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

BRIEF OF AMICUS CURIAE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFFS-APPELLANTS ON REHEARING *EN BANC*

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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 changed its name in June 2022 to reflect its expanded mission of protecting free expression beyond colleges and universities.

Khosla, 931 F.3d 887 (9th Cir. 2019) (No. 17-55380). 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. In this case, the original panel got it right: The school district discriminated against the Fellowship of Christian Athletes ("FCA") on the basis of viewpoint. This Court should reaffirm that holding and 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, 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 K–12 schools and on college campuses nationwide. And its effects are real. As FIRE's research in the campus context shows, students are increasingly afraid to express controversial opinions in class or in front of fellow students, and increasingly willing to self-censor rather than risk harm to their reputations. If this Court signs off on the school district here actively punishing students for their controversial views, other students will take notice, and self-censorship will only increase.

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. They often do so through the selective enforcement of expansive non-discrimination policies to deny certain organizations

recognition or funding. But selective enforcement 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 adopt the panel'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 often sees on campuses from becoming worse.

ARGUMENT

I. Students Are Increasingly Afraid to Express Their Opinions on Campus for Fear of Judgment or Punishment Like Happened Here.

As documented by *amicus* FIRE's original research, students today are increasingly afraid to express their opinions—controversial or not—on campus. And there is good reason for that: they fear becoming the subject of viewpoint-based vitriol from fellow students and school administrations. The facts of this case prove that those fears are well founded. The Supreme Court recently observed that "America's public schools are the nurseries of democracy." *Mahanoy Area Sch. Dist. v. B. L. by & through Levy,* 141 S. Ct. 2038, 2046 (2021). But FIRE's research demonstrates that our nation's students are learning precisely the wrong lessons: To decry rather than to venerate free speech, to self-censor rather than to engage freely with the marketplace of ideas. If this Court

ratifies the school district's viewpoint discrimination here, it will signal to American students that they are right to keep their mouths shut.

The damage done to students by actions like those the school district took in this case are not speculative—they are well supported by the data, at least in the college context. Every year, FIRE surveys tens of thousands of students to get a pulse on the state of free speech on America's college campuses and compiles it into a College Free Speech Ranking and accompanying report. To compile its most recent 2022-2023 College Free Speech Rankings ("2022-23 Rankings"), FIRE surveyed almost 45,000 students at over 200 schools, both public and private, across the country.[3] The 2022-23 Rankings contain two key findings that highlight the harm the school district's actions, if sanctioned by this Court, will have on its students.

First, survey results proved that most students feel uncomfortable expressing their views on campus, particularly on controversial topics and particularly in view of other students:

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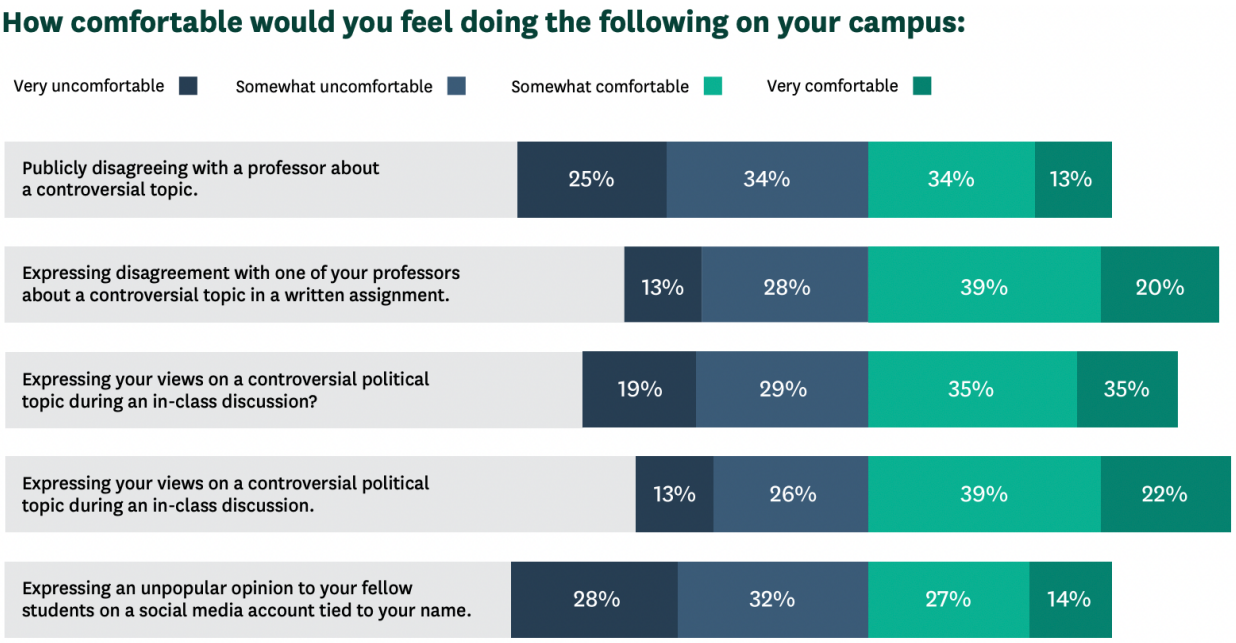
[3] The report is available in its entirety here: https://www.thefire.org/research-learn/2022-college-free-speech-rankings. The underlying data for the report is available here: https://public.tableau.com/app/profile/college.pulse/viz/2022CollegeFreeSpeechRankingsData-Draft1/2022CollegeFreeSpeechRankingsData.



