Docket No. 22-15827

In the

United States Court of Appeals

For the

Ninth Circuit

FELLOWSHIP OF CHRISTIAN ATHLETES, et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty.[2] To best prepare all students for success in our democracy, FIRE believes the law must remain unequivocally on the side of robust free-speech protections for students.

Since 1999, FIRE has successfully defended the First Amendment rights of countless students at campuses nationwide through public advocacy, targeted litigation, and as *amicus curiae* in cases that implicate student rights, like the matter before this court. *See, e.g.*, Brief for FIRE, et al. as *Amici Curiae* Supporting Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255); Brief for FIRE and Cato Institute as *Amici Curiae* Supporting Plaintiff-Appellant, *Koala v.*

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[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

[2] Formerly known as the Foundation for Individual Rights in Education, FIRE recently changed its name to reflect its expanded mission of protecting free expression beyond colleges and universities.

Khosla, 931 F.3d 887 (9th Cir. 2019) (No. 17-55380); Brief for FIRE as *Amicus Curiae* Supporting Appellees, *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855 (8th Cir 2021) (No. 19-3389); Brief for FIRE as *Amicus Curiae* Supporting Appellant, *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021) (No. 19-1696). FIRE has a direct interest in this case because administrators at both the K–12 and collegiate levels routinely interpret "discrimination" broadly to deny student organizations recognition and funding on the basis of viewpoint. This Court must make clear that the First Amendment protects the right of public high school students to form belief-based student organizations with like-minded leaders, free from viewpoint-based discrimination.

SUMMARY OF ARGUMENT

The Fellowship of Christian Athletes (FCA), like many groups, reasonably seeks student leaders who agree with the group's core values. Yet, the San Jose Unified School District denied FCA recognition and its accompanying benefits because the group did just that. The school district's refusal to recognize FCA and its selective enforcement of its nondiscrimination policy constitute viewpoint discrimination prohibited

by the First Amendment. Unfortunately, this kind of viewpoint discrimination is prevalent in both grade schools and on college campuses nationwide.

Student organizations play a pivotal role in education by providing students a forum to associate with others who share similar interests and collaborate in pursuit of a common goal. To that end, courts have long held that public universities cannot deny recognition or benefits to a student organization because of its viewpoint. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 187–88 (1972); *Koala v. Khosla*, 931 F.3d 887, 898–99 (9th Cir. 2019); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366–68 (8th Cir. 1988). Despite this longstanding precedent, administrators continue to burden student groups that espouse minority or unpopular viewpoints—often using expansive non-discrimination policies to deny certain organizations recognition or funding.

Selectively enforcing nondiscrimination policies against student groups to discriminate against particular viewpoints also violates the First Amendment. *See, e.g.*, *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 864 (8th Cir. 2021); *Bus. Leaders in Christ v. Univ. of Iowa* (*BLinC*), 991 F.3d 969, 985–86 (8th Cir. 2021). The district

court's decision below ignores the school district's disparate enforcement of the non-discrimination policy. Several recognized student groups at district high schools, including the South Asian Heritage club and the Senior Women club, cater to student members of a certain gender, national origin, or other protected category. The district also recognizes other student groups formed around any purpose, such as the Big Sister/Little Sister club. Yet, the school district enforced its non-discrimination policy only against FCA, to prevent the group from requiring its leaders to affirm their shared belief in the group's faith, its *raison d'être*. The school district's targeted and uneven application of its policies constitutes viewpoint discrimination. In effect, this invidious viewpoint discrimination threatens rather than encourages diversity and pluralism.

This Court should reverse the district court's holding and issue a decision that offers the judicial clarity needed to protect minority or dissenting views, educate students about life in our pluralistic democracy, and prevent the viewpoint discrimination that *amicus* FIRE sees on college campuses from becoming worse.

ARGUMENT

I. Denying a Student Organization Recognition or Benefits Because of its Viewpoint Violates the First Amendment.

In 2019, the school district and its officials revoked recognition of FCA student groups at several district high schools. The school district claimed FCA's requirement that its student leaders affirm their commitment to the group's core religious values violated the district's non-discrimination policy. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 20-cv-02798, 2022 WL 1786574, at *2–5 (N.D. Cal. June 1, 2022). The school district's decision deprived FCA of the benefits afforded other recognized student groups, such as access to funds and inclusion in the yearbook. *Id.* at 5.

The school district's decision is not an isolated incident. Despite decades of First Amendment precedent prohibiting viewpoint-based discrimination, administrators across the country—at both public K–12 schools and colleges—continue to deny student groups like FCA recognition or funding based on their beliefs. The district court's ruling, if not reversed, will threaten expressive and associational rights for both grade school and college students.

A. For decades, courts have held that denying a student organization recognition or benefits due to its viewpoint is unconstitutional.

The Supreme Court has repeatedly affirmed the importance of students' associational rights in the university setting.[3] The Court's decisions make equally clear that universities cannot subject student groups to unusual scrutiny or deny them official recognition merely on the basis of the group's viewpoint. *See Healy*, 408 U.S. at 187–88 ("The College . . . may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."); *see also Widmar*, 454 U.S. at 277 (holding that by denying a religious student group the use of campus facilities for meetings, a public university violated the group's right to free exercise of religion and freedom of speech and association); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829, 837 (1995) (denying student activity fee funding to student journal based on religious editorial viewpoint violates the First

[3] *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy*, 408 U.S. at 181 ("There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right.").

Amendment because the state is forbidden from "exercis[ing] viewpoint discrimination, even when the limited public forum is one of its own creation").

Accordingly, this Court ruled that a university could not deny all student media groups funding because it disliked the viewpoint of a satirical student newspaper. *Koala*, 931 F.3d 887. In *Koala*, a student newspaper at the University of California, San Diego authored an article satirizing "safe spaces" on campuses. *Id.* at 891. Many on campus condemned the article, including the university chancellor who called the piece "offensive" and "hurtful." *Id.* at 892. In response, the university banned *all* student media organizations from accessing student activity fee funding. *Id.* at 893. This Court held the university could not hide "under the guise of content neutrality" to "isolate offensive speech." *Id.* at 904.

Federal courts have recognized that denying student organizations benefits by subjecting them to unique scrutiny and unusual procedural requirements on account of their viewpoints violates the First Amendment. For example, in *Gerlich v. Leath*, 861 F.3d 697, 706 (8th Cir. 2017), the U.S. Court of Appeals for the Eighth Circuit ruled that Iowa

State University impermissibly imposed "unique scrutiny" on the ISU student chapter of the National Organization for the Reform of Marijuana Laws when the group sought to use the university's trademark on a t-shirt design. The university's higher scrutiny of the group's request, which came only after pressure from public and state officials, "evidenced" its "discriminatory motive." *Id.* at. 705. The Eighth Circuit reached a similar conclusion in *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). There, the court held that the University of Arkansas violated the First Amendment when its student senate followed an "unusual procedure" to consider the Gay and Lesbian Students Association's requests for funding. *Id.* at 367.

Decades of First Amendment jurisprudence establish that universities may not discriminate against student groups on the basis of viewpoint. Yet, as detailed below, this practice remains depressingly common.

B. Nevertheless, colleges consistently deny student organizations recognition or benefits because of their viewpoints.

Despite the clarity of longstanding precedent, public universities and officials regularly single out disfavored student organizations for

adverse treatment because of their beliefs or mission. In the course of its advocacy, *amicus* FIRE has intervened on behalf of student groups from across the ideological spectrum subjected to unlawful, illiberal viewpoint discrimination. As a nonpartisan organization dedicated to protecting student speech without regard to the speaker's identity or beliefs, FIRE has witnessed censorship against student groups voicing a range of political, artistic, and social messages representing viewpoints as diverse as the United States itself.

