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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. 5:20-cv-2798-LHK

DEFENDANTS' NOTICE OF MOTION AND, MOTION TO DISMISS THE AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: December 10, 2020
Hearing Time: 1:30 p.m.
Ctrm.: 8, 4th Floor
Judge: Honorable Lucy H. Koh

Complaint Filed: April 22, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Thursday, December 10, 2020, at 1:30 p.m., or as soon thereafter as counsel may be heard, before The Honorable Lucy H. Koh, in Courtroom 8, Fourth Floor, of the San Jose Courthouse, 280 South 1st Street, San Jose, California, 95113, Defendants San Jose Unified School District Board of Education, Nancy Albarran, Herb Espiritu, and Peter Glasser, will and hereby do move for an order dismissing, with prejudice, the Amended Complaint filed by Plaintiffs in the above-captioned matter as set forth in the following Memorandum of Points and Authorities.

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DATED: August 10, 2020

DANNIS WOLIVER KELLEY

By: */s/Amy R. Levine*
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

I. INTRODUCTION

Plaintiffs are two former students of Pioneer High School in the San Jose Unified School District, and the organization they led at that school site, the Fellowship of Christian Athletes ("FCA"). In twelve causes of action brought under 42 U.S.C. section 1983, they claim that the District and three District employees violated their rights under the First and Fourteenth Amendments and under the Equal Access Act ("EAA"), 20 U.S.C. sections 4071-74. The gravamen of their Amended Complaint ("Complaint" or "AC") is that at three District high schools, Willow Glen, Leland, and Pioneer, the District improperly refused to recognize the FCA as an official student organization under the umbrella of the Associated Student Body ("ASB"), with the privileges that adhere to that status, but instead only allowed them to meet on campus without the official recognition. They acknowledge that the District cited its nondiscrimination policy as the basis for its action, but assert this decision was based on their religious viewpoint. More specifically, they allege the District took issue with the requirement that FCA representatives "affirm their agreement with FCA's Christian beliefs and [] not subscribe to or promote any religious beliefs inconsistent with these beliefs," and that they at all times conform to FCA's conduct standards which include subscription to a "Sexual Purity Statement," requiring them to "abstain from any sexual acts outside of a marriage consistent with FCA's religious beliefs," including any homosexual conduct. (AC, ¶¶98, 100, Ex. C). Plaintiffs Doe and Roe also allege that at Pioneer, they were harassed by other students who tried to interfere with their meetings, and that school and District officials either facilitated such harassment or failed to prevent it. All plaintiffs seek injunctive and declaratory relief, and the two students also seek nominal, compensatory and punitive damages against the District, the District's Superintendent Nancy Albarran, Pioneer Principal Herb Espiritu, and Pioneer teacher Peter Glasser.

For the reasons set forth below, Defendants move to dismiss several of Plaintiffs' causes of action and claims for relief for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), and for lack of jurisdiction based on mootness under Rules 12(b)(1) and 12(h)(3).

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II. PLAINTIFFS' DECLARATORY AND INJUNCTIVE RELIEF CLAIMS ARE MOOT AND NOT RIPE FOR ADJUDICATION

A. Plaintiffs Doe and Roe Have Graduated, Mooting Their Claims for Prospective Relief

A plaintiff must maintain a live controversy through all stages of the litigation, not just when the complaint is filed. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797-99 (9th Cir. 1999). Standing and mootness are jurisdictional issues derived from the Article III requirement that courts decide only live cases or controversies and not issue advisory opinions. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098-1100 (9th Cir. 2000). A defendant may challenge a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) at any time. Fed.R.Civ.Pro. 12(h)(3). Such a motion is not limited to the face of the complaint, but may also rely on extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)

"It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy." *Cole*, at 1098-1100. This mootness doctrine applies fully to cases where plaintiffs assert their religious rights have been infringed. See, *Cole*, at 1098-1000 (students required to omit sectarian references from their graduation presentations); *Doe*, at 797-99 (students compelled to participate in prayer at high school graduation ceremony); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216-18 (3d Cir. 2003) (challenge to high school's ban of Bible club from the activity period). Here, Plaintiffs Doe and Roe both graduated from high school in June 2020. (Declaration of Stephen McMahon ["McMahon Decl."], ¶ 2). Because neither declaratory nor injunctive relief will afford them any remedy, they lack standing to pursue such relief against Defendants, and those claims have become moot. *Doe*, at 797-99. Because this Court lacks jurisdiction over Doe and Roe's declaratory and injunctive relief claims, all such claims should be dismissed. *Doe*, at 797-99.

B. The Limited Public Forum For Student Organizations Does Not Currently Exist, Mooting all of Plaintiffs' Claims for Prospective Relief

All the Plaintiffs' declaratory and injunctive relief claims should also be dismissed because the limited public forum they seek to be a part of no longer exists. In their Prayer for

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Relief, Plaintiffs Roe, Doe and FCA seek a declaration that Defendants "cease withholding club recognition and all its attendant benefits due to Plaintiffs' religious beliefs, including but not limited to religious leadership requirements." They also seek a preliminary and permanent injunction "prohibiting Defendants from denying Plaintiffs recognition as a recognized student group or any benefits of recognition available to other student groups because of Plaintiffs' religious beliefs, including but not limited to religious leadership requirements, and enjoining Defendants from allowing students and faculty to harass students in the Student FCA Chapters because of the their religious beliefs and/or the FCA students' exercise of their federal statutory or constitutional right to meet to express those religious beliefs." The only allegations in the Complaint specifically addressing harassment or retaliation pertain to Plaintiffs Doe and Roe, former Pioneer High School students. (AC, ¶¶10-19, 60-77; McMahon Decl., ¶2).

All of Plaintiffs' claims are predicated on the allegations that the FCA was an officially recognized student group at three District high schools, and entitled to the benefits afforded such groups, including access to faculty advisors, access to ASB funds, inclusion in the yearbook, and other benefits. (AC, ¶¶55, 59.) They allege that on May 2, 2019, the Principal at Pioneer told the student leaders that FCA would no longer be a recognized student group there. (*Id.*, ¶54.) At the same time, they allege District officials informed FCA student leaders at Leland and Willow Glen that their groups would also not be officially recognized. (*Id.*, ¶54.) They further allege that FCA chapters were allowed to form as interest groups, not as clubs, and were permitted to meet on the high school campuses. (*Id.*, ¶¶ 46, 56.) This was unlawful, according to the Plaintiffs, because the schools "maintain a limited open forum for noncurriculum-related student groups to meet," from which FCA was excluded. (*Id.*, ¶¶78, 84.)

In *Widmar v. Vincent*, 454 U.S. 263, 267 (1981), the Supreme Court determined that a public university that allows secular student groups to use its facilities to meet on campus creates a limited public forum, which requires that it also make such meeting space available to religious student groups. The Court recognized that universities are not required to create such forums for student groups, but if they choose to do so, they must not discriminate against religious groups simply because of the religious viewpoint of their speech. *Widmar*, at 267; *Truth v. Kent Sch.*

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Dist., 634 F.3d 634, 649 (9th Cir. 2008), *overruled on other grounds, Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29 (2010) ("[t]he Court recognized that, although the state is not required to open certain fora to public discourse, once it elects to do so, it 'assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms'"); see also, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30 (1995).

The Equal Access Act extends these principles to public secondary schools. The Act makes it unlawful for "any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. §4071(a). Under the Act, a "limited open forum" is created when a school "grants an offering to or opportunity for one or more noncurriculum related students groups to meet on school premises during noninstructional time." 20 U.S.C. §4071(b). The Act defines "meeting" to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. §4072(3). Subsequent case law has established that the rights granted under the EAA extend not just to physically meeting on school premises, but also to being provided the perks associated with recognition as an official student group, like access to bulletin boards, public announcements, events only open to official groups, and funds available only to official student groups (so long as the provision of such funds does not violate the Establishment Clause). *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 247 (1990) ("equal access" requires official recognition of religious groups, not just permission to meet on campus); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (analyzing benefits afforded student groups under Establishment Clause).

Plaintiffs' original complaint was filed on April 22, 2020. Their amended complaint was filed on May 19, 2020. However, on March 13, 2020, the three high schools at issue were closed due to the coronavirus outbreak. (McMahon Decl., ¶3). On March 23, 2020, all instruction at those sites was moved to distance learning. (*Id.*, ¶4). Because of the ongoing pandemic, the District does not currently plan to reopen those school sites in the fall of 2020, and instead will be

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continuing distance learning until at least October 4, 2020, at which time the District will reevaluate the situation. (*Id*., ¶5). While the ASB continues to exist, no student groups are meeting or holding events on school premises and no new club applications are being accepted. (*Id*., ¶6). Given current health and safety restrictions, it is unlikely that groups that meet indoors in large numbers will be permitted to do so on campus even after October 4, 2020. (*Id*., ¶7). To the extent student groups are continuing to meet during the school closures, they are doing so privately, and without the involvement or assistance of the District. (*Id*., ¶8). Such private meetings are not "within [the] limited open forum" (20 U.S.C. §4071(a), (b)), and do not implicate the EAA or the First Amendment. Indeed, there is no "limited open forum" in existence at all at this time as the schools are not allowing any "noncurriculum related student groups to meet on school premises during noninstructional time."

In fact, the District has no way to control whether individuals meeting off school premises are meeting "during noninstructional time" at all. 20 U.S.C. §4071(a). This is because during distance learning, there is no traditional school day that can be broken into instructional and noninstructional time. Instead, state law provides for daily instructional minutes, to be "based on the time value of assignments" as determined by the teacher. Educ. Code §§43501, 43502(e)(2). Students are required to "attend" school, and attendance is based on the student's "daily participation," which does not necessarily happen under the teacher's watch. "Daily participation" may be based on "evidence of participation in online activities, completion of regular assignments, completion of assessments, and contacts between employees of the local educational agency and pupils or parents or guardians." Educ. Code §§43500(a), 43504(a), (d).

Furthermore, during the current health crisis, FCA has no imminent injury that may be adjudicated by this Court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). FCA's "vision" is "to see the world transformed by Jesus Christ through the influence of coaches and athletes," and its "mission" is "to lead every coach and athlete into a growing relationship with Jesus Christ and His church." (AC, ¶¶ 33, 40, Ex. B.) Its "Huddle Playbook" says: "We pursue our vision and mission through the strategy of **to and through the coach**. We seek ministry first to coaches hearts, marriages and families. Then, when ready, we minister **through** coaches to their fellow

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coaches, teams and athlete leaders." (*Id*., p. 9 (Dkt. 14-2) (emphasis in original).) However, since March 13, 2020, all athletic programs have been suspended. (McMahon Decl., ¶9.)

Each of the high schools at issue are in the Blossom Valley Athletic League, and part of the Central Coast Section ("CCS") of the California Interscholastic Federation ("CIF"). (McMahon Decl., ¶ 10; Educ. Code §§33353(a), 35179(b).) Those organizations have suspended interscholastic competition for league members at this time, with the first day of official practice for fall sports on hold until December 14, 2020. (McMahon Decl., ¶11, Ex. A (CIF-Central Coast Section News Release, July 21, 2020).) While the CCS has allowed informal team training to occur at this time, whether it happens at any particular school site is a local decision. (McMahon Decl., ¶12). However, all of the high schools involved here have decided to prohibit on campus team trainings at this time. (*Id*., ¶12). Thus, even if student groups were meeting on campus at this time, FCA would not be able to pursue its vision and mission due to the current health crisis. And, as a result, it currently suffers no injury from being denied official club recognition that is suitable for this Court to adjudicate. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense.")

In summary, nothing in the District's policies prevents students from meeting privately, off campus, for any lawful purpose. All such groups are treated the same. Under the current circumstances, there are no benefits afforded to officially recognized groups that are not equally available to FCA, and, there is no limited public forum that currently exists that allows any student groups to meet on campus. Further, any injury to FCA at this point is only speculative and not ripe for adjudication. As a result, Plaintiffs' claims for declaratory and injunctive relief must be dismissed from this case.

III. PLAINTIFFS HAVE NO CAUSE OF ACTION FOR VIOLATION OF THE ESTABLISHMENT CLAUSE

Plaintiffs bring four causes of action that appear to be based on the Establishment Clause, in whole or in part. The Fifth Cause of Action ("Targeting of Religious Beliefs"), says that Defendants have stated or adopted views hostile to Plaintiffs' religious faith, and allowed or encouraged faculty and students to harass them for their religious beliefs. (AC, ¶¶167-68.) The

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Sixth Cause of Action ("Ministerial Exception and Internal Autonomy"), says Defendants have impermissibly interfered with Plaintiffs' right to select their religious leaders and entangled themselves with Plaintiffs' religious beliefs and internal religious affairs. (*Id.*, ¶¶176-83.) The Seventh Cause of Action is for "Denominational Discrimination," and says that Defendants officially recognize a number of religious or atheistic student groups, but not FCA because they disagree with Plaintiffs' religious beliefs. (*Id.*, ¶¶189-91.) The Eighth Cause of Action ("Government Hostility Toward Religion"), alleges that Defendants disapproved of Plaintiffs' religious beliefs. (*Id.*, ¶¶197-99.) The Complaint alleges that: "On or about April 23, 2019, Peter Glasser, a teacher at Pioneer, …put the FCA Statement of Faith and Sexual Purity on the classroom whiteboard [and] wrote, 'I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements. How do you feel?'" (*Id.*, ¶50.) Plaintiffs allege that "[t]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." (*Id.*, ¶197).

Despite Plaintiffs' various attempts to parse the First Amendment in their Complaint, what their allegations boil down to is that the District failed to provide official recognition to the FCA based on its religious views, despite allowing other religious or non-religious groups to have official recognition, and that Peter Glasser made Plaintiffs uncomfortable by his whiteboard message about the FCA's anti-gay policies. (McMahon Decl., ¶ 13, Ex. B (FCA Student Leader Application containing Statement of Faith and Statement of Sexual Purity).)[1] The problem with Plaintiffs' theory is that neither of these events violated the Establishment Clause.

A. The Creation of a Limited Public Forum for Student Groups Does Not Establish Religion

First, it is well established that a school's official recognition of a variety of student groups, including religious groups, does not violate the Establishment Clause. Instead, it creates a limited public forum that allows student speech to flourish. (AC, ¶¶78, 84, 125.) Recognized

[1] Documents not attached to the complaint may be considered by the Court on a 12(b)(6) motion to dismiss if the complaint refers to such document; the document is "central" to plaintiffs' claim; and no party questions the authenticity of the copy attached. *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011).

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student groups are engaging in student speech, not government speech, and so the recognition (or non-recognition) of any club does not involve government sponsorship of any particular type of speech or viewpoint.

To survive an Establishment Clause challenge, the law must 1) have a secular purpose, 2) have a primary effect that neither advances nor inhibits religion, and 3) not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In *Widmar*, the Supreme Court applied the *Lemon* test to hold that an "equal access" policy for student organizations does not violate the Establishment Clause. The Court noted that, by allowing student groups to exist, the university had not created a religious forum, but a public forum in which school groups could use university facilities. *Widmar*, at 273. It concluded that although incidental benefits accrued to religious groups who used university facilities, this did not amount to an establishment of religion, because a university's forum does not "confer any imprimatur of state approval on religious sects or practices." *Id*., at 273-74. Indeed, the university could not be found to be endorsing the speech of the multitude of different political, social, religious, and other groups found on its campus, just because they were allowed to use it facilities. *Id.* The university's recognition of a religious student organization "'would no more commit the University ... to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities." *Id.*, at 276.

In *Mergens*, the Court considered whether granting a religious group official recognition as a high school student organization under the Act violated the Establishment Clause. It concluded it did not. It found that "Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular." *Mergens*, at 249. The Court noted that:

> [T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

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Mergens, at 250. "Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.*, at 252. In addition, the Court rejected the notion that because the Act allowed for the involvement of a faculty advisor there was excessive entanglement with religion. *Id.*, at 252-53.

In *Prince*, the Ninth Circuit evaluated whether a Washington school district appropriately denied a religious student group official ASB recognition under both the Act and the First Amendment. The district there argued that providing the group with official recognition and the benefits that entailed would constitute sponsorship of the organization. The Ninth Circuit "reject[ed] the argument that simply because of a limited approval and oversight process by the district, the district impermissibly sponsors the club within the meaning of the Act or as proscribed by the First Amendment." *Prince*, at 1084. In addition, to the extent the student group received funding from ASB, those funds were not "public funds" subsidizing religious activities. *Id.*, at 1085-86. Further, any district funds used by student groups for school supplies, AV equipment, and school vehicles were part of the limited public forum the high school had created for student clubs, and were being used for secular purposes. *Id.*, at 1090-93. The Court also found it significant that access was granted to a "wide spectrum of student groups." *Id.*, at 1092.

> The School District distributes funds to dozens of student groups to facilitate their speech and club activities. "[I]f numerous private choices, rather than a single choice of government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.

Prince, at 1093.

Under these authorities, the limited public forums the high schools created do not establish religion. Their purposes are secular, they allow a multitude of groups to participate, thus neither advancing nor inhibiting religion, and they are not excessively entangled with religion, either by allowing ASB to fund student organizations, providing faculty advisors, or covering the groups' incidental expenses for secular purposes. (AC, ¶¶4, 49, 78-90, Ex. A.) By the same token, these same limited public forums cannot be deemed to be establishing non-

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religion or atheism because they do not represent the District's speech at all, only the speech of the student participants. As a result, Plaintiffs' Establishment Clause claims under their Fifth, Sixth, Seventh and Eighth Causes of Action should be dismissed.

B. A Teacher's Secular Comment During Instruction Does Not Establish Religion

Plaintiffs also suggest that Defendants violated the Establishment Clause because teacher Peter Glasser posed a question to his students on his whiteboard about how they felt about FCA's Statement of Faith and Sexual Purity Statement. (AC, ¶¶5, 168, 171, 197-201.) Yet, there is no case law to support the notion that a high school history teacher's statement in the classroom that is inherently secular unconstitutionally establishes religion. Moreover, to the extent any such law exists, it was not clearly established at the time Mr. Glasser made his comments, and thus he is entitled to qualified immunity for such statements.

C.F. v. Capistrano Unif. Sch. Dist., 654 F.3d 975 (9th Cir. 2011) involved a challenge by an AP European History student to comments his teacher made during instruction critical of religious thinking and/or of a literal interpretation of the Bible. The student claimed that the comments violated the Establishment Clause because they disparaged religion and particular Christian views.[2] The Court noted, however, that "teachers must … be given leeway to challenge students to foster critical thinking skills and develop their analytical abilities." *Id.*, at 988. Indeed, it noted:

> The Supreme Court has long made clear … that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson v. Arkansas*, 393 U.S. 97, 106, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). Even statements exhibiting some hostility to religion do not violate the Establishment Clause if the government conduct at issue has a secular purpose, does not have as its principal or primary effect inhibiting religion and does not foster excessive government entanglement with religion. [Citations omitted]

C.F., at 985-86.

[2] For instance, the teacher stated: "What was it that Mark Twain said? 'Religion was invented when the first con man met the first [fool].'" *C.F.*, at 981.

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It is hard to see how Mr. Glasser's whiteboard announcement challenging the thinking of his students had anything other than a secular purpose. Clearly teachers are permitted to discuss religious themes in their classrooms as they are critical to an understanding of history, politics, literature and art, for example. (Educ. Code §51511.) There are no allegations in the Complaint that Plaintiffs' religious beliefs were inhibited by this comment or that it was an excessive entanglement in their religious practices. Thus, there is no cause of action under the Establishment Clause for this single teacher comment.

In *C.F.*, the Ninth Circuit did not even reach the question of whether the teacher's comments violated the Establishment Clause because it held he was entitled to qualified immunity.

> We have little trouble concluding that the law was not clearly established at the time of the events in question—there has never been any reported case holding that a teacher violated the Establishment Clause by making statements in the classroom that were allegedly hostile to religion.

C.F., at 986. Because the teacher could not have had fair warning that his conduct was unlawful, he was entitled to qualified immunity for his comments. *Id.*

Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 827 (9th Cir. 2017), which Plaintiffs cite in their Complaint, is not to the contrary. That case involved a high school football coach who prayed on the 50 yard line immediately after football games and was let go because of his conduct. Because he was acting as a public employee during his prayers, the Court found his speech was not protected; therefore his employer was free to non-renew his contract. The issue in *Kennedy* was the coach's regular promotion of religion to students and spectators while on duty, not the allegedly anti-religious comment made by Mr. Glasser here. Thus, the *C.F.* court's observation still holds true – there is no case law to support the notion that a teacher violates the Establishment Clause by making statements in the classroom allegedly hostile to religion. *C.F.*, at 986. With no support for Plaintiffs' legal theory, they have failed to state a claim under the Establishment Clause.

Moreover, to the extent there is any cause of action for disparaging Plaintiffs' religious beliefs, it is already covered under their Free Exercise Clause theories. "[A]s the Supreme Court has noted, its Establishment Clause cases 'for the most part have addressed governmental efforts

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to benefit religion or particular religions,' and thus allegations of an 'attempt to disfavor' a religion … are properly analyzed under the Free Exercise Clause." *Harper v. Poway Unif. Sch. Dist.*, 445 F.3d 1166, 1190-91 (9th Cir. 2006) (school dress code policy restricting student's wearing of tee shirt with an anti-gay message did not violate Establishment Clause), *vacated on other grounds by Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). Thus, Plaintiffs' claims under the Establishment Clause are duplicative of their claims under the Free Exercise Clause, and should be dismissed on this basis as well.

C. The Individual Defendants Are Entitled to Qualified Immunity from the Establishment Clause Claims

Even if the Court were to find a viable Establishment Clause claim here, it should nonetheless dismiss the Fifth, Sixth, Seventh and Eighth Causes of Action against the individual defendants. Since the conduct at issue did not violate any clearly established constitutional right, those defendants are entitled to qualified immunity. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). The reasonableness of the officer's conduct is "judged against the backdrop of the law at the time of the conduct." *Id.*, at 1152.

The Supreme Court has set forth a two-part analysis for resolving qualified immunity claims. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the court must consider whether the facts "[t]aken in the light most favorable to the party asserting the injury … show [that] the [defendant's] conduct violated a constitutional right[.]" *Saucier*, at 201. Second, the court must determine whether the right was clearly established at the time of the alleged violation. *Id.* "'These two prongs of the analysis need not be considered in any particular order, and both prongs must be satisfied for a plaintiff to overcome a qualified immunity defense.'" *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017), citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The "clearly established" prong is a question of law for the court to decide. *Morales v. Fry*, 873 F.3d 817, 821 (9th Cir. 2017). To be clearly established, "[t]he contours of the right

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must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The courts have stressed that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Dunn v. Castro*, 621 F.3d 1196, 1201 (9th Cir. 2010). Although there need not be "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, at 1152. This "high standard is intended to give officers breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011). "When this test is properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* Even if the violated right was clearly established at the time of the violation, it may be "difficult for [the defendant] to determine how the relevant legal doctrine … will apply to the factual situation the [defendant] confronts… . [Therefore, i]f the [defendant's] mistake as to what the law requires is reasonable ... the [defendant] is entitled to the immunity defense." *Saucier*, at 205.

The plaintiff bears the burden of proving that the right was clearly established at the time of the alleged violation. *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011). Here, however, Plaintiffs have not met that burden. As explained above, at the time of the alleged conduct, there was no clearly established right under the Establishment Clause to require a public school to grant official recognition to a religious student group that violated its nondiscrimination policy. There was also no clearly established right under the Establishment Clause for a high school student to be free of an offensive comment made by her classroom teacher based on her religion. As a result, Mr. Glasser and the other individual Defendants are entitled to qualified immunity from damages based on these alleged violations.

IV. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FOR THE REMAINING CLAIMS

More globally, the individual defendants are entitled to qualified immunity under all Plaintiffs' causes of action as there was no clearly established right for them to have an officially recognized student group at school that excluded non-Christians and gay and lesbian students

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from its leadership ranks.

The gravamen of Plaintiffs' case is that the District revoked and/or failed to grant their application as an official student organization at three of its high schools "pursuant to official policy." (AC, ¶¶107, 112, 126, 129, 157.) They allege that when Principal Espiritu informed FCA leaders that their chapter would no longer be recognized at Pioneer, "his email cited District policies." (AC, ¶108.) Further, they allege that "FCA student leaders for all Student FCA chapters within the District were informed at or near this time that the District would not recognize a Student FCA Chapter at any school because of instructions from the District." (AC, ¶108.) Principal Espiritu's email is not attached to the Complaint, but may be considered on this motion to dismiss, and is attached as Exhibit A to the Declaration of Amy R. Levine, filed herewith. *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011).

That email, dated May 2, 2019, is addressed to the student FCA leaders at Pioneer, and states that "San Jose Unified does not sponsor programs and activities with discriminatory practices," and that the District "requires all of its programs and activities to be free from discrimination based on "ender, gender identity and expression, race, color, religion, ancestry, national origin, immigration status, ethnic group, pregnancy, marital or parental status, physical or mental disability, sexual orientation or the perception of one or more of such characteristics." The Complaint alleges the contents of the District's nondiscrimination policies referenced in the email, at paragraphs 116-117.

At the time the District took action to withdraw recognition of the FCA, in the spring and fall of 2019, there was no clearly established right of a religious student organization to obtain official student club status when its organization violated the school's nondiscrimination policies. To the contrary, the established law was and is that a public school can enforce its nondiscrimination policy as to such organizations.

In *Christian Legal Society Chapter of the Univ. of Calif., Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010), students at the UC Hastings law school partnered with the national organization of the Christian Legal Society to organize a student club at their school. Per the national organization, the student chapters had to adopt bylaws that required officers and

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members to sign a Statement of Faith obligating them to conduct their lives in accordance with that Statement's principles. "Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman". The Christian Legal Society interpreted its bylaws to require it to exclude anyone who engaged in "unrepentant homosexual conduct." *Id*., at 672.

The university had an "all-comers policy" under which "Hastings requires ... that registered student organizations allow any student to participate, become a member or seek leadership positions in the organization regardless of their status or beliefs." *Christian Legal Society*, at 675 & fn. 5. The Supreme Court stated that "[i]t is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers." *Id*., at 694 (emphasis in original). The Court found the all-comers policy to be "reasonable and neutral," and thus rejected any argument that the university violated the First or Fourteenth Amendments in denying recognition to the club. *Id*., at 669. It held that a public university does not violate the Constitution when it "condition[s] its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students." *Id*., at 668.

The Supreme Court in *Christian Legal Society* left open the question of whether the same result would ensue if the school enforced a nondiscrimination policy instead of an "all comers" policy. That question was resolved by the Ninth Circuit in *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011). The plaintiffs in that case were a Christian fraternity and sorority that sought official recognition from San Diego State University. But,

> [e]ach time Plaintiffs have applied for official recognition, they have been denied by San Diego State administrators because of Plaintiffs' requirement that their members and officers profess a specific religious belief, namely, Christianity. These membership requirements conflict with San Diego State's nondiscrimination policy, which San Diego State requires all officially recognized student organizations to include in their bylaws. The policy states:
>
> > On-campus status will not be granted to any student organization whose application is incomplete or restricts membership or eligibility to hold appointed or elected student officer positions in the campus-recognized chapter or group

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> on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law.

Alpha Delta, at 796.

The Ninth Circuit held the university was entitled to enforce its non-discrimination policy as to these Christian student organizations. *Alpha Delta*, at 801-02. Following Supreme Court precedent, the *Alpha Delta* court found that "antidiscrimination laws intended to ensure equal access to the benefits of society serve goals 'unrelated to the suppression of expression' and are neutral as to both content and viewpoint." *Id*., at 801. In reaching its conclusion, the Court drew on its earlier decision in *Truth*, *supra*, 542 F.3d 634, in which it held that a school district could refuse to recognize a Bible Club which required members to be Christian and voting members to sign a "Statement of Faith," as that refusal was "based on the [the student group's] discriminatory membership criteria, not the religious 'content of the speech'" or its religious viewpoint. *Id.*, at 639, 645, 650.

Given this legal landscape, Plaintiffs cannot meet their burden of showing that the constitutional and statutory principles they seek to enforce were clearly established in this context, so as to defeat qualified immunity. Defendants did not have to be 100% correct in their understanding of the law to be protected by immunity. Thus, even if there are some nuances here of which the Defendants were unaware, they are entitled to some "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft*, at 734. Based on the state of the law at the time of these events, the individual Defendants are entitled immunity, and must have all damages claims against them dismissed.

V. THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM DAMAGES UNDER THE COVERDELL TEACHER PROTECTION ACT

A. The Individual Defendants are Immune From Failing to Protect Students From Harassment at School

In addition, to the extent the Complaint seeks to impose liability for the Defendants' failure to protect Plaintiffs Doe and Roe from injury because of the actions of other students, the Defendants are immune under the Paul D. Coverdell Teacher Protection Act of 2011, 20 U.S.C.

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§§ 7941, et seq. Under 20 U.S.C. section 7946,

> … no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if —
>
> (1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;
>
> (2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school; … [and]
>
> (4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher ….

20 U.S.C. §§7946(a)(1), (2), (4). "Teacher" is defined in the Act to include principals and administrators, and so applies to all individual Defendants here. 20 U.S.C. § 7943(6)

This Act protects teachers against claims based on their acts and omissions in furtherance of maintaining order or control in the classroom or school, and has been construed to immunize them for their alleged failures to act to protect students from injury by other students or third parties. *See, Nkemakolam v. St. John's Military Sch.*, 890 F.Supp.2d 1260, 1263–64 (D. Kan. 2012) (motion for leave to amend to add a defendant denied, where plaintiffs allege that the defendant "intentionally failed to supervise and 'control the conduct' of students at the school" and that he "'was aware of the dangerous propensities' of some of the students at St. John's"); *Doe v. Bd. of Educ. of Washington Cty.*, 2015 WL 4716065, at *4–6 (D. Md. 2015) (defendant immunized from negligence claim for failure to appropriately address bullying, which led to plaintiff's injuries).

Here, all the claims against Principal Herb Espiritu and Superintendent Nancy Albarran, and at least some of the claims against teacher Peter Glasser, are that they failed to intervene to protect Plaintiffs Doe and Roe from harassment by faculty and students. (AC, ¶94.) For instance, they allege that: Espiritu allowed Glasser's whiteboard display to remain posted in his classroom for a week (*id.*, ¶6); Espiritu and Glasser "coordinated with students who oppose FCA's religious

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beliefs in an effort to prevent the Student FCA Chapters from meeting at all on campus" (*id.*, ¶10); Glasser coordinated with the Satanic Temple Club students to harass the FCA Chapter (*id.*, ¶¶11-13, 64); Defendants allowed the Satanic Temple Club to demonstrate outside the FCA meetings knowing it would intimidate and harass the FCA students (*id.*, ¶14); Espiritu and "District officials" allowed Pioneer students and faculty to harass, intimidate and attempt to prevent Pioneer FCA students from meeting (*id.*, ¶63, 67, 72-73); Espiritu allowed student reporters to take more than 300 pictures of FCA students during their meeting (*id.*, ¶68); District officials and Espiritu allowed protesting students to intrude into the classroom where FCA was meeting (*id.*, ¶¶69-70), made "no effort to protect the FCA students from harassment" by the Satanic Temple Club students, the school newspaper, or others (*id.*, ¶¶14-15-16, 65-68), and failed to discipline faculty and students who harassed FCA students (*id.*, ¶¶17-18, 52-53, 65-66, 77); Espiritu told the FCA students they needed to allow student photographers to take their pictures if they wanted to be in the yearbook (*id.*, ¶68) and threatened to punish Plaintiffs for taking pictures of the students who were harassing them (*id.*, ¶71); and Albarran approved the continued discrimination (*id.*, ¶19). Many of their Causes of Action refer to these allegations, including the Second (*id.*, ¶137), Third (*id.*, ¶150), Fifth (*id.*, ¶¶167-68, 171), Ninth (*id.*, ¶208), and Tenth (*id.*, ¶216) Causes of Action. Their Eighth Cause of Action for "Government Hostility Toward Religion" (*id.*, ¶¶197-201) and Twelfth Cause of Action for "Retaliation" (*id.*, ¶232) both seem primarily based on these allegations. Yet, all these allegations amount to acts or omissions "in furtherance of efforts to … maintain order or control in the classroom or school," analogous to those in *Nkemakolam* and *Doe,* from which the individual Defendants are immune under the Coverdell Act. Accordingly, those Defendants cannot be liable for such acts or omissions.

B. Plaintiffs Cannot Recover Punitive Damages Against the Defendants

Moreover, these allegations seem to be the ones used to support Plaintiffs' claim for punitive damages. Yet, the Coverdell Act also limits the circumstances under which such damages may be awarded against a teacher. Such damages are available only if the plaintiff shows "by clear and convincing evidence that the harm was proximately caused by an act or omission of such teacher that constitutes willful or criminal misconduct, or a conscious, flagrant

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indifference to the rights or safety of the individual harmed." 20 U.S.C. §7946. However, the allegations in the Complaint do not rise to this standard. And, this is particularly so without the allegations that are subject to Coverdell Act immunity. With nothing in the Complaint to support a request for punitive damages, those allegations must be dismissed. See also, Gov. Code §818; *C.N. v. Wolf*, 410 F.Supp.2d 894, 904 (C.D. Cal. 2005) (public entity and individual defendants in official capacity cannot be sued for punitive damages under section 1983 or Gov. Code §818).

VI. THE DEFENDANTS ARE PROTECTED BY ELEVENTH AMENDMENT IMMUNITY

Finally, Plaintiffs' claims are limited by Eleventh Amendment immunity and the parameters of 42 U.S.C. section 1983.

A. The District is Not a Proper Party to This Action

As an initial matter, the District must be dismissed as a party to this action. All of Plaintiffs' claims are brought under 42 U.S.C. section 1983, which provides a cause of action for the violation of rights protected by the Constitution or created by a federal statute that are proximately caused by a "person" acting under color of state law. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To that end, Plaintiffs allege that: "All Defendants are persons acting under the color of state law." (AC, ¶29). However, States, and government agencies that are arms of the State, are not "persons" subject to Section 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

Moreover, under the Eleventh Amendment, a state is generally not subject to suit in federal court by a private person or entity. *Will*, at 66. The Eleventh Amendment embodies a principle of sovereign immunity which bars a federal court from hearing claims by individuals against the State, unless the State consents to suit, or unless Congress has expressly and effectively abrogated the State's immunity by passing a law pursuant to its powers under the Fourteenth Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54-55, 59-60 (1996); *Will*, at 66. Under Eleventh Amendment jurisprudence, the State *qua* State cannot authorize unconstitutional or illegal conduct. *Froebel v. Meyer*, 13 F.Supp.2d 843, 849 (E.D.Wis. 1998). Since the Eleventh Amendment is a limitation on the federal courts' power to hear cases and

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controversies under Article III of the Constitution, even if a case against a State arises under the Constitution or federal law, the suit is barred where immunity applies. *Seminole*, at 67-68, 72-73.

In California, school districts are arms of the State and thus enjoy Eleventh Amendment immunity. *Belanger v. Madera Unif. Sch. Dist.*, 963 F.2d 248, 251-52 (9th Cir. 1992); *Kirchmann v. Lake Elsinore Unif. Sch. Dist.*, 83 Cal.App.4th 1098 (2000). They therefore may not be sued under Section 1983, regardless of the type of relief sought and regardless of whether the claim asserts constitutional or federal statutory rights. *Cory v. White*, 457 U.S. 85, 90-91 (1982) (barring suit for injunctive relief); *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978) (barring suit under 8th and 14th Amendments); *Quern v. Jordan*, 440 U.S. 332, 342 (1975) (passage of Section 1983 did not abrogate 11th Amendment immunity). Accordingly, the District itself must be dismissed from this case.

B. All Claims for Damages Against the Individual Defendants in Their Official Capacities Must Be Dismissed

Further, no claims for damages or other retrospective relief may be made against District employees acting in their official capacities. Under *Ex Parte Young*, 209 U.S. 123 (1908), where appropriate, a court may order prospective injunctive relief against a State official for a violation of federal law without running afoul of the Eleventh Amendment. However, no retroactive relief is allowed against the State or a State official in his or her official capacity, even if it is equitable in nature. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102-03, 106 (1984); *Edelman v. Jordan*, 415 U.S. 651, 667-69 (1974). Accordingly, to the extent there are any viable damages claims against the individual Defendants, they may only be pursued against them in their personal capacities. All damages claims against them in their official capacities must be dismissed.

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VII. CONCLUSION

For the foregoing reasons, Defendants request that the Court grant this motion to dismiss, with prejudice.

DATED: August 10, 2020

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