2022-23 Rankings at 33. As *amicus* FIRE's chart demonstrates, 59% of students feel very or somewhat uncomfortable publicly disagreeing with their teacher about a controversial topic. They also fear judgment or retaliation from fellow students. For example, 60% reported being very or somewhat uncomfortable with the thought of expressing unpopular opinions—whether on controversial subjects or not—on social media where other students could see. *Id.* at 60. And only 22% of students reported that they felt "very comfortable" expressing their views on a controversial political topic in a discussion with other students in a common campus space like a quad, dining hall, or lounge. *Id.* at 59.

Second, the 2022-23 Rankings demonstrate students' increased willingness to self-censor for fear of how other students, faculty, or

administrators would react. For example, 22% of students surveyed—and 42% of conservative students surveyed—said they have either very or fairly often felt that they could not express their opinion on a subject because of how students, a professor, or the administration would respond. *Id.* at 35, 62. And nearly two-in-three students (63%) reported having worried about damaging their reputations because someone on campus misunderstands something they have said or done. *Id.* at 62.

While FIRE's findings relate to higher education, it is safe to assume that high school students—who are younger, more vulnerable, and in a more administrator-controlled environment than young adults at college—feel the various school pressures elicited in FIRE's surveys at least as keenly as college students. One can debate whether these students' fears of retaliation from students and their schools are well founded. But regardless, students' fear is real, and it is having a real effect on their willingness to publicly debate controversial topics at school. Because "[o]ur representative democracy only works if we protect the 'marketplace of ideas,'" including "the protection of unpopular ideas," *Mahanoy*, 141 S. Ct. at 1046, this Court should condemn school districts who take viewpoint discriminatory steps to punish those ideas.

II. Denying a Student Organization Recognition or Benefits Because of Its Viewpoint Violates the First Amendment.

The district court should be reversed and the panel's holding readopted for the additional reason that the school district's revocation of FCA's official recognition and denial of associated benefits constituted viewpoint discrimination in violation of the First Amendment. Unfortunately, viewpoint discriminatory incidents like this are common, both in the K–12 and university contexts. Despite decades of First Amendment precedent prohibiting viewpoint-based discrimination, administrators across the country continue to deny student groups like FCA recognition or funding based on their beliefs.

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.[4] The Court's decisions make equally clear that schools cannot subject student groups to unusual scrutiny or deny

[4] *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.").

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

In keeping with this precedent, 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, this Court ruled that a university could not deny all student media groups funding because it disliked the viewpoint of one particular 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 that this violated the First Amendment and counseled that the university could not hide "under the guise of content neutrality" to "isolate offensive speech." *Id.* at 904.

Similarly, in *Gerlich v. Leath*, 861 F.3d 697, 706 (8th Cir. 2017), the Eighth Circuit ruled that Iowa State University impermissibly imposed "unique scrutiny" on its 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 this practice remains depressingly common. *See infra* Section II.D.

B. Selective enforcement is a type of viewpoint discrimination.

One form of viewpoint discrimination commonly employed by school administrators, including in this case, is selective enforcement. As this Court recognized, public school administrators cannot selectively enforce policies against certain groups on the basis of viewpoint, while allowing other groups to violate the policies. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803–04 (9th Cir. 2011) ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly"). Yet, schools regularly rely on non-discrimination policies to selectively exclude student groups with religious viewpoints.

For example, in 2017, administrators at the University of Iowa revoked the Christian student organization Business Leaders in Christ's (BLinC) status as a recognized student organization 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. The university ultimately de-recognized several additional religious groups, including the Christian group InterVarsity. *InterVarsity*, 5 F.4th at 861. Both BLinC and InterVarsity sued the university for violations of their First Amendment rights.

In both instances, the Eighth Circuit denied the university 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 targeted "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, both religious and secular, that likewise required their student leaders to confirm their agreement with the organization's preferred viewpoints. *Id.* at 816.

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. *See infra* II.D.

C. By selectively enforcing its non-discrimination policy against FCA, the district engaged in viewpoint discrimination.

In this case, the district court found that FCA 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.[5] The school 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

[5] 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).

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*, 534 F. Supp. 3d at 822. This is especially true for religious groups, which often hold "profound and sometimes deeply contested worldviews." *Id.* Affirming the district court's decision would 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.[6] 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 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. at 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.

[6] 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").

D. Colleges consistently deny student organizations recognition or benefits because of their viewpoints.

Sadly, selective enforcement and viewpoint discrimination against disfavored student groups is common, and the district's actions against FCA are not an isolated incident. Throughout the course of FIRE's advocacy, public schools regularly single out disfavored student organizations from across the ideological spectrum for adverse treatment because of their beliefs or mission.

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."[7] Students for a National Health Program advocates for a single-payer healthcare program. However, the student government association

[7] 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].

recognized other belief-based organizations like Medical Students for Choice and the Christian Medical and Dental Association.[8]

Similarly, 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.[9]

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[8] *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].

[9] *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].

Other schools have been even more blatant in their political targeting. For example, 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.[10] 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.[11] And in 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,[12] a justification FIRE

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[10] 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].

[11] *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].

[12] 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].

has seen employed repeatedly over the years to deny official recognition to student organizations.

These cases demonstrate that the school district's actions against FCA in this case are not a one-off problem. To the contrary, school officials continue to look to the viewpoints of student groups when deciding recognition or funding issues, despite the longstanding body of law against it. Should this Court condone the district court's illegal efforts in this case, viewpoint discrimination by school officials in the K–12 and university context is likely to worsen.

CONCLUSION

For the reasons stated above, this Court should reverse the district court and reaffirm the panel's granting of a preliminary injunction.

Dated: February 22, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The undersigned certifies that on February 22, 2023 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: February 22, 2023

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