No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES., *et al*.,

Appellants,

v.

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

Appellees.

On Appeal from the United States District
Court for the Northern District of California
Case No. 20-cv-02798
The Honorable Haywood S. Gilliam, Jr., U.S. District Judge

Brief of Americans for Prosperity Foundation as *Amicus Curiae* in Support of Appellants and Reversal

CYNTHIA FLEMING CRAWFORD
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road
Arlington, VA 22201
Telephone: 571.329.2227

Attorneys for Americans for Prosperity Foundation

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INTEREST OF AMICUS CURIAE

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF works toward these goals by defending the individual rights that are essential to all members of society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment for all Americans, including students. Campuses are not just places where First Amendment rights should be protected; that protection is vital to their mission. They are uniquely positioned to instill in the next generation an appreciation for free speech and association. This is why "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted and emphasis added).[1]

SUMMARY OF ARGUMENT

Alexis de Tocqueville warned that "[f]or men to remain civilized or to become so, the art of associating must become developed among them and be

[1] This brief was not authored in whole or in part by a party or counsel to a party. No person other than the amicus curiae and its counsel contributed money intended to fund this brief. All parties have consented to the filing of this brief.

perfected," observing that in "democratic countries the science of association is the mother science; the progress of all the others depends on the progress of the former."[2] Indeed he considered there to be a necessary connection between the principles of association and equality, because, if equal individuals never "acquire[d] the habit of forming associations in ordinary life, civilization itself would be endangered.."[3]

Tocqueville's observations are as true now as they were then. But the characteristically American art of spontaneous association is threatened where, as here, the state excludes participants based on viewpoint rather than respecting the capacity of voluntary associations to "achieve the object of their common desires" by accommodating differences of opinion.[4]

In addition to building a society of equals, Tocqueville saw associations playing another more-personal role—developing the minds and morals of the people and fitting them for self-government.[5] These complementary

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[2] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 902 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835), *available at* https://bit.ly/36Sm7QQ (last visited July 1, 2022) ["DEMOCRACY IN AMERICA"].

[3] *Id.* at 897–98.

[4] "If men who live in democratic countries had neither the right nor the taste to unite for political ends, their independence would run great risks, but they could for a long time retain their wealth and their enlightenment; while, if they did not acquire the custom of associating in ordinary life, civilization itself would be in danger." *Id*. at 898.

[5] Daniel Stid, *Civil Society and the Foundations of Democratic Citizenship*,

competencies form a virtuous cycle to sustain a free and democratic society: external emerging associations create the building blocks of society, and internal morals and ideals, developed through association, feed the ability to work together to preserve a free society and the progress of all other endeavors within it.

Tocqueville also saw associations as the bulwark against isolated individuals becoming subdued by a government that alone acts as the font of ideas, opinions, and the energy necessary to undertake great goals. Without voluntary associations, a destructive cycle would ensue, weakening the will and the ability of individuals to manage their own affairs.[6]

As critical as each of these concerns is to the functioning of a robust pluralistic—and self-governing—society, the responsibility of schools to foster

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Stanford Social Innovation Review (Aug. 16, 2018), https://bit.ly/3duvj0E (last visited July 1, 2022). "The second role that Tocqueville saw associations playing . . . was indirect: drawing individuals out of their private concerns, where they would otherwise stay focused and striving, and enabling them to be part of something larger than the circumstances of their own existence. In doing this, they invariably had to rub elbows and learn to work with others with different interests and points of view. And in this way, those participating in associations became better collaborators, leaders, and citizens." *Id*. *See also 2* DEMOCRACY IN AMERICA 902.

[6] *Id.* at 900 ("The more [government] . . . puts itself in the place of associations, the more individuals, losing the idea of associating, will need it to come to their aid. These are causes and effects that engender each other without stopping."). *See also* Stid, *supra* note 5 ("Tocqueville feared a scenario in which the great mass of Americans . . . would submit to a paternalistic and despotic central government that would rule over them as a shepherd would 'a flock of timid and hardworking animals.'").

spontaneous association and diversity of viewpoints cannot be overstated. Nor should the importance of developing young leaders with courage to uphold minority positions be downplayed. District Board Policies 0410 and 5145.3 and the ASB Affirmation Form, which cites them, (collectively "Board Policies") do just that, interfering with freedom of speech and association by imposing viewpoint-based criteria to select who may speak and associate in public schools. But speech and association are not privileges to be doled out to those who toe the party line.

The Board Policies interfere with freedom of speech by prohibiting and compelling viewpoint specific speech. They interfere with freedom of association by mandating who may be a member or leader of a private organization on threat of withdrawing a generally available government benefit. Both policies expressly do so on the basis of religion. As the Supreme Court recently confirmed in *Carson v. Makin*, when government offers a public benefit, an otherwise eligible recipient may not be denied the benefit based on religious exercise. 142 S. Ct. 1987 (2022). Likewise, speakers may not be compelled to adopt a favored viewpoint simply because they attend a public school. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and

spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). And "[w]here the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy v. Bremerton School Dist.*, 597 U.S. ___ (2022). Nor can government sidestep these protections by styling the issue as based in association. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) ("the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities."). The Board Policies fail on all three factors.

The trial court relied on *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 679–83 (2010), for the proposition that student club programs are limited public forums, which the government can restrict if the restriction "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." 1-ER-0009 (citing *Martinez*, 561 U.S. at 695). The approach in *Martinez*, sidestepping constitutional protection of associational rights by subordinating them to limited public forum doctrine, was erroneous the day it was decided and has since been left behind by developments in the law, which robustly protect the autonomy of religious organizations and speakers. To the extent *Martinez* has any relevance, the district court misapplied

it in holding the Board Policies are "neutral as to content and viewpoint because [they] serve[] a purpose unrelated to the suppression of expression." 1-ER-0011.

As a factual matter, this assertion is contradicted by the text of the mandatory affirmation form which compels speech with prescribed content and only one allowable viewpoint: the one printed on the form that "affirms" the government's perspective. 1-ER-0017 (citing ASB Affirmation form). Moreover, the actively hostile approach by school faculty and administration to purge the campus of FCA's viewpoint was overt suppression of expression.

As a matter of law, it gets the analysis backwards, by placing government purpose ahead of content neutrality. The law commands the opposite approach, considering "whether a law is content neutral on its face before turning to the law's justification or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015). Here, the facially content-based policy demands strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id*. at 171. The District's exemption of itself from the prohibition on religious discrimination and the ASB's recognition of student groups whose membership and leadership criteria are contrary to the Board Policies undermine the District's claim that its interest is so compelling that non-conforming groups must be excluded.

In addition to the clear violation of First Amendment principles, this

approach teaches students that government, not individuals, has the power to decide who may speak and associate, for what purpose, under what arrangement, and what they are allowed to believe. That lesson threatens the very basis for civil society, which depends on the robust ability for spontaneous assembly, self-organization, problem solving, and internal resolution of challenges.

ARGUMENT

I. Voluntary Association is a Necessary Component of Liberty.

Voluntary associations—large and small, political and civil, commercial and charitable—form the foundation of a free and democratic society. Instilling the habit of voluntary association to achieve a mutual goal not only strengthens the skill of spontaneous association, but also develops other characteristics that are crucial to self-government, including the practice of speaking freely, circulating and challenging ideas, and holding government accountable. This aspect of American life is something of an historical oddity, and as such, should be nurtured if our talent for self-government is to survive.

Tocqueville noted three critical features of the relationship between voluntary civil associations and the practice of self-government. *First*, associations cannot be limited to only certain aspects of life or the habit of voluntary association will be broken, in turn destroying the will of the people to

undertake great things.[7]

Second, voluntary associations provide stability in a democratic society and reduce risks to the state by allowing people to apply their skill of give-and-take in the political sphere, diffusing the risks of faction and ennui.[8]

Third, civic associations guard against tyranny by providing a font and outlet for fresh and competing ideas, allowing mediating institutions to provide the critical check against government overreach that individuals acting alone cannot.[9] These beneficial characteristics of voluntary association are imperiled

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[7] *See* 2 DEMOCRACY IN AMERICA 915. Tocqueville wrote: "When citizens have the ability and the habit of associating for all things, they will associate as readily for small ones as for great ones. But if they can associate only for small ones, they will not even find the desire and the capacity to do so. In vain will you allow them complete liberty to take charge of their business together; they will only nonchalantly use the rights that you grant them; and after you have exhausted yourself with efforts to turn them away from the forbidden associations, you will be surprised at your inability to persuade them to form the permitted ones." *Id*.

[8] *See id*. at 916. According to Tocqueville: "It is within political associations that the Americans of all the states, all minds and all ages, daily acquire the general taste for association and become familiar with its use. There they see each other in great number, talk together, understand each other and become active together in all sorts of enterprises. They then carry into civil life the notions that they have acquired in this way and make them serve a thousand uses. So it is by enjoying a dangerous liberty that the Americans learn the art of making the dangers of liberty smaller." *Id.*

[9] *Id*. at 901 ("A government can no more suffice for maintaining alone and for renewing the circulation of sentiments and ideas among a great people than for conducting all of the industrial enterprises. From the moment it tries to emerge from the political sphere in order to throw itself into the new path, it will exercise an unbearable tyranny, even without wanting to do so; for government only knows how to dictate precise rules; it imposes the sentiments and ideas that it favors, and

by forced exclusion of certain volunteers from the public square. The give-and-take among ideas and the development of skill in achieving a common goal is diminished, in turn undermining the ability of the people to sustain self-governance.

The Board Policies' imposition of doctrinal conformity as a condition of participation as a student group is but one example of government seeking to exclude "disfavored" viewpoints. Indeed, such exclusionary tactics have a long and storied history. After all, the "accepted wisdom" is constantly changing. As new opinions come to the fore—arising from the robust and free exchange of ideas—those who disclaim the contemporary canon should not be expunged *seriatim* until the state alone decrees who may participate in civic life. The myriad of cases the Supreme Court has decided in favor of students with non-conforming viewpoints has instructed generations of students that their participation in public life is not so tenuous. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021); *Tinker v Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969); *Barnette*, 319 U.S. 624 (1943).

Moreover, a cursory review of the Supreme Court's association jurisprudence displays the kaleidoscope of participants in public life that

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it is always difficult to distinguish its counsels from its orders. . . . Associations, among democratic peoples, must take the place of the powerful individuals that equality of conditions has made disappear.").

overzealous enforcers have tried to exclude and the Court's consistent support for association from a variety of viewpoints:

- 1930s–1970s: Communist adherents. *E.g.*, *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Application of Stolar*, 401 U.S. 23 (1971).

- 1940s–2010s: Union representation. *E.g.*, *Thomas v. Collins*, 323 U.S. 516 (1945); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) *overruled by Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

- 1950s–1980s: NAACP. *E.g.*, *Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

- 1920s–present: Families. *E.g.*, *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Over time, perspectives regarding who is right and who must be silenced for the common good rise and fall. If nothing else, this ever-changing landscape should teach us that what is dogma today may be anathema tomorrow.

It would appear the District's student organizations program, which purports to "give students practice in self-governance, and provide social and recreational activities," and "enhance school spirit and student sense of belonging,"[10] would be wholly consistent with the Supreme Court's enduring recognition of expressive

[10] 9-ER-1590–91; 8-ER-1377, 1379; *see also* 7-ER-1098–99 (purpose of ASB program is for students to "feel connected to other students that are like them")

associational rights as well as Tocqueville's observations on the importance of spontaneous association to the development of self-governance skills. But instead of promoting inclusiveness, the District has made itself the gatekeeper over which student organizations may occupy the public school square. In addition, the District has determined gatekeeping is not enough—it also commanded that anyone suffered to enter must proclaim the government's viewpoint. This is because student groups *are required* to affirm they agree with the Board Policies. This the government cannot do. *Agency for Int'l Dev. v. Aliance. for Open Soc'y Int'l, Inc*., 570 U.S. 205, 213 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.") (cleaned up).

This case affects a single student group, but it sends two clear messages. *First*, government can expel from the public square anyone who is not prepared to echo its present views. This message is false. As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

Second, government may exempt itself from its own rules, exempt favored groups from those rules, and violate its own policy by discriminating against

disfavored groups on the very basis the Board Policies prohibit. This too is false. Here, for example, the lower court distinguished school sports teams from student groups, creating a safe harbor from non-discrimination rules for the District (whom the Constitution constrains) while forbidding such distinctions among private actors (whom the Constitution protects).1-ER-0017, n. 10. The lower Court likewise found that the National Junior Honor Society, whose eligibility criteria include age and demonstrated mental prowess, does not apply criteria "disallowed under the Board Policies or precluded by the ASB Affirmation Form," 1-ER-0017, such as "age", "mental disability", or the perception of one or more of such characteristics. 1-ER-0004–05 (citing Board Policies).

And perhaps more importantly, the District violates its own policy by discriminating on the basis of religion, while simultaneously promoting its policy against religious discrimination.

II. *Martinez* Was Wrongly Decided, Does Not Control This Case, and Lower Courts Should Not Extend It Where the Supreme Court Has Declined To Do So.

A. *Martinez* Was Wrongly Decided and Has Reached Near-Zombie Status.

Martinez stands alone as a Supreme Court decision authorizing government to compel college students to sacrifice their freedom of association in exchange for accessing a government speech forum. The Supreme Court has recognized that laws and regulations that constrain associational freedom are subject to strict

scrutiny and that such restrictions are permitted only if they serve compelling state interests unrelated to the suppression of ideas that cannot be advanced through less restrictive means. The Christian Legal Society brought free speech, free exercise, and free association claims in that case. Nevertheless, the Court eschewed the heightened standard of review applicable to associational rights and conflated all CLS's claims into the forum doctrine analysis applicable to the free speech claim, considering only whether a requirement that all groups waive a fundamental aspect of freedom of association, the right to select one's leaders who share the group's beliefs, is viewpoint neutral and reasonable. *Martinez*, 561 U.S. at 680–81. Under the Court's approach in *Martinez*, a race- or sex-based exclusion from a public forum, or a bar on student press organizations, would require a court only to evaluate whether such a violation is reasonable and viewpoint neutral, with the latter prong being satisfied if everyone's rights were equally violated.

There was no precedent for such a conflation of all constitutional claims into the First Amendment's forum analysis, allowing government to withhold access to a benefit—a speech forum no less—or surrender another constitutional right. Indeed, the decision was impossible to square with the Court's precedents involving campus speech in which the Court had repeatedly applied strict scrutiny and rejected the exclusion of student organizations from campus speech forums. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995)

(applying strict scrutiny to exclusion of religious student group from access to student activity funding, an aspect of official recognition); *Widmar v. Vincent*, 454 U.S. 263, 269–70, 276 (1981) (applying strict scrutiny to denial of recognition of religious student group); *Healy v. James*, 408 U.S. 169, 187–88 (1972) (applying strict scrutiny and rejecting denial of recognition as a violation of freedom of association where group was excluded based on its association with others who had committed acts of violence).

Moreover, when *Martinez* was decided it was well established that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48, (2000); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."). And it has long been established that government cannot deny a benefit or privilege on the basis of exercising a constitutionally protected right. *United States v. Am. Libr. Ass'n, Inc*., 539 U.S. 194, 210 (2003); *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr,* 518 U.S. 668, 674 (1996) (collecting cases). The *Martinez* decision thus departed sharply from well-established speech and association precedent.

B. The Law Has Passed *Martinez* By.

At the time it was decided, *Martinez* was an outlier in subordinating the more rigorous standard applicable to government burdens on freedom of association to the lesser standard applicable to limited public forum access rules. Perhaps this is why in the twelve years since *Martinez* was decided, it has achieved near zombie status, figuring in no majority Supreme Court opinion on a substantive constitutional issue despite multiple opportunities.[11] By contrast, the Court has issued numerous opinions that call the reasoning of *Martinez* into doubt.

Decided just two years after *Martinez*, in *Hosanna-Tabor v. EEOC*, the Supreme Court held that by "imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. 565 U.S. 171, 188–89 (2012). *Accord Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."). These cases are significant here because, although the religious entity in question is a student group, the Supreme Court has long

[11] *Martinez* has been cited twice for the proposition that factual stipulations are binding on the party that makes them. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 (2013); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013).

upheld the free exercise rights of children just as it has for adults. *See, e.g.*, *Barnette*, 319 U.S. at 630.

In *Agency for Int'l Dev.*, the Court held that in "some cases, a funding condition can result in an unconstitutional burden on First Amendment rights." 570 U.S. at 214. It held that AID could not compel as a condition of funding the affirmation of a belief that by its nature could not be confined within the scope of the government program. 570 U.S. 205–06. The same was true in *Martinez* where conditioning CLS's access to a speech forum on changing leadership would impose a condition whose impacts could not be limited to the forum. *See also Carson v. Makin*, 142 S. Ct. 1987 (2022) (conditioning participation in a generally available government benefit program on religious exercise violates the First Amendment). And recently in *Fulton v. City of Philadelphia*, the Court held a "law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." Government "may not refuse to extend that exemption system to cases of religious hardship without compelling reason." 141 S. Ct. 1868, 1877–78 (2021) (cleaned up).

None of these cases is on all fours with this case. But taken together they stand for three clear propositions. *First*, government cannot interfere with the internal autonomy of a religious organization. *Second*, government cannot impose

conditions on access to government benefits—even grant funding, much less access to a speech forum—on a participant's sacrifice of constitutional rights both inside and outside the program. *Third*, government cannot expunge religious participants from generally available public programs.

A case with facts similar to this one demonstrates a well-reasoned application of these concepts. In *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ*. ("IVCF"), "Defendants permitted secular groups, including political organizations, to limit leadership overtly on a host of categories, identities, and beliefs;" "[Recognized Student Organizations] were categorically permitted to discriminate in leadership selection on the basis of ethnicity, political viewpoint, ideology, physical attractiveness, and grade point average;" "Defendants did not have an objective and consistent basis for its decision to revoke Plaintiffs' RSO status;" and, "Defendants fail[ed] to provide reasonable and objective justifications for its application of the non-discrimination policy against Plaintiffs." 534 F. Supp. 3d 785, 821 (E.D. Mich. 2021). *IVCF* held the university's denial of RSO status to a Christian organization on the basis of its religious beliefs caused demonstrable harm in violation of the First Amendment,[12]

[12] "[T]the record shows that the effect of Plaintiffs' delisting of its organization, and its ability to carry out its mission of ministering the Christian faith on Wayne State's campus, was significant. Plaintiffs could no longer obtain free and low-cost meeting spaces on campus, and they were relegated to less attractive spaces when

because "[n]o religious group can constitutionally be made an outsider, excluded from equal access to public or university life, simply because it insists on religious leaders who believe in its cause." *IVCF*, 534 F. Supp. 3d at 812–13. "The First Amendment does not require that Plaintiffs' members choose between risking their continued access to public education and their right to select spiritual leaders who share their beliefs." *Id*. This well-reasoned case provides guidance in how the law should be applied here to protect FCA against unlawful discrimination.[13]

C. To the Extent *Martinez* Retains Any Pulse, This is Not the Case to Revive It.

This is not a close case. To the extent this Court may be inclined to revive or expand *Martinez*, this is not the case to do so. The law clearly protects FCA from the discrimination visited upon it; and the District's actions were egregious

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any spaces were available. . . .Plaintiffs could not use tables in Wayne State's central Student Center to run recruiting events, they could not apply to school funding, and they could not access the school web systems used to communicate with students about events and recruiting. . . . Further, Plaintiffs were barred from participating in the main school-sponsored recruiting event, WinterFest.". *IVCF*, 534 F. Supp. 3d at 812.

[13] The District Court, citing *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011) and *Truth v. Kent Sch. Dist*., 542 F.3d 634 (9th Cir. 2008), found the District Policies prohibiting discrimination on the basis of enumerated classifications to be permissible under Ninth Circuit precedent. 1-ER-0008–09. Whether such policies could survive a facial challenge on free speech grounds, here, the District's active hostility toward FCA's beliefs, is controlled by *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), rendering such overt discrimination unconstitutional.

in scope and viciousness. To hold otherwise would not just infringe FCA's constitutional rights—to the extent the word "just" is proper in such a context—but would establish that public school students may be attacked by their teachers in the classroom on the basis of religious belief, 10-ER-1920; 10-ER-2005–07; 10-ER-2015 ("Glasser taped the statement to his classroom whiteboard to highlight FCA's 'moral stances' and 'views' regarding marriage and sexuality that he found 'objectionable,' and 'wrote a message to his students beneath it: 'I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements'"); that public school teachers may invoke the power of government to purge from a public high school campus religious views with which they disagree, 10-ER-1926 (Glasser urged the principal to silence views that are "bullshit to me"); that "open-mindedness" requires repressing disfavored views, 7-ER-1273; 5-ER-751–52; 5-ER-828 (following the "Climate Committee" meeting, "Principal Espiritu . . . contacted District administrators to derecognize Pioneer FCA."); that public school principals may denounce students' views in the school newspaper, 6-ER-1008 ("Espiritu announced in the school newspaper that 'the Climate Committee and District officials' had made the decision to 'no longer be affiliated with' FCA because Pioneer 'disagree[d] with' FCA's beliefs and saw them as being 'of a discriminatory nature.'"); that adult government employees may accuse the minors in their care of sexual

harassment on the basis of religious belief, 4-ER-639–40 ("Glasser wanted to 'ban FCA completely from campus,' and so repeatedly suggested that Principal Espiritu accuse Pioneer FCA of 'sexual harassment' based solely on the content of their religious beliefs."); that religious students may be equated with the KKK, 5-ER-815 ("Espiritu testified that he treated FCA the same way he would have treated a KKK club"); that public school staff may incite student protests against other students on the basis of religion, 10-ER-1922, App. Br. at 11 ("GSA's faculty advisor publicly lamented that Pioneer FCA was allowed to remain 'on campus' despite its 'hurtful' beliefs, and said the 'best way' to change that 'is to have students rally[] against the issue.' And rally they did, with teacher support."); that public schools may compel students to choose between equal treatment and their religious beliefs, 10-ER-1912 ("GSA's other faculty advisor attended the protests, telling the school newspaper that the protests were 'an act of love,' and that FCA must choose between 'hold[ing] events on campus' and its 'statement of faith'"); and that faculty may encourage students to physically intimidate disfavored students, 8-ER-1523; 10-ER-1888–90; 10-ER-1889; 10-ER-1892; 8-ER-1528 ("Reporters from the school newspaper—itself a District program—entered an FCA meeting and took hundreds of pictures of FCA students, standing within feet or inches of them. . . . A Pioneer teacher in attendance told Espiritu that this was 'intimidating' and left FCA students visibly

'embarrassed, harassed, and scared.' . . . " The newspaper's faculty advisor . . . called one of his reporters an 'idiot' for 'feel[ing] bad' for FCA.").

Martinez cannot be squared with the Court's decisions before or since. It was expressly limited to an "all comers" policy unlike the one here. And the Supreme Court's subsequent decisions and avoidance of even citing much less extending *Martinez* beyond its facts counsel against this Court stretching the opinion to reach this case. Regardless what life remains in *Martinez*, these facts provide no sure footing for invigorating the law.

III. Public Schools Should Uphold Free Speech, Not Chill It.

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."
—*Judge Learned Hand*[14]

The Supreme Court has consistently recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. at 512 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). Regarding boards of education, the Court has said they have "important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of

[14] Judge Learned Hand, *The Spirit of Liberty*, 1944, available at Digital History, http://bit.ly/3raLZQN (last visited July 1, 2022).

Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Tinker*, 393 U.S. at 507 (citing *Barnette,* 319 U.S. at 637). These stouthearted statements depart from school efforts, regardless of other well-intentioned goals, to teach children that constitutional freedoms may be edited when times change.

Here, the District defends its discriminatory action in the name of "equal opportunity for all individuals in district programs and activities" and ensuring "[a]ll district programs and activities within a school under the jurisdiction of the superintendent of the school district shall be free from discrimination, including harassment" 1-ER-0004–05. These are laudable goals, and the District is most likely sincere in its asserted motivation. But previous attempts by school boards to impose uniformity of belief in the name of unity have foundered on the rocks of compulsion as have similar attempts in other civilizations from time immemorial. As the Supreme Court noted in *Barnette*,

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts

> of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Barnette, 319 U.S. at 641.

It is no excuse to claim discriminatory policies may be justified by the absence of nefarious intent. *See* 1-ER-0011 ("Plaintiffs point to no evidence that those Board Policies were implemented for the purpose of suppressing Plaintiffs' viewpoint."). Intent is irrelevant when First Amendment rights are at stake. *Reed*, 576 U.S. at 165 ("[I]llicit legislative intent is not the s*ine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive.") (cleaned up). And thus, whether the Board Policies were implemented for the purpose of suppressing viewpoint or simply create that result is beside the point. They infringe FCA's First Amendment rights and thus must fall.

Application of non-discrimination policies, inconsistent with the First Amendment, educates students in misunderstanding the American system that is anathema to the rights secured by the Constitution; and permitting schools to pick-and-choose whose beliefs are acceptable to the state educates the next generation that this is the kind of relationship citizens should expect with their

government.[15] Because good intentions can lead to repression, it is particularly important schools bear in mind their duty to educate children in the protection of constitutional rights—wherever they are exercised. Schools should teach students to carry with them the understanding that government must respect constitutional freedoms regardless of expansive theories to circumvent them.

CONCLUSION

The Board Policies discriminate against speech, religion, and associational rights and are content based and viewpoint specific. Thus strict scrutiny should apply. It cannot survive that scrutiny. The Court should reverse the district court and remand the case with instructions to enter FCA's requested injunction.

Dated: July 5, 2022

Respectfully submitted,

s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford
Casey Mattox
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road
Arlington, VA 22201
Telephone: 571.329.2227
Attorneys for Americans for Prosperity Foundation.

[15] The inclination toward a converse-Lotus principle, where everything that is not allowed is forbidden, is contrary to the American and English traditions and should be avoided. *See generally Everything which is not forbidden is allowed*, Wikipedia, http://bit.ly/2TgF5vB (last visited July 1, 2022).

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s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford

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I hereby certify that on July 5, 2022, I electronically filed the above Brief of *Amicus Curiae* Americans for Prosperity Foundation in Support of Appellants with the Clerk of the Court by using the appellate CM/ECF system.

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