Docket No. 22-15827

In the

United States Court of Appeals

For the

Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES,
an Oklahoma corporation, et al.,

Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 4:20-cv-02798-HSG · Honorable Haywood S. Gilliam, Jr.

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND TWENTY-ONE ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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ADDITIONAL *AMICI CURIAE*

Together with NWLC, the following *amici* join this brief:

1. Anti-Defamation League (ADL)
2. Birnbaum Women's Leadership Network, NYU Law
3. Equality California
4. Family Equality
5. Girls for Gender Equity (GGE)
6. League of Women Voters of the United States
7. Legal Aid at Work
8. National Association of Social Workers
9. National Center for Lesbian Rights
10. National Consumers League
11. National Crittenton
12. National LGBTQ Task Force
13. National Women's Political Caucus
14. Reproaction
15. SIECUS: Sex Ed for Social Change
16. SisterReach
17. The Women's Law Center of Maryland
18. Virginia Sexual and Domestic Violence Action Alliance
19. Women Lawyers On Guard Inc.
20. Women's Bar Association of the State of New York
21. Women's Law Project

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, each *amicus* hereby certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Women's Law Center ("NWLC") is a nonprofit organization that advocates for gender justice in the courts, in public policy, and in broader society to ensure that women and girls, and all people, can live free of sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, reproductive rights and health, workplace justice, and education, with particular attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination, including women and girls of color and LGBTQ people. NWLC has participated in numerous federal and state cases, including before U.S. Courts of Appeals and the U.S. Supreme Court, to ensure that rights and opportunities are not restricted based on sex and that all enjoy the protections against sex discrimination as promised by law.

NWLC and the twenty-one additional *amici* submit this brief to emphasize the importance of civil rights laws in guaranteeing equal opportunities and access for all, and that the existence of such protections does not open the door to

[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. NWLC also recognizes the substantial contributions of NWLC consulting attorney Harper Jean Tobin to the preparation of this brief.

permitting harmful discrimination. Preventing and addressing discrimination in public schools is an essential government interest that corresponds with larger societal nondiscrimination goals as reflected in our federal, state, and local civil rights laws. Accordingly, *amici*'s experience advocating for and litigating under our nation's civil rights laws, including for LGBTQ rights, would assist the Court in its resolution of this case.

INTRODUCTION

Schools in the San José Unified School District (the "District") employ nondiscrimination policies to "provide a safe school environment that allows all students equal access to District programs and activities." 6-ER-998.

The District applies its overarching nondiscrimination policies through specific implementing rules tailored to different types of school activities. *Compare* Cal. Code Regs. tit. 5 § 4925 (2022) (prohibiting discrimination in extracurricular activities), *with id.* §§ 4926–4927 (requiring membership in student clubs to be open to all students). Pursuant to these policies, District programs and activities, including student clubs, "shall be free from discrimination based on" protected characteristics, including "gender, gender identity and expression," "pregnancy, marital or parental status," "religion," and "sexual orientation." 6-ER-994; 6-ER-1045. To ensure an open and welcoming extracurricular environment, student leaders of registered clubs commit to not "adopt or enforce

any . . . leadership criteria that excludes any student based on gender, gender identity and or expression, . . . religion, . . . pregnancy, marital or parental status, . . . [or] sexual orientation." 6-ER-1046.

Students in registered clubs remain free to express controversial opinions and elect whomever they want to leadership positions; the District simply requires that all students be given an equal opportunity to fully participate, without being excluded on the basis of protected characteristics. Policies and practices, like the District's, that prohibit discrimination in school activities are commonplace in public education and indeed are required by longstanding civil rights laws and decades of jurisprudence interpreting those laws.[2]

[2] *See, e.g.*, 20 U.S.C. §§ 1681–1688 (Title IX of the Education Amendments of 1972) (prohibiting sex-based discrimination in federally funded educational programs); 34 C.F.R. pt. 106 (2022) (implementing rules for Title IX); Cal. Gov't Code § 11135 (West 2022) (prohibiting discrimination based on protected characteristics in all state-funded activities); Cal. Educ. Code § 220 (West 2022) (prohibiting discrimination based on protected characteristics in educational activities); Cal. Code Regs. tit. 5 §§ 4926–4927 (2022) (stating that membership in student clubs must be open to all students); 42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964) (prohibiting discrimination based on race, color, or national origin in any federally funded program); 29 U.S.C. §§ 701–796 (Rehabilitation Act of 1973) (guaranteeing equal employment opportunities for individuals with disabilities); 20 U.S.C. §§ 1400–1482 (Individuals with Disabilities Education Act of 2004) (requiring states to provide education for children with disabilities); 42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act of 1978) (prohibiting employment discrimination based on pregnancy); 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (upholding a neutral generally applicable

A crucial part of a school's mission is teaching students the "shared values of a civilized social order." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)). This includes "instilling [in students] the value of non-discrimination" and affording all students fair and equal opportunities to access student groups. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649 (9th Cir. 2008), *overruled on other grounds by Los Angeles County v. Humphries*, 562 U.S. 29 (2010). Accordingly, restricting access to certain benefits provided by the District "based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum." *Id.* This Court and the U.S. Supreme Court have upheld virtually identical policies against virtually identical challenges.

Plaintiffs-Appellants—Fellowship of Christian Athletes ("FCA National") and the Pioneer High School FCA student chapter ("Pioneer FCA")—indisputably violated the District's nondiscrimination policies by requiring student leaders to affirm FCA National's Statements of Faith and Sexual Purity ("Statements"). These Statements require prospective student leaders to affirm, among other things: "[t]he biblical description of marriage is one man and one woman in a lifelong commitment"; "[t]he Bible is clear in teaching on sexual sin including sex

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nondiscrimination policy that required student groups to provide equal access to all students.).

outside of marriage and homosexual acts"; and "[n]either heterosexual sex outside of marriage nor any homosexual act constitute an alternative lifestyle acceptable to God." 3-SER-657–58; 3-SER-671–72; 3-SER-681–84. By premising a student's leadership eligibility on acknowledgement of these Statements, Appellants created a discriminatory leadership opportunity that impermissibly excludes LGBTQ students, as well as students who support LGBTQ rights, from full participation in the club.[3]

The District decided that Pioneer FCA's determination to adopt FCA National's discriminatory pledge made Pioneer FCA ineligible to be an official student club under the Associated Student Body ("ASB") program because the Statements violated the District's nondiscrimination policies—not because of any hostility toward any student's religious beliefs. Even without official recognition, Pioneer FCA was still allowed to meet as a "student interest group" and continued to enjoy equal access to school facilities for meetings and events. Appellants sued in the Northern District of California, asking the court to direct the District to extend the benefits of the ASB program to FCA National-affiliated clubs despite the discriminatory restrictions on participation in club leadership positions. *See* 4-

[3] While *amici* write to highlight FCA's discrimination against LGBTQ students, the Statements also appear to discriminate against students on the basis of other protected characteristics, including religion, marital status, and pregnancy status. *See* 6-ER-1051–52.

SER-804–05. The District Court correctly denied Appellants' motion, finding that they failed to show that the District's nondiscrimination policies violated either the Constitution or the Equal Access Act, allowed for discretionary exceptions, or was selectively enforced. *See* 1-ER-2–22. Appellants then filed this appeal.[4]

Appellants ask a panel of this Court to render its precedents in *Alpha-Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), and *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), a nullity in practice. They claim that the District makes "exceptions" to its nondiscrimination policies for nonreligious clubs and programs, and thus must also permit FCA clubs to discriminate against LGBTQ students. But those other programs are not "exceptions" to the nondiscrimination policies. They take into account protected characteristics in completely different contexts, as part of achieving government interests in promoting equality, and subject to tailored legal parameters. School districts must comply with and be able to rely on longstanding civil rights laws, including Title IX, to establish a wide array of policies and programs that provide equal opportunities for all, including women and girls and LGBTQ students.

[4] *Amici* join Defendants-Appellees' argument that Plaintiffs-Appellants lack standing to seek prospective injunctive relief because they do not face imminent injury from the District's nondiscrimination policies. *See* Answering Br. 20–23. This appeal should therefore be dismissed for lack of standing. Should the Court nonetheless find the matter justiciable, *amici* write to address the merits of Appellants' arguments for purposes of the likelihood-of-success analysis.

Appellants' flawed arguments would create absurd results and unworkable conflicts with federal and state laws. Public schools would face a Hobson's choice of either granting nearly unlimited exemptions from existing laws and policies based on religious belief or abandoning a host of longstanding, widespread programs and practices that are expressly allowed—and in some cases required—by law. *Amici* respectfully request that this Court affirm the District Court's denial of a preliminary injunction.

ARGUMENT

I. THE DISTRICT'S CONSIDERATION OF PROTECTED CHARACTERISTICS AS PERMITTED BY CIVIL RIGHTS LAWS DOES NOT REQUIRE IT TO OFFICIALLY RECOGNIZE A CLUB THAT EXCLUDES LGBTQ STUDENTS.

Appellants seek to evade clear precedents upholding neutral, generally applicable nondiscrimination policies by claiming "exceptions" or "uneven enforcement" where none exists. *See Alpha Delta*, 648 F.3d at 801; *Truth*, 542 F.3d at 647. They attempt to do this primarily by reaching beyond the District's recognition of student clubs to analogize—however absurdly—their discriminatory policy to any aspect of the District's operations that considers student demographics, while ignoring the interests that are at stake in these vastly different

contexts.[5] Unlike Appellants' blanket exclusion of students on the basis of protected characteristics, the District's programs both *provide* equal opportunities and do not *exclude* students from educational and extracurricular opportunities. The District's reliance on, and compliance with, federal and state civil rights laws does not require it to officially recognize a club that excludes LGBTQ students.

Appellants' conclusory comparison of their exclusionary policy to an array of unrelated District activities, and to student groups that comply with nondiscrimination policies, ignores this Court's precedents, schools' reliance on longstanding federal and state civil rights laws, and schools' distinct and long-recognized interests in tailoring school programs to promote equal opportunities for all. It is well established that, within certain parameters provided by law, schools are allowed to maintain separate sports teams for boys and girls because of the specific interests at play. Similarly, the District's remedial programs that address specific challenges faced by disadvantaged groups must be considered in the context of their explicit goal of *promoting* inclusion in compliance with civil rights laws. None of these practices requires the District to allow a student group to bar

[5] *Amici* do not address in detail the range of specific allegations made by Appellants regarding various past and present school activities or student clubs, or the limited and sometimes contradictory record evidence regarding each. *Amici* focus instead on the broad implications of Appellants' arguments for all schools' efforts to promote equal opportunities in compliance with civil rights laws.

LGBTQ students from the opportunity to participate fully in an official school-approved club.

A. Sex-Separated Sports Teams Are Not Comparable to FCA's Exclusionary Policy.

Appellants incorrectly point to sex-separated school sports teams as an example of the District "permitting exclusion" in violation of its own nondiscrimination policies, without acknowledging that school-organized athletics involve completely different considerations, and are required by law to provide equal opportunities for all students. *See* Opening Br. 35. Federal and California law expressly permit schools to maintain separate sports teams based on sex in certain circumstances. Moreover, unlike the discriminatory policy that Appellant FCA National requires local affiliates like FCA Pioneer to implement, consideration of sex in school sports teams is carefully circumscribed by federal and state regulations and caselaw: sex separation is not permitted in all sports activities, and schools must ensure equal athletic opportunities between boys and girls, and for transgender students. The mere fact that the District—like virtually every school district in the nation—maintains separate teams for boys and girls for some sports activities cannot demonstrate differential treatment of religion, much less hostility to it.

The District's establishment of sex-separated sports teams is based on Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, parallel state

law, and equal protection principles. Far from authorizing the sex-based exclusion of a student from playing any sport, Title IX requires schools to provide "equal athletic opportunity" for all. 34 C.F.R. § 106.41(c) (2022) (listing non-exclusive factors for evaluating equality of opportunities, ranging from the provision of equipment and supplies to publicity). Where an institution's athletic program includes separate-sex sports teams, the institution must ensure that the athletic programs available to female students are comparable to those available to male students (and vice versa). If the institution fails to provide equal opportunities on separate-sex sport teams, then female students must be permitted to try out for the male athletic team (and vice versa).[6]

Similarly, California law requires that where "a local agency provides only one team in a particular sport for members of one sex but provides no team in the

[6] *See Brenden v. Ind. Sch. Dist. 742*, 477 F.2d 1292, 1302 (8th Cir. 1973) (rule prohibiting female students from participating in interscholastic athletics with male students was unconstitutional where schools "failed to provide [girls] with opportunities for interscholastic competition equal to those provided for males with similar athletic qualifications"); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 170 (D. Colo. 1977) (school district violated Fourteenth Amendment by providing interscholastic soccer only for male high school students, when sex separation was based on the "general physiological differences between males and females as classes without any regard for the wide range of individual variants within each class"); *Lantz ex rel. Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (regulation barring female students from trying out for the football team based on medical "averages and generalities" regarding the physical development of girls and boys violated female student's right to equal protection under the Fourteenth Amendment).

same sport for members of the other sex, and athletic opportunities in the total program for that sex have previously been limited, members of the excluded sex must be allowed to try out and compete with the local agency team." Cal. Code Regs. tit. 5, § 4921(b) (2022).

Nothing in the enforcement of Title IX or parallel state law permits a school to *exclude* any student from participating in school sports on the basis of sex. When analyzing a potential Title IX violation, courts examine "whether 'participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.'" *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 855 (9th Cir. 2014) (quoting 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979)). This analysis "begins with a determination of the number of participation opportunities afforded to male and female athletes." Off. for C.R., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. Dep't Educ. (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two. Even if substantial participation is not achieved, schools can still satisfy Title IX if they prove "'that the interests and abilities of' female students 'have been fully and effectively accommodated.'" *Ollier*, 768 F.3d

at 858 (quoting 44 Fed. Reg. at 71,418). This analytical framework again reflects Title IX's parameters, which were designed to promote equity and inclusion.[7]

This tailored approach in the context of school sports bears no resemblance to the complete exclusion of students based on a protected characteristic from a school-sponsored opportunity that Appellants seek. Additionally, because nearly every school district in the country relies to some extent on Title IX's tailored approach to school sports teams, Appellants' argument taken to its ultimate conclusion would mean that *all* public schools must permit such exclusionary student clubs if they have any sex-separated sports teams.

B. District Programs That Promote Equal Opportunity Are Not Comparable to FCA's Exclusionary Policy.

Appellants' repeated references to District policies and programs adopted to remediate specific challenges faced by disadvantaged groups ignore that those

[7] Appellants' cursory comparison to the District's Sportsmanship Policy omits that the policy is consistent with the terms and goals of Title IX to promote gender equity in athletics and to *prohibit* discrimination. *See* 7-ER-1287 ("No person shall on the basis of gender be excluded from participation in, be denied the benefits of, be denied equivalent opportunity in, or otherwise be discriminated against in interscholastic or intramural athletics."). While the policy permits "single-gender teams" where "equivalent opportunities are available to both genders in athletic programs," the policy is clear that "[t]he district shall not provide athletics *separately*" on the basis of gender. 7-ER-1287 (emphasis added). That is, the District's policy requires that athletic opportunities be available equally to all students, and that sex cannot be used as a basis on which to exclude a student from an athletic opportunity.

programs are tailored to the District's interests in *increasing* equality of opportunities and participation in the school community, and that they are adopted in compliance with longstanding civil rights laws. Moreover, the District Court found no reliable, admissible evidence that any such program excluded students based on protected characteristics. *See, e.g.*, 9-ER-1816 (Latino Male Mentor Group to "include an emphasis on engaging with the Pioneer community" and bridge achievement gaps); 10-ER-1850 (District's policy to ensure equal opportunities for married, pregnant, and parenting students, as required by applicable law); 10-ER-1851 (requiring provision of support services "authorized by Education Code 54746," such as "special school nutrition supplements for pregnant and lactating students"); 10-ER-1851 (permitting excused absences for "confidential medical appointments" or rendering "personal services . . . to a dependent"); 10-ER-1852 (requiring "reasonable accommodations" to lactating students). These programs facilitate the equal participation of students in educational opportunities.

Appellants' selective-enforcement argument ignores the stark contrast between their selection criteria, which impermissibly exclude students based on protected characteristics, and school activities that consider protected characteristics to ensure that *all students* receive equal opportunities. Consideration of protected characteristics in programs designed to remedy discrimination and

overcome obstacles to participation is simply not evidence of a lack of neutrality toward religion, especially when—unlike Appellants' discriminatory exclusion—such consideration is expressly permitted, and sometimes required, by federal and state civil rights laws. This Court has already rejected similar arguments, recognizing the "problems" inherent in the argument that sex-conscious policies that "Congress has specifically allowed for" somehow demonstrate discriminatory application of nondiscrimination policies. *Truth*, 542 F.3d at 648 n.2.

In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the U.S. Supreme Court made clear that educational institutions do not need to provide "special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program." 561 U.S. at 668. This Court should reject Appellants' attempt to make an end run around this precedent by claiming that the District's consideration of protected characteristics to create equal opportunities obligates the District to simultaneously provide "special dispensation" to engage in discrimination on the basis of protected characteristics.

Like Appellees in this case, school districts across the country strive to ensure that all students have equal access to educational opportunities across the programs they conduct and sponsor, and tailor those activities to promote equity, address historical and present-day discrimination, and comply with numerous

federal and state civil rights laws. With respect to specific areas of school-conducted or -sponsored activities, or employment, schools rely on provisions of laws, and applicable caselaw, that either permit or require limited consideration of protected characteristics—including sexual orientation, gender identity, disability, race, and national origin—in service of promoting equal opportunities for students, employees, and other individuals. As relevant here, such provisions of law do not permit categorical *exclusion* of individuals from opportunities on these bases, and instead require equitable opportunities for all.

II. SCHOOL CLUBS WITH OPEN PARTICIPATION THAT PROMOTE OPPORTUNITIES FOR UNDERSERVED STUDENT GROUPS ARE NOT COMPARABLE TO A CLUB THAT EXCLUDES LGBTQ STUDENTS.

Open-membership student clubs are a crucial aspect of the District's educational mission. The vast majority of high schools in the United States provide students with some form of extracurricular engagement, recognizing that participation in such activities "may increase students' sense of engagement or attachment to their school, and thereby decrease the likelihood of school failure and dropping out." *Extracurricular Participation and Student Engagement*, Nat'l Ctr. Educ. Stats. (June 1995), https://nces.ed.gov/pubs95/web/95741.asp. Involvement in extracurricular activities has also been associated with "academic performance, positive school perceptions, and high self-esteem." Brian Knop & Julie Siebens, U.S. Census Bureau, Report No. P70-159, *A Child's Day: Parental*

Interaction, School Engagement, and Extracurricular Activities: 2014, at 4 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/P70-159.pdf.

In assessing a school's mission and how it structures its educational and extracurricular policies, courts have understood "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969); *see also Martinez*, 561 U.S. at 686–87 ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. Schools . . . enjoy 'a significant measure of authority over the type of officially recognized activities in which their students participate.'" (citation omitted) (quoting *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 240 (1990))).

The District has the authority to create parameters for official group recognition and has chosen to do so through policies that promote inclusion and equal opportunity, recognizing a broad spectrum of clubs, including religious and Christian student groups, such as the Shekinah Christian Club at Leland, the Jewish Culture Club and Christian Club at Willow Glen, and, notably, Pioneers for

Christ, an approved group led by the individual Plaintiffs that held the same views as Pioneer FCA, but did not have the same exclusionary leadership requirements that caused Pioneer FCA to be de-recognized. *See* 5-SER-833 ¶ 101.

Promoting educational opportunities for all students, regardless of race, gender, sexual orientation, religion, and other protected characteristics ensures that all students are welcome to join any extracurricular club in which they are interested. A public school does not violate the Constitution when it "condition[s] its official recognition of a student group . . . on the organization's agreement to open eligibility for membership and leadership to all students." *Martinez*, 561 U.S. at 668. In direct contravention of this precedent, Appellants seek to exclude a specific category of students from participation in leadership roles through a pre-clearance oath. *See* 5-SER-818–19 ¶ 42. But by requiring Pioneer FCA, "in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition," the District "d[oes] not transgress constitutional limitations." *Martinez*, 561 U.S. at 669 (holding that student organization that sought to violate nondiscrimination policy for religious reasons "enjoy[ed] no constitutional right to state subvention of its selectivity"). Applicable law clearly permits the District to ensure that educational and extracurricular opportunities are accessible to all students, including those who face discrimination, such as LGBTQ students who disproportionately experience

bullying, interpersonal violence victimization, and suicide risk.[8] *See* Michelle M. Johns et al., *supra*, at 18 n.8.

The District's policies require that every student must have the opportunity to participate as members and leaders in official clubs, including through open membership whereby clubs democratically choose their leaders. The policies are oriented toward expanding, not limiting, opportunities for all students. Like the school policy in *Truth*, which prohibited officially recognized student organizations from discriminating on grounds like race, gender, and religion, the District's nondiscrimination policies align with larger "pedagogical goals" and are "reasonable in light of the purposes served by the ASB." 542 F.3d at 649. Nothing in the District's policies requires students to change their religious beliefs or views;

[8] LGBTQ high school students "experienced more bullying at school (33% among LGB students and 17% among heterosexual students), more sexual dating violence by dating partners (LGB, 16%; heterosexual, 6%), and more suicide attempts (LGB, 23%; heterosexual 5%) . . . than their heterosexual peers." Michelle M. Johns et al., *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students—Youth Risk Behavior Survey, United States, 2015–2019*, 69 Morbidity & Mortality Wkly. Rep. (Supp.) 19, 19 (2020), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf. LGBTQ youths are also more likely to drop out of high school because of "the hostile school climate created by continual bullying and harassment from peers due to their sexual orientation" and face a disproportionate risk of homelessness. Am. Psych. Ass'n, *Facing the School Dropout Dilemma* 6 (2012), https://www.apa.org/pi/families/resources/school-dropout-prevention.pdf; *Student Homelessness: Lessons from the Youth Risk Behavior Survey*, SchoolHouse Connection, https://schoolhouseconnection.org/wp-content/uploads/2021/06/YRBS-Part-III-Sexual-Orientation-and-Gender-Identity-Equity.pdf (last visited July 25, 2022).

the policies simply prevent Pioneer FCA (like any other group) from accessing certain resources provided by the public school while simultaneously discriminating against other students on the basis of well-established protected characteristics. By withholding ASB status from Pioneer FCA for refusing to comply with its nondiscrimination policies, the District "no more engaged in viewpoint discrimination . . . than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti-drug policy." *Id.* at 650; *see also Alpha Delta*, 648 F.3d at 798.

Contrary to Appellants' argument, there is no conflict between the specific viewpoints or goals of ASB groups within the District and the nondiscrimination policies. Student clubs are often organized around shared interests or experiences; their foundational purpose is to attract like-minded and curious students to learn from each other. Student clubs that organize for the purpose of enjoying a shared interest related to sex or race or for promoting opportunities for historically disadvantaged groups, like Girls Who Code, do not discriminate in membership or leadership based on sex or race. Appellants cannot identify any other student group that refused to agree to the District's nondiscrimination policies. *See* 1-ER-20; 4-ER-583–84; 2-SER-416–17 ¶¶ 25-28. And the law clearly permits programs that uplift marginalized communities, including the LGBTQ community that is

blatantly excluded by FCA National's leadership requirements. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020) ("The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past." (citing *Obergefell v. Hodges*, 576 U.S. 644 (2015), among other cases)).

By contrast, FCA National's pre-clearance oath excludes entire segments of the student body population from participation, in violation of both the text and purpose of the District's nondiscrimination policies. To be clear, the District's policies simply require that all students be *eligible* for leadership roles in officially recognized clubs, and does not dictate the organization's leadership or require it to include certain members.

The District's nondiscrimination policies reflect its efforts to achieve parity and are rooted in laws that prevent its policies from becoming instruments of discrimination against other groups. Unlike the District's programs, the FCA clubs employ discriminatory criteria that do not have the purpose of attending, in a nondiscriminatory fashion, to the specific needs of a protected class. *See supra* Section I.B. Accepting Appellants' equation of these policies with wholesale discriminatory exclusion in contexts presenting different government interests would eliminate any limiting principle on selective-enforcement arguments. This Court should not endorse the absurd result advocated by Appellants.

III. FORCING THE DISTRICT TO ALLOW DISCRIMINATION AGAINST LGBTQ STUDENTS WOULD EVISCERATE THIS COURT'S PRECEDENTS UPHOLDING NONDISCRIMINATION POLICIES AND CREATE UNTENABLE CONFLICTS WITH NUMEROUS CIVIL RIGHTS PROTECTIONS.

Numerous federal and state civil rights laws either permit or, in limited contexts, require consideration of protected characteristics such as sex, disability, race, or national origin for the purposes of advancing equality and inclusion. Appellants' approach to religious exemptions would call into question countless local, state, and federal laws and policies and endanger virtually any effort by government actors, including schools, to promote inclusion and opportunity through nondiscriminatory means. Taken to its logical endpoint, this view leads to a sweeping and absurd result: any school district's reliance on—and, in some cases, mere compliance with—federal and state civil rights laws necessarily requires it to officially recognize and fund a student group whose avowed discrimination violates those same nondiscrimination policies. As described below, adopting such a position would essentially prevent school districts from complying with civil rights and nondiscrimination laws ranging from providing pregnancy and disability accommodations for students and employees, to accommodations for English learners, to voluntary affirmative action in employment. This would be a dramatic departure from this Court's precedents and, in practice, would render *Alpha-Delta* and *Truth* nullities.

A. Protections for Pregnant and Parenting Students and Employees

Appellants' request for a sweeping exemption to the District's nondiscrimination policies would call into question schools' ability to comply with federal and state laws prohibiting discrimination on the basis of pregnancy or parenting status. Indeed, among the District programs that Appellants decry as "discriminatory" are pregnancy and parenting accommodations that follow federal and state laws that require these accommodations. Opening Br. 8 (citing 10-ER-1850–54; 9-ER-1728). Title IX is clear that schools "shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom," and requires certain accommodations to provide equitable educational opportunities for protected students. 34 C.F.R. § 106.40 (2022). The Department of Education's Title IX guidance also makes clear that school districts are legally obligated to take certain actions and adopt procedures to specifically protect pregnant and parenting students. Off. for C.R., *Supporting the Academic Success of Pregnant and Parenting Students*, U.S. Dep't Educ. (June 1996), https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.html#_Toc13. The California Education Code, too, specifically prohibits sex discrimination through the "application of any rule concerning the actual or potential parental, family, or

marital status of a person, or the exclusion of any person from any program or activity or employment because of pregnancy or related conditions." Cal. Educ. Code § 230(h) (West 2022).

Civil rights laws in the employment context also apply to the District, requiring it to provide pregnancy accommodations in certain contexts. The Pregnancy Discrimination Act of 1978, Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act of 2004 ("IDEA"), and their state counterparts, compel limited consideration of protected characteristics to combat discrimination and promote equal opportunities for all. *See* 42 U.S.C. § 2000e(k); 29 U.S.C. §§ 701–796; 20 U.S.C. §§ 1400–1482; Cal. Educ. Code § 222.5 (West 2022); Cal. Educ. Code § 56345.2 (West 2022). Thus, the District's policies implement civil rights requirements that already exist in the law.

Contrary to Appellants' bizarre argument, the fact that the District complies (as it must) with federal and state civil rights laws does not mean that it is actually "discriminating" against students (or employees) who are not pregnant or parenting. This is not an "exemption" or proof of unequal enforcement of the District's nondiscrimination policies—in fact, such accommodations are an essential part of *effectuating* the District's nondiscrimination goals. It makes even less sense to argue in this context that the District's accommodations are somehow evidence of religious animus, rather than evidence that the District is complying

with applicable laws. To accept Appellants' approach would mean completely turning well-established federal and state civil rights laws on their head and forcing every school district in the country to grant sweeping exemptions to their nondiscrimination policies. Such a result is practically untenable, harmful to already often-marginalized students, and foreclosed by this Court's precedents.

B. Disability Accommodations for Students and Employees

Appellants' problematic approach would also conflict with longstanding federal and state laws that require accessibility for disabled students and employees. These laws, including the IDEA, the Americans with Disabilities Act of 1990 ("ADA"), the Rehabilitation Act, and their state counterparts, necessarily *require* some consideration of protected characteristics to ensure equal opportunities.

For example, the IDEA was passed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). This includes a uniquely tailored individualized education program that is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996 (2017) (quoting

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 204 (1982)).

The IDEA (and its predecessor law) represent an "ambitious federal effort to promote the education of [disabled] children." *Rowley*, 458 U.S. at 179. These laws were enacted to remedy an identified harm: Congress recognized that the majority of disabled students with "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out,'" *id.* at 191 (alteration in original) (quoting H.R. Rep. No. 94-332, at 2 (1975)), and that "[o]nly 55 percent of students with disabilities receive a regular high school diploma (compared to 75 percent of individuals within the general school population)," 149 Cong. Rec. E644-02 (2003).

Section 504 of the Rehabilitation Act also mandates broad protections and accommodations for students and employees in various settings, including schools. *See* 29 U.S.C. § 794. The Act requires schools to explicitly consider disability when implementing reasonable accommodations, such as separate study areas or aids for those with hearing or vision disabilities. The ADA specifically prohibits disability discrimination in employment and also requires employers to provide reasonable accommodations. 42 U.S.C. § 12112; *see also* 20 U.S.C. §§ 6311(b), 6314, 6361(a), 6491(d) (Title I school funding requirements include compliance

with numerous civil rights laws to ensure inclusion and accessibility); 34 C.F.R. § 200.6 (2022) (same).

The purpose and practice of these targeted policies—which must take disability into account—is to achieve the essential government interest of providing an education to all students and an equitable workplace to all employees. Despite decades of precedent upholding these essential civil rights protections, Appellants would have this Court recategorize disability accommodations as "discrimination" against able-bodied students and employees. In this context, it becomes even clearer that Appellants' position is nonsensical, unworkable, and dangerous.

C. Protections and Resources for English Language Learners

Federal and California laws also require interventions and services for students who are in the process of acquiring English language skills, in order to remedy educational inequities. These protections are vital because failure to provide appropriate English language education constitutes discrimination on the basis of national origin. *See Lau v. Nichols*, 414 U.S. 563, 566 (1974) (failure to provide English language instruction to hundreds of students of Chinese ancestry who did not speak English denied them a meaningful opportunity to participate in educational opportunities, violated the Civil Rights Act, and made "a mockery of public education").

Specifically, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin and requires school districts to remove language barriers for English Language Learners and their families. Title VI also obligates schools to address bullying based on race, color, or national origin. Additionally, the Equal Educational Opportunities Act of 1974 prohibits discrimination and requires school districts to ensure equal participation by removing language barriers for English Language Learners. 20 U.S.C. § 1703(f); *see also, e.g.*, 20 U.S.C. §§ 6811–6871 (grants for language instruction for English learners and immigrant students); 20 U.S.C. §§ 6311(b), 6314, 6361(a), 6491(d) (Title I school funding requirements); 34 C.F.R. § 200.6 (inclusion and accommodation for English learners). California public schools are also required to provide "instruction in a language understandable to the pupil that recognizes the pupil's primary language and teaches the pupil English." Cal. Educ. Code § 52165 (West 2022).

In sum, Appellants' arguments put at risk schools' ability to comply with civil rights laws and provide English-language resources to students who need it.

D. Voluntary Affirmative Action Programs in Employment

Federal and California law also permit schools to implement tailored, voluntary affirmative action programs in employment for people with disabilities, veterans, women, and people of color. *See, e.g.*, 34 C.F.R. § 106.3 (2022)

(remedial and affirmative action self-evaluation); *id.* § 106.23 (nondiscrimination in recruitment); *id.* § 106.53 (nondiscrimination in recruitment and hiring). Voluntary affirmative action policies are carefully limited by law to fit their goals of promoting equal opportunity and "overcom[ing] the effects of past or present practices, policies, or other barriers to equal employment opportunity." 29 C.F.R. § 1608.1(c) (2022); *see also* Cal. Code Regs. tit. 2, § 11011 (2022) ("Voluntary action by employers and other covered entities is an effective means for eliminating employment discrimination.").[9]

The Supreme Court has consistently held that race- and sex-conscious affirmative action programs may be implemented consistent with federal law's prohibitions on employment discrimination. *United Steelworkers v. Weber*, 443 U.S. 193, 194 (1979) ("[A]n interpretation of [§§ 703(a) and (d) of Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." (quoting *United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 315 (1953))); *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987) ("[C]onsideration of the sex of applicants

[9] While not applicable to the District, Appellants' arguments would also imply that no university holding a federal contract may apply a uniform nondiscrimination policy for student clubs, given federal laws *requiring* affirmative action plans to recruit and advance qualified veterans, people with disabilities, women, and racial minorities. *See* 29 U.S.C. § 793 (Rehabilitation Act of 1973); 38 U.S.C. § 4212 (Vietnam Era Veterans' Readjustment Assistance Act of 1972); Exec. Order 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

for . . . jobs was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'" (quoting *Weber*, 443 U.S. at 197)). Title VII intended to "eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," so the laws governing equal protection in the employment context "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges." *Weber*, 443 U.S. at 204.

Appellants essentially ask this Court to ignore the context in which these civil rights laws exist and adopt a harmful and reductive approach to analyzing nondiscrimination policies that would look only at whether students are being treated "differently." This deeply flawed approach would frustrate, and at times conflict with, schools' compliance with civil rights protections, including the rights to accommodations that help ensure equal opportunity and access for all.

CONCLUSION

For the foregoing reasons, *amici* respectfully support Defendants-Appellees' request that the Court affirm the denial of Appellants' motion for a preliminary injunction.

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New York, NY

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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