at ¶ 232 (harassment was retaliatory). In the Ninth Circuit, the "right to be free from a campaign of harassment and humiliation in retaliation for constitutionally protected speech [is] clearly established." *Aydelotte v. Town of Skykomish*, 757 Fed. Appx. 582, 583-84 (9th Cir. 2018) (citing *Gibson v. United States*, 781 F.3d 1334, 1338 (9th Cir. 1986)); *see also Flores*, 324 F.3d 1130 (holding that school's failure to equally enforce peer harassment policies is constitutionally impermissible); AC ¶¶ 61-64 (District refuses to enforce bullying policy for FCA students).

Defendants conditioned club recognition and benefits on Plaintiffs' agreement not to discuss and promote their religious beliefs. AC ¶¶ 8, 56, 221-228. The government cannot condition benefits on the forfeiture of constitutional rights. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Courts have regularly held that the government cannot condition funding on the refusal to discuss certain subjects. *See, e.g., Legal Svcs. Corp. v. Velaquez*, 531 U.S. 533, 548–49 (2001) (finding unconstitutional condition where lawyers receiving funds from Legal Services Corporation were restricted from litigating certain types of cases); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (finding unconstitutional condition where federal statute prohibited editorializing by stations receiving grants from the Corporation for Public Broadcasting).

IV. The Coverdell Teacher Protection Act does not protect Defendants under the alleged facts.

Defendants argue that the individual defendants are protected from damages liability under the Coverdell Teacher Protection Act ("CTPA"). 20 U.S.C §§ 7941 *et seq*. The CTPA is not appropriate for a motion to dismiss because it is an affirmative defense for which Defendants bear the burden of proof. *See L.G. though M.G. v. Columbia Public Schs.*, No. 2:19-cv-4191, 2020 WL 2441419, at *9 (W.D. Mo. May 12, 2020) (citing *Zell v. Ricci*, 957 F.3d 1, 18 n.19 (1st Cir. 2020)). For CTPA immunity to apply, the Defendants must meet five requirements. The cited conduct must (1) "fall within the scope of the school employee's responsibilities"; (2) "conform with federal, state, and

local laws"; (3) "fall within what the official is licensed, certified or authorized to do"; (4) "involve no willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed"; and (5) "involve no vehicle." *Wormuth v. Lammersville Union Sch. Dist*., 305 F. Supp. 3d 1108, 1131 (E.D. Cal. 2018).

Accordingly, the CTPA only applies to claims of general negligence, not to illegal or willful acts. *See id.* ("Plaintiff's negligence claim involves no allegations that Principal Yeager violated any laws, nor allegations that Principal Yeager's conduct was willful, criminal, grossly negligent, reckless, conscious or flagrant."). Here, Defendants' actions both violate federal law and were willful misconduct. Defendants "knowingly allowed *and facilitated* harassment of FCA students," AC ¶ 1; "targeted the FCA students for negative treatment due to … [Plaintiffs'] religious beliefs and speech," AC ¶ 10; "coordinated with Satanic Temple Club students about their intention to harass the Student FCA Chapter," AC ¶ 11; threatened to punish Plaintiffs if they did not acquiesce to harassment, AC ¶¶ 16, 68, 71; were informed of and approved the District's illegal actions against Plaintiffs, AC ¶¶ 19, 109; and "sought to shame students in the classroom, and knowingly allowed and facilitated harassment of Plaintiffs." AC ¶ 232. Where harassment is ascribed to students, that harassment was done in coordination with Principal Espiritu and Mr. Glasser. AC ¶¶ 10, 64-67. Defendants acts were "malicious, oppressive, and in reckless disregard for Plaintiffs' rights." AC ¶ 120.

Plaintiffs have sufficiently alleged that these actions were both willful and based on Plaintiffs' religious beliefs in violation of the First and Fourteenth Amendment. *See, e.g.*, AC ¶¶ 1, 120-32, 142-54. Indeed, Defendants do not challenge the sufficiency of Plaintiffs' pleadings on many counts. In contrast, the cases cited by Defendants do not involve intentional targeting or situations in which school officials did more than fail to act. The facts as alleged plausibly indicate that the Defendants are not entitled to CTPA immunity at the motion to dismiss stage.

Similarly, Defendants' intentional and unlawful behavior precludes immunity from punitive damages under the CTPA and California law. *See J.E.L. v. San Francisco Unified Sch. Dist.*, 185 F. Supp. 3d 1196, 1202 (N.D. Cal. 2016) (denying motion to dismiss under Section 818 immunity where plaintiffs alleged "defendants' acts were 'negligent, careless, reckless, and malicious' and

noting that "Federal Rule of Civil Procedure 9(b) allows state of mind, including malice, to be 'alleged generally'").

V. To the extent that the Court finds Plaintiffs' Complaint insufficient, the Court should grant Plaintiffs leave to amend.

Federal Rule of Civil Procedure 15(a) states that a "court should freely give leave [to amend pleadings] when justice so requires." In the Ninth Circuit, "'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). This is especially so where, as here, "the current motion to dismiss is 'the first pleading[ ] to attack the sufficiency of [the plaintiffs'] allegations, the current decision[ ] by the district court ... [is] the first to address the sufficiency of those allegations, and [the plaintiffs are] seeking [their] first opportunity to cure those deficiencies.'" *Roney v. Miller*, 705 Fed. Appx. 670, 671 (9th Cir. 2017) (quoting *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1183 (9th Cir. 2016)). This includes amending pleadings to assert claims against individual officers. *See Az. Students' Ass'n*, 824 F.3d at 871 ("The district court abused its discretion when it failed to grant the ASA leave to amend its complaint to conform with the requirements of *Young*.").

VI. Objections

Plaintiffs object to the Exhibit B to the McMahon Declaration. Exhibit B is not the student leadership application used in the Bay Area FCA region, which includes the San Jose Unified School District, during the relevant time. Lopez Declaration at ¶¶ 4-5. The correct application was attached to the Complaint and is attached as Exhibit A to the Lopez Declaration.

CONCLUSION

For the foregoing reasons, the Court should DENY Defendants' motion to dismiss. To the extent the Court grants any part of Defendants' motion, the Court should give Plaintiffs leave to amend their complaint to address any deficiencies.

Respectfully Submitted,

Dated: September 8, 2020

CENTER FOR LAW & RELIGIOUS FREEDOM

By: /s/ Reed N. Smith

Reed N. Smith (VA SBN 77334)*
Kimberlee Wood Colby (DC BN 358024)*
(*admitted *pro hac vice*)
8001 Braddock Road, Suite 302
703-642-1070 tel / 703-642-1075 fax
rsmith@clsnet.org / kcolby@clsnet.org

SETO WOOD & SCHWEICKERT LLP

Stephen C. Seto (CA SBN 175458)
Steven N.H. Wood (CA SBN 161291)
Christopher J. Schweickert (CA SBN 225942)
1470 Maria Lane, Suite 300
Walnut Creek, CA 94596
925-938-6100 tel / 925-262-2318 fax
sseto@wcjuris.com / cjs@wcjuris.com

Attorneys for Plaintiffs
Jane Doe, Jessica Roe, and Fellowship of Christian Athletes

Reed N. Smith (VA BN 77334)*
Kimberlee Wood Colby (DC BN 358024)*
(*admitted *pro hac vice*)
CENTER FOR LAW & RELIGIOUS FREEDOM
8001 Braddock Road, Suite 302
Springfield, VA 22151
703-642-1070 tel / 703-642-1075 fax
rsmith@clsnet.org / kcolby@clsnet.org

Stephen C. Seto (CA SBN 175458)
Steven N.H. Wood (CA SBN 161291)
Christopher J. Schweickert (CA SBN 225942)
SETO WOOD & SCHWEICKERT LLP
1470 Maria Lane, Suite 300
Walnut Creek, CA 94596
925-938-6100 tel / 925-262-2318 fax
sseto@wcjuris.com / cjs@wcjuris.com

Attorneys for Plaintiffs
JANE DOE, JESSICA ROE, AND
FELLOWSHIP OF CHRISTIAN ATHLETES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE DOE, JESSICA ROE, and FELLOWSHIP OF CHRISTIAN ATHLETES, an Oklahoma corporation,

Plaintiffs,

vs.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, in its official capacity, NANCY ALBARRÁN, in her official and personal capacity, HERB ESPIRITU, in his official and personal capacity, and PETER GLASSER, in his official and personal capacity.

Defendants.

CASE NO. 5:20-cv-2798-LHK

JUDGE: Hon. Lucy H. Koh

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that on September 8, 2020, I served the following documents on all counsel of record by filing with the Court's CM/ECF system.

1) Plaintiffs' Response and Objections to Defendants' Motion to Dismiss;
2) Declaration of Rigoberto Lopez in Support of Plaintiffs' Response;
3) Declaration of Reed Smith in Support of Plaintiffs' Response;
4) Proposed Order Denying Plaintiffs' Motion to Dismiss;

September 8, 2020 /s/ *Reed N. Smith*

Reed N. Smith
Counsel for Plaintiffs