Take, for example, Edward Si's case. When Si, a student at Eastern Virginia Medical School, tried to establish a chapter of Students for a National Health Program, the student government association denied his application because it did not want to approve clubs "based on opinions."[4] Students for a National Health Program advocates for a single-payer

[4] One day after FIRE filed a lawsuit on behalf of Si, the Medical School approved his club. As part of an eventual settlement agreement, the school agreed to revise their student group recognition policies to prevent future viewpoint discrimination. *VICTORY: Med Student Prohibited from Starting a Club Promoting Universal Healthcare Reaches Settlement with East Virginia Medical School*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Mar. 22, 2022), https://www.thefire.org/victory-med-student-prohibited-from-starting-a-club-promoting-universal-healthcare-reaches-settlement-with-eastern-virginia-medical-school [https://perma.cc/WH7T-8D6L].

healthcare program. However, the student government association recognized other belief-based organizations like Medical Students for Choice and the Christian Medical and Dental Association.[5]

When Truman State University student Naomi Mathew tried to start Animal Alliance, an animal rights club, a committee of staff and students denied the club recognition due the "reputational risk" of its association with People for the Ethical Treatment of Animals and the "emotional risk" of potential confrontations amongst students. Animal Alliance was the third prospective student group promoting veganism or vegetarianism to be denied recognition in as many years. The university had previously rejected a proposed Vegetarian Club after a committee member objected to part of its mission statement as "very very very extreme" and said they would not go vegetarian themselves.[6]

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[5] *LAWSUIT: A Med School Prohibited a Student from Starting a Club Promoting Healthcare Reform. Now He's Suing to Protect His Rights*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Aug. 17, 2021), https://www.thefire.org/lawsuit-a-med-school-prohibited-a-student-from-starting-a-club-promoting-healthcare-reform-now-hes-suing-to-protect-his-rights/ [https://perma.cc/8MRW-JCJR].

[6] *Public University Rejects Animal Rights Club, Citing 'Emotional Risk' to Students*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 10, 2019), https://www.thefire.org/public-university-rejects-animal-rights-club-citing-emotional-risk-to-students/ [https://perma.cc/VG4B-GQK4]. The university eventually recognized the club and agreed to reform its

At Wichita State University in 2017, a prospective chapter of Young Americans for Liberty was denied official recognition because of its "dangerous" views regarding the First Amendment.[7] At the University of Rhode Island, a wide variety of student organizations were routinely denied student activity fee funding based on student government officials' perceptions of their missions until FIRE intervened in 2018.[8] In

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policies to ensure clubs were no longer denied recognition on the basis of viewpoint after FIRE intervened. *WHALE Done: Animal Rights Club Approved by Public University After FIRE's First Amendment Uproar*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Feb. 1, 2020), https://www.thefire.org/whale-done-animal-rights-club-approved-by-public-university-after-fires-first-amendment-uproar/ [https://perma.cc/AB7Y-2LKD].

[7] Matthew Kelly, *SGA Votes Against Recognizing Controversial Young Americans for Liberty Group*, SUNFLOWER (Apr. 6, 2017), https://thesunflower.com/16806/news/student-government-association/sga-votes-against-recognizing-controversial-young-americans-for-liberty-group/ [https://perma.cc/TJW6-EMBF]. After intervention by *amicus* FIRE, Wichita State administrators appealed the decision, and the group was granted recognition. *VICTORY: Wichita State Student Court Recognizes Libertarian Group, Reverses Student Government Discrimination*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 14, 2017), https://www.thefire.org/victory-wichita-state-student-court-recognizes-libertarian-group-reverses-student-government-discrimination/ [https://perma.cc/4DFK-EBEV].

[8] *VICTORY: Student Government Abandons Discriminatory Funding Policy at the University of Rhode Island*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 12, 2018), https://www.thefire.org/victory-student-government-abandons-discriminatory-funding-policy-at-the-university-of-rhode-island [https://perma.cc/3PT6-JN8T]. Only after *amicus* FIRE

2010, the University of South Florida denied recognition to a conservative student group claiming it was too "similar" to a libertarian student group on campus,[9] a justification FIRE has seen employed repeatedly over the years to deny official recognition to student organizations.

These cases demonstrate that university officials continue to look to the viewpoints of student groups when deciding recognition or funding issues, despite the longstanding body of law prohibiting this viewpoint discrimination and content-based decision making. Too often, and despite the significant differences between the two educational settings, rulings governing student First Amendment rights in the K–12 context are misapplied to restrict student rights at public colleges and universities.[10]

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intervened on behalf of the College Republicans, Students for Sensible Drug Policy, ACLU, and BridgeUSA were the student government's viewpoint-discriminatory funding practices ended.

[9] Peter Bonilla, *University Recognizes Young Americans for Freedom: Conservative and Libertarian Groups Were Too 'Similar' to Coexsist*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Nov. 20, 2010), https://www.thefire.org/university-recognizes-young-americans-for-freedom-conservative-and-libertarian-groups-were-too-similar-to-coexist/ [https://perma.cc/3T74-W593].

[10] In *Speech First v. Cartwright*, for example, the Middle District of Florida relied on a line of cases regulating free speech in public grade schools, including *Tinker v. Des Moines Independent Community School*

Were this Court to sanction the disparate treatment of the religious student organizations at public high schools at issue here, it would risk worsening the viewpoint discrimination that belief-based student groups already suffer on campuses nationwide.

II. Selectively Enforcing Policies Against Student Groups on the Basis of Viewpoint Also Violates the First Amendment.

Universities violate the First Amendment when they selectively enforce policies against groups on the basis of viewpoint. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011). Here, the school district denied FCA recognition, claiming the group violated its non-discrimination policy because it required its *leaders* to affirm their acceptance of FCA's faith-based values. But administrators inexplicably permitted other student groups to limit *membership* on the basis of belief or protected status. Such uneven treatment violates the First Amendment. Allowing administrators to selectively enforce policies

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District, to deny preliminary injunction of an overbroad and viewpoint-based discriminatory harassment policy at the University of Central Florida. No. 6:21-cv-313, 2021 WL 3399829 (M.D. Fla. July 29, 2021) (citing *Tinker*, 393 U.S. 503 (1969)). Ultimately, the Eleventh Circuit reversed the district court's decision and rejected UCF's argument that the university's policy should be subject to the more lenient grade school speech standard set forth in *Tinker*. *Speech First v. Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022).

against only groups whose viewpoints they dislike endangers ideological diversity in our nation's public schools.

A. Selective policy enforcement on the basis of a group's beliefs is viewpoint discrimination.

Courts consistently reject disparate treatment of student groups on the basis of viewpoint as a violation of the First Amendment. As this Court recognized in *Reed*, public school administrators cannot selectively enforce policies against certain groups on the basis of viewpoint, while allowing other groups to violate the policies. 648 F.3d at 803–04 ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly."). Yet, universities regularly use non-discrimination policies similar to that used by the school district to selectively exclude student groups with religious viewpoints.

In 2017, administrators at the University of Iowa revoked the Christian student organization Business Leaders in Christ's (BLinC) RSO status after the group denied a leadership position to a gay student who refused to affirm his agreement with BLinC's religious views on homosexuality. *BLinC*, 991 F.3d at 975–77. University administrators decided that the group had breached the school's Policy on Human Rights, which forbade student groups from discriminating on the basis of

race, sex, or other protected status. *Id.* at 973, 975, 977. Subsequently, the University instituted an organizational "clean up," reviewing all registered student groups' governing documents to ensure they did not violate the Policy on Human Rights. *Id.* at 977. Reviewers were instructed to focus on religious groups first and look "for language that required leaders to affirm certain religious beliefs." *InterVarsity*, 5 F.4th at 861. The university ultimately de-recognized several additional religious groups, including the Christian group InterVarsity. *Id.* Both BLinC and InterVarsity sued the university for violations of their First Amendment rights.

In both instances, the Eighth Circuit denied the university and its officials qualified immunity. The court ruled that existing precedent—including *Widmar*, *Rosenberger*, and *Reed*—clearly established that "a school's selective enforcement of a nondiscrimination policy violates the student group's free speech . . . ." *BLinC*, 991 F.3d at 985–86; *accord InterVarsity*, 5 F.4th at 863–64. Despite its treatment of BLinC and InterVarsity, the university had decided to allow several other student organizations to explicitly restrict membership or leadership eligibility on the basis of race, gender, sexual orientation, or other protected status.

BLinC, 991 F.3d at 978; *InterVarsity*, 5 F.4th at 864. "We are hard pressed to find a clearer example of viewpoint discrimination," wrote the Eighth Circuit *InterVarsity* panel, finding that the University of Iowa had "focused its 'clean up' on specific religious groups and then selectively applied the Human Rights Policy against them," while "[o]ther groups were simply glossed over or ignored." 5 F.4th at 864.

At Wayne State University, another InterVarsity chapter was denied official recognition due to its requirement that student leaders agree with the group's faith-based beliefs. *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F.Supp.3d 785, 796 (E.D. Mich. 2021). While InterVarsity was not permitted to participate in campus life, the university recognized "countless other" student organizations that likewise required their student leaders to confirm their agreement with the organization's preferred viewpoints. *Id.* at 816. For example, a Catholic group required its leaders to be "faithful," and a Muslim student group maintained a policy allowing them to remove student leaders who violated Islamic principles. *Id.* at 816. Non-religious groups, such as the Secular Student Alliance and the Macedonian-American Student Association, were similarly allowed

leeway to limit leadership positions to those students who shared the groups' beliefs and missions. *Id.* at 816–17. Further, the school allowed Greek organizations, veterans groups, and the Iraqi Student Organization to exclude even *members* in a manner that violated the university's non-discrimination policy. *Id.* at 817. Surveying this disparate enforcement, the District Court for the Eastern District of Michigan held the university had violated the group's speech and association rights: "Defendants have barred [InterVarsity] from selecting leaders that share its Christian views while allowing other groups to engage in [a] similar form of leadership selection. This divergent treatment cannot withstand constitutional scrutiny." *Id.* at 823.

In each of these instances, the court recognized the impermissible viewpoint discrimination inherent in the institution's disparate enforcement. Yet in the case at hand, the district court brushed aside several potential instances of the school district's similarly selective enforcement of its policies.

B. By selectively enforcing its non-discrimination policy, the district engaged in viewpoint discrimination.

Here, the district court found that plaintiffs failed to show the school district allowed some student groups to act in violation of the

policy, while strictly enforcing it against others. However, the court overlooked several examples of disparate enforcement. The school district's disparate treatment of FCA ensures that those holding minority viewpoints will be powerless to take advantage of the freedom of association that the First Amendment guarantees.

Several student groups prescribe membership based on a protected category. The Senior Women club's constitution, for example, states all students are eligible for membership, but also confirms that its members are all seniors who identify as female. *Fellowship of Christian Athletes*, 2022 WL 1786574, at *18. FCA could not rely on these conflicting statements, the district court reasoned, to establish that the school district had knowingly allowed the Senior Women's club to operate in violation of the non-discrimination policy. *Id.* Yet, it appears from the organization's admission that all of its members are female that the group discriminates on the basis of gender in practice.[11] The school

[11] The Senior Women club's 2021 and 2022 Instagram accounts feature only female members and leaders. *See* Senior Women (@lelandseniorwomen2022), INSTAGRAM, https://www.instagram.com/lelandseniorwomen2022/ (last visited July 4, 2022); Leland Senior Women (@lhs_seniorwomen21), INSTAGRAM, https://www.instagram.com/lhs_seniorwomen21/?igshid=NWRhNmQxMjQ%3D (last visited July 4, 2022).

district's lenient application of its policy to the Senior Women club sharply contrasts with its strict application of the policy to FCA, which does not require *any* of its *members* belong to a protected class.

Similarly, a new South Asian Heritage club represents that it will prioritize acceptance of South Asian members, even though it is "fine with non-south asians joining." *Id.* (internal quotation marks omitted). While the group's constitution does not *explicitly* exclude members from any protected category, neither do FCA's policies. Again, FCA does not preclude students from joining as *members* based on their religious beliefs or sexual orientation, but seeks merely to ensure that its *leaders* share the group's worldview and faith—the defining characteristics of the association, and its reason for existence. While the school district determined that the South Asian Heritage club's stated preference for members of a certain national origin was *not* discriminatory, it perplexingly decided FCA's desire for leaders who agreed to affirm the group's faith *was*.

The distinction between membership and leadership requirements is an important one. Interfering with a student organization's leadership selection can have dire effects on the organization's vitality as a whole.

"Preventing groups . . . from selecting leaders who are in ideological agreement with the organization they propose to lead can undermine vital interests of maintaining the group's character and expressing its beliefs in a coherent and authentic way." *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F.Supp.3d 785, 822 (E.D. Mich. 2021). This is especially true for religious groups, which often hold "profound and sometimes deeply contested worldviews." *Id.* Allowing the district court's decision to stand would distinctively impair student groups' associational rights by disallowing belief-based leadership requirements.

Further, the school district permits student organizations to further any "discriminatory" *purpose* they desire.[12] For example, the Big Sister/Little Sister club presumably exists to enrich only the lives of female students. While male students may be able to join the club, *Fellowship of Christian Athletes*, 2022 WL 1786574, at *17, they join to

[12] The school district's 30(b)(6) witness testified that recognized student groups are generally allowed to focus on supporting and advancing the interests of a protected class. *See* 9-ER-1653–54, 9-ER-1763–64, 9-ER-1666, 9-ER-1675 (testifying that groups—including the Black Student Union, the Gay-Straight Alliance, and Latinos Unidos—are permitted to pursue "whatever students are interested in that they think will help support them and their needs moving forward").

carry out the group's purpose. Similarly, FCA simply requires its leaders to agree to accept its purpose and views. The school must afford FCA its right "to associate to further their personal beliefs" *Healy*, 408 U.S. 169, just as it affords other student groups the same opportunity. These incidences of disparate application evidence viewpoint discrimination, and this Court should re-consider the district court's determination that the school district did not selectively enforce its policy against FCA.

The district court's decision exposes organizations that espouse minority viewpoints to censorship by those wishing to silence speech with which they disagree. This concern is not simply hypothetical. Challenges to a student group's policies often come from students, faculty, or administrators who disagree with the group's core tenants. In the instant case, the school district decided to initially revoke FCA's recognition only after a teacher complained about the group's religious beliefs. *Fellowship of Christian Athletes*, 2022 WL 1786574, at *3. If the decision below is upheld, unpopular viewpoints may be excluded from schoolhouse discourse. In turn, the ideological diversity of our nation's public

schools—"the nurseries of democracy"[13]—and our universities will continue to suffer.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's order and provide the judicial clarity needed to protect minority and dissenting views like the ones at issue in *Healy* and here. This Court's decision must educate American public schools about the particular importance of protecting unpopular views and prevent the viewpoint discrimination that *amicus* FIRE sees on college campuses from getting worse.

[13] *See Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) ("[T]he school itself has an interest in protecting a student's unpopular expression . . . . America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.").

Dated: July 5, 2022

/s/ Ronald G. London

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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The undersigned certifies that on July 5, 2022 an electronic copy of the Foundation for Individual Rights and Expression Brief of *Amicus Curiae* was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: July 5, 2022

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