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 Rehearing en banc 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 and Professor Luke C. Sheahan as *Amici Curiae* in Support of Appellants and Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Americans for Prosperity Foundation states that it is a nonprofit corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no publicly held corporation has an ownership interest of 10% or more.

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INTEREST OF AMICI 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 the "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).

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Amendment Pluralism, University Press of Kansas (2020); and the editor of *International Comparative Approaches to Free Speech and Open Inquiry (FSOI)*, Palgrave Macmillan (2022). Professor Sheahan has a particular interest in this case because the Board Policies forcefully illustrate the peril of failing to protect the right of assembly recognized by the First Amendment.[1]

SUMMARY OF ARGUMENT

The freedom to assemble has been long recognized as a predicate for a self-governing civil society. In the constitutional debates, the right of assembly was thought so self-evident it did not need to be expressed in the Bill of Rights. Alexis de Tocqueville underscored its importance, observing that if individuals never "acquire[d] the habit of forming associations in ordinary life, civilization itself would be endangered."[2] More recently, scholars have identified characteristics vital to successful social groups that allow them to promote diverse interests that reflect but surpass the interests of their members.

Because of the importance of free assembly to a pluralistic and self-governing society, the responsibility of schools to foster spontaneous association

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

[2] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 897–98 (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"].

around a diversity of viewpoints and causes cannot be overstated. Likewise, the future of free thought requires the development of young leaders with courage to uphold minority positions. District Board Policies 0410 and 5145.3 and the ASB Affirmation Form, which cites them, (collectively "Board Policies") fail in both respects, interfering with freedom of association, compelling viewpoint-based speech, and defeating the very basis for our constitutional protection of freedom of assembly—the functional autonomy that allows groups to define and differentiate themselves.

Voluntary social groups require several characteristics to form and thrive. They must exist for a purpose, allowing individuals to do something together. This definition may seem so basic as to appear a truism, but as Professor Sheahan's work demonstrates, "Social groups come into existence around various ends . . . such as raising and socializing children, educating a populace, cheering for a sports team, or organizing suitable religious ceremonies."[3] None of these pursuits is necessarily dedicated to a political goal. But each is necessary to the layers of community that form a free society—some so necessary they merit protection in other clauses of the Constitution. Such groups also have central tenets, practices

[3] Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* 45 (2020).

derived from those tenets, and authority to pursue the purpose of the group.[4]

The Board Policies interfere with these characteristics by attacking student organizations' autonomy to observe and profess their own beliefs, select their own leadership, set membership boundaries to like-minded students, and decline professing a faith contrary to their own. Assaulting the functional autonomy of student groups obstructs freedom of association by mandating who may be a member or leader on threat of withdrawing a generally available government benefit while also prohibiting and compelling viewpoint specific speech. The Policies expressly do so based on religion, presenting a three-pronged attack on the First Amendment.

As the Supreme Court recently confirmed in *Carson v. Makin*, when government offers a public benefit, an otherwise-eligible recipient may not be denied 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). 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.*,

[4] *Id*. at 45 (citing Robert A. Nisbet, *The Degradation of the Academic Dogma: The University in America 1945–1970* 43 (1971).

142 S. Ct. 2407, 2421 (2022). Government cannot 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). Nor should it try to undermine some First Amendment rights by attacking another right: assembly.

The trial court relied on *Christian Legal Society 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 it "serves purposes unrelated to the content of expression." 1-ER-0009 (citing *Martinez*, 561 U.S. at 695). The approach in *Martinez*, sidestepping full 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. But *Martinez*, which "effectively removes freedom of association from the pantheon of First Amendment rights"[5] provides the narrow ledge on which the Board Policies poise. It cannot hold that weight and its extension to this case exposes its flaws.

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

[5] Sheahan, *Why Associations Matter* at 101.

factual matter, this assertion is contradicted by the text of the mandatory affirmation, which compels speech with prescribed content and a single viewpoint: the one "affirming" the government's perspective. 1-ER-0017 (citing ASB Affirmation form). Moreover, the school's aggressive attempt to purge FCA from campus was overt viewpoint suppression.

As a matter of law, the lower court got the analysis backward 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, requiring "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 claimed interest.

In addition to the violation of First Amendment principles, this approach teaches students that government has the power to decide who may associate, under what arrangement, for what purpose, what they may say, and what they are allowed to believe. That lesson threatens the basis for civil society, which depends on the ability for assembly, self-organization, and self-definition.

ARGUMENT

I. Voluntary Association is a Necessary Component of Self Governance.

Although, far from being the only basis for protecting freedom of assembly, the most common justification is that voluntary associations form the foundation of a free and democratic society, equipping individuals for self-governance, teaching the art of achieving goals together, circulating and challenging ideas, and holding government accountable.[6] These practices create a bulwark against a government monopoly on the ideas, opinions, and energy necessary to undertake great objectives.[7]

To preserve the positive feedback between civil associations and the practice of self-government, Tocqueville noted three features of the relationship that must be maintained. *First*, associations cannot be limited to only certain aspects of life

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

[7] *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."). *See also* Stid, *supra* note 6 ("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.'").

or the habit of voluntary association will be broken.[8] If *only* political association is protected, a society will not develop the ability to associate for political causes. *Second*, people must apply their skill of give-and-take in the political sphere to diffuse the risks of faction and ennui, reduce risks to the state, and provide stability to society.[9] *Third*, mediating institutions must provide the critical check against government overreach, guarding against tyranny by providing an outlet for fresh and competing ideas.[10] These characteristics of voluntary association are imperiled

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[8] *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*.

[9] *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.*

[10] *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 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.").

by forced exclusion of certain voluntary associations from the public square.

II. Voluntary Association, Whether For Political or Other Purposes, Must be Fully Protected.

There is a tendency to cast voluntary association in purely political terms, and therefore limit or emphasize the importance of associational protections to participation in democratic government.[11] The history of protection for voluntary association indicates the right to form and join voluntary associations is not restricted to politics, but extends to social and religious matters as well, protecting political as well as non-political groups.

Voluntary association finds its constitutional origin and protection in the Assembly Clause. Constitutional law professor Akhil Amar has demonstrated the "Right of the People peaceably to assemble" was intended to secure the sovereignty of the people who may organize assemblies for the purposes of self-government.[12] As such, the government could not dictate the terms of assembly beyond non-violence. It would be a contradictory protection for popular sovereignty if the government decided whether the assembling citizens were assembling for "appropriate" political purposes. Instead, the right of assembly offers "strong

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[11] Sheahan, *Why Associations Matter* at 8-10, 112-3.

[12] Akhil Amar, *Bill of Rights: Creation and Reconstruction* 26 (1998) ("The right *of the people* to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the *collective* right of We the People to assembly in a future convention and exercise our sovereign right to alter or abolish our government.").

protection for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards."[13]

The intent of the Assembly Clause to protect non-political groups is revealed in an exchange between John Page of Virginia and Theodore Sedgwick of Massachusetts during the debates over the First Amendment in the first Congress. Representative Sedgwick proposed striking the Assembly Clause, not because he disagreed with the right, but because "[Assembly] is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae."[14]

Representative Page responded that the right *is* obvious, like "whether a man has a right to wear his hat or not." But "such rights have been opposed . . . people have . . . been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority."[15] Scholars agree the reference to the "right to wear his hat" was a reference to William Penn's arrest in 1670 under the 1664 Conventicle Act which restricted the ability of non-conformist religious groups in England to attend religious meetings with more than five

[13] John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 153 (2012).
[14] Neil Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 232 (2nd ed. 2015).
[15] *Id*.

persons.[16] Page's allusion to Penn is a reference to an explicitly religious gathering with no explicit political aspect. Every lawyer in America, especially those sitting in the first Congress, knew that story and understood its constitutional and historical ramifications. Page continued, "if the people could be deprived of the power of assembling *under any pretext whatsoever*, they might be deprived of every other privilege contained in the clause."[17] Page's argument won the day and Congress retained the Assembly Clause, forbidding government intrusion on "any pretext whatsoever" into free assemblies. The final wording includes only the requirement that the assemblies be "peaceable."

Historically, the right of assembly included a broad array of activities not limited to explicitly political activity. Democratic-Republican groups appealed to the right to exist as a dissenting group in a society dominated by Federalists, but they claimed protection for a vast array of non-political activities, including parades and feasts. One society declared, "One of our essential rights, we consider that of assembling, at all times, to discuss, with freedom, friendship and temper, all subjects of public concern."[18] As this broad right was adjudicated at the federal and state

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[16] Inazu, *Liberty's Refuge* 24; Irving Brant, *The Bill of rights; its origin and meaning* 56, 57, 61 (1965); Ashutush Bhagwat, *Our Democratic First Amendment* 44-5 (2020).

[17] Cogan, *The Complete Bill of Rights* at 232 (emphasis added).

[18] Inazu, *Liberty's Refuge*, at 26. Philip S. Foner, *The Democratic-Republican Societies 1790–1800 (A Documentary Sourcebook* 393 (1976), (quoting *Resolution*

levels it protected everything from abolitionists, to suffragettes, to dancing, to singing and banging drums in a parade "to attract or call together an unusual crowd or congregation of people."[19]

A. Vibrant Assembly Rights Require Functional Autonomy for Groups.

"Functional autonomy," a sociological concept that illuminates the meaning of assembly as a concrete social act and provides a guide to protecting this textual right, is essential to securing the broad rights of association under the Assembly Clause. Functional autonomy is the ability of an association "to work with the maximum possible freedom to achieve its own distinctive ends."[20] If associational freedom under the Assembly Clause means anything, it must take account of respecting the purposes and internal structure of groups, their functional autonomy.

Function is at the core of every group. It is "the end for which the (group) came into existence."[21] Along with function, every group has dogma, "the central tenets, and locus of shared beliefs that was the impetus for forming the group in the first place."[22] Required by the central tenets are prescribed practices, "collective and

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Adopted Upholding the Cause of France, South Carolina State Gazette, April 29, 1794.

[19] Inazu, *Liberty's Refuge*, at 42-3 (quoting *Anderson v. City of Wellington*, 19 P. 719, 721, 722 (Kan. 1888).

[20] Robert A. Nisbet, *Twilight of Authority* 215 (1st edition, 1975).

[21] Sheahan, *Why Associations Matter* at 46.

[22] *Id*. at 132.

individual activities that the group agrees are inferred by the central tenets."[23]

For a religious group like FCA, the function is assembling Christian students according to their version of Christian doctrine. Prescribed practices include the requirements of Christian doctrine as FCA understands it. This is true not just for religious groups, but for every group. A soccer club has the function of playing soccer and the dogma is that soccer playing is good, healthy, and worthwhile. Prescribed practices include playing soccer, not baseball or chess, at club events.

Only when a group stays true to its function and central tenets can its members receive the benefits of membership including solidarity around shared principles, the sense of "we" in the group. The principles and practices of a group serve as a reference for the values and practices essential to individual identity. This is why individuals join groups. These qualities "give the individual a sense of value for her role in the group and a sense of belonging to something beyond herself."[24] The group represents values and a way of life that are attractive to its members and only by maintaining those functions, beliefs, and practices does the group retain its ability to function as a reference for its members' individual values and identity.

Denial of functional autonomy is a denial of individual ability to associate in a peaceable assembly and a violation of the Assembly Clause as a protection for a

[23] *Id*. at 132.
[24] *Id*. at 47.

broad array of groups in their "formation, composition, expression, and gathering."[25]

B. Freedom of Assembly Requires Respect for the Borders for the Group and Its Selection of Its Own Leaders.

For a group to exercise functional autonomy secured by the Assembly Clause requires that the group be able to police its borders, decide how its tenets are to be followed, its function fulfilled, and its practices performed. This requires the exercise of authority by those in an appropriate place in the group's hierarchy. Individuals who reject the central tenets and practices of a group may exercise the right of exit. Reciprocally, the group must also be able to exercise a right of exclusion to maintain its central tenets and prescribed practices and perform its function.

Accordingly, a group must be free to choose leaders who adhere to the group's function and dogma. They must be able to exercise authority to ensure the group is functioning according to its central tenets, including requiring members to engage in the practices prescribed by the group's tenets. This is key to a group maintaining its functional integrity, "the ability of the group to function in the manner in which the group claims to function, according to its central tenets and prescribed practices."[26]

The right of a group to maintain its integrity around its purpose is the inverse of the ability of individuals to exit any group with which they disagree. Just as we

[25] Inazu, *Liberty's Refuge*, at 153.
[26] Sheahan, *Why Associations Matter* at 133.

do not force individuals to be included in groups they dislike, so we do not force groups to include individuals who disagree with the tenets and purposes of the group.[27]

"The right of exclusion is an essential exercise of the authority of the group. The functional integrity of the group depends on its ability to effectively pursue its purposes through the means it finds appropriate. This requires a membership dedicated to the group's purposes."[28] This is especially true in the selection of leaders, those who exercise authority on behalf of the group to accomplish its function according to its central tenets.

These protections are especially important for dissenting groups, those who fall outside majoritarian protection. Examples of groups who appealed to protections under the Assembly Clause and freedom of association include Jeffersonian Republicans in the 1790s, abolitionists in the first half of the nineteenth century and suffragettes in the latter half, civil rights activists in the twentieth century, and, today, religious student groups like FCA.

The Board Policies' imposition of doctrinal conformity as a condition of participation is but one example of government seeking to exclude "disfavored" viewpoints. Indeed, such exclusionary tactics in public schools have a long and

[27] *Boy Scouts of Am. v. Dale*. 530 U.S. 640 (2000).
[28] Sheahan, *Why Associations Matter* at 135.

storied history. 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 protected. *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).

A cursory review of the Supreme Court's association jurisprudence displays the kaleidoscope of groups that overzealous enforcers have tried to exclude and the Court's consistent support for association. *E,.g,. Keyishian*, 385 U.S. 589 (Communist adherents); *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) (Unions); *Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (NAACP); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (parents); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (intimate relationships); *Americans for Prosperity Foundation v. Bonta,* 141 S.Ct. 2373 (2021) (nonprofits). If nothing else, this ever-changing landscape teaches that what is dogma today may be anathema tomorrow, and deciding which views and associations are anathema does not lie within the powers of government.

At face value, the District's student organizations program appears to affirm everything we have written above about the value of free association, purporting to

"give students practice in self-governance, and provide social and recreational activities," and "enhance school spirit and student sense of belonging."[29] One might then expect policies and practices wholly consistent with the Supreme Court's enduring recognition of associational rights, Tocqueville's observations on the importance of spontaneous association, and the necessary functional autonomy for groups to form and thrive. But instead of promoting true diversity of ideas and inclusiveness consistent with its own stated goals, the District made itself the gatekeeper over which student organizations may be recognized, using that power to diminish the very freedoms it claims to foster. The District has expressly attacked the functional autonomy of those groups by commanding they proclaim the government's viewpoint, in flagrant violation of the Constitution. *Agency for Int'l Dev. v. Alliance. 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 flawed messages. *First*, government can expel from the public square anyone who is not prepared to echo its present views. But, as Justice Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be

[29] 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")

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. Here, for example, the lower court distinguished school sports teams from student groups, creating a safe harbor for the District (whom the Constitution constrains) while forbidding such distinctions among private actors (whom the Constitution protects). *See* 1-ER-0017, n. 10. The lower Court likewise found 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.

III. *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 (or anyone for that matter) to sacrifice First Amendment protected freedom of association or assembly in exchange for the First Amendment protected activity of accessing government speech forum. The Supreme Court has long recognized that laws and regulations that constrain associational freedom are subject to strict scrutiny. The Christian Legal Society brought free speech, free exercise, and free association claims in *Martinez*. Nevertheless, the Court eschewed the heightened standard of review applicable to associational rights and conflated CLS's claims into forum doctrine analysis, considering only whether requiring all groups to waive a fundamental aspect of freedom of association, the right to select leaders who share the group's beliefs, is viewpoint neutral and reasonable. *Martinez*, 561 U.S. at 680–81. Remarkably, the Court determined it would be "reasonable" to require everyone to waive one right—association—to exercise another right—speech. No other decision of the Court before or since has so held. [30]

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. Sadly, this

[30] Indeed, even where exercise of another constitutional right is not involved, lesser interests, such as receipt of a government benefit, cannot be conditioned on waiver of a First Amendment right. *United States v. Am. Libr. Ass'n, Inc*., 539 U.S. 194, 210 (2003) (citing *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

second approach is the only one the School Board seems able to envision. ECF 93-1 (arguing that under *Hoye v. City of Oakland*, the remedy to selective infringement of constitutional rights is "to ensure that the policy is administered even-handedly going forward"—thus infringing *everyone*'s rights not just the unfortunate few).[31]

There was no precedent in *CLS v Martinez* for such a conflation of constitutional claims into free speech 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); *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 to denial of recognition of group was that associated with others who had been violent).

[31] The Board's reading of *Hoye* is off by 180 degrees. The Court there held that a viewpoint-based enforcement policy could not be reconciled with a facially-neutral law and remanded to the trial court to craft a remedy that met "the level of neutrality that the Constitution demands." *Hoye v. City of Oakland*, 653 F.3d 835, 851–52 (9th Cir. 2011) (citation omitted). At no point did *Hoye* suggest the cure for selective infringement is to broaden infringement to the entire population.

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." *Dale*, 530 U.S. at 647–48; *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. *Am. Libr. Ass'n, Inc*., 539 U.S. at 210; *Bd. of Cnty. Comm'rs, Wabaunsee Cnty.,* 518 U.S. at 674 (collecting cases). *Martinez* thus departed from well-established speech and association precedent—not even stopping to explain the departure.

Such treatment is especially egregious where the basis for association is religious—thus implicating both viewpoint and status. As Judge Ripple explained in his concurrence to *Alpha Delta Chi*, purportedly neutral membership requirements cannot be neutral relative to religious groups. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 805 (9th Cir. 2011) (Ripple, J. concurring). This is because "most clubs can limit their membership to those who share a common purpose or view: Vegan students, who believe that the institution is not accommodating adequately their dietary preferences, may form a student group restricted to vegans and, under the policy, gain official recognition. Clubs whose memberships are

defined by issues involving "protected" categories, however, are required to welcome into their ranks and leadership those who do not share the group's perspective." *Id.* at 805–06 (Ripple, J. concurring). And, while some groups may ameliorate this issue by admitting people of different status but similar sympathies, "Religious students . . . do not have this luxury—their shared beliefs coincide with their shared status. They cannot otherwise define themselves and not run afoul of the nondiscrimination policy." *Id*. at 805–06 (Ripple, J. concurring). Thus, to the extent *Martinez* cannot be applied to religious groups without infringing the very religious status that such policies purport to protect, it must be read narrowly or distinguished.

B. The Law Has Passed *Martinez* By.

At the time it was decided, *Martinez* was an outlier in subordinating the rigorous standard applicable to government burdens on freedom of association to the lesser standard applicable to limited public forums. 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.[32] At the same time the Court has issued numerous opinions that call the reasoning of *Martinez* into doubt.

[32] *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).

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). Although FCA is a student group, the Supreme Court has long upheld the free exercise rights of children just as it has for adults. *See, e.g.*, *Barnette*, 319 U.S. at 630.

Likewise, in *Agency for International Development*, the Court held "a funding condition can result in an unconstitutional burden on First Amendment rights," 570 U.S. at 214, and thus AID could not condition funding on affirming a belief the government could not compel directly. 570 U.S. at 205–06. *See also Carson*, 142 S. Ct. at 1989 (conditioning 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," and thus, 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).

Taken together these cases stand for three propositions. *First*, government cannot interfere with the internal autonomy of a religious organization. *Second*,

government cannot condition access to government benefits on a participant's sacrifice of constitutional rights. *Third*, government cannot expunge religious participants from generally available public programs. Whatever ground *Martinez,* and its lower-court progeny stands on has been shaken by these decisions.

Accordingly, *InterVarsity Christian Fellowship/USA v. Board of Governors of Wayne State University* ("IVCF") held the university's denial of Recognized Student Organization status to a Christian organization on the basis of religious beliefs caused demonstrable harm in violation of the First Amendment. *IVCF*, 534 F. Supp. 3d 785, 812 (E.D. Mich. 2021). This was so 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." *Id.* at 812–13. By contrast, the university "permitted secular groups, including political organizations, to limit leadership overtly on a host of categories, identities, and beliefs;" including "selection on the basis of ethnicity, political viewpoint, ideology, physical attractiveness, and grade point average." *Id*. at 821. As in *IVCF*, here the "First Amendment does not require [CLF's] members choose between risking their continued access to public education and their right to select spiritual leaders who share their beliefs." *Id*.[33]

[33] The District Court, citing *Alpha Delta Chi*, 648 F.3d 790, and *Truth v. Kent Sch. Dist*., 542 F.3d 634 (9th Cir. 2008), found the District Policies prohibiting

Defendants' reliance on *Alpha Delta Chi* cannot redeem the Policies' express viewpoint discrimination because that decision turned in large part on this Court's finding that Plaintiffs "put forth no evidence that San Diego State implemented its nondiscrimination policy for the purpose of suppressing Plaintiffs' viewpoint, or indeed of restricting any sort of expression at all." *Alpha Delta Chi*, 648 F.3d at 790. Thus, whether the policy had been applied even handedly was material to viewpoint discrimination. Here, of course, viewpoint discrimination is the entire point of the policy. And, since then, the Supreme Court decided *Reed v. Town of Gilbert*, explaining that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" 576 U.S. at 165. In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral and the court must decide "whether a law is content neutral on its face before turning to the law's justification or purpose." *Id*. at 166. The School Board cannot escape this mandated sequence of events by relying on *Alpha Delta Chi* to turn content-based policy followed by years of viewpoint-based hostility into an innocent

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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).

mistake.

Not only has the "inadvertent mistake" element of *Alpha Delta Chi* been superseded, but the underlying Supreme Court precedent used to analyze San Diego State' non-discrimination policy is simply not applicable here. *Roberts. v. U.S. Jaycees* was decided under public accommodations law, not religious discrimination. 468 U.S. at 629–30. Public accommodations law has not been raised here, and it would not provide cover for government compelled declarations of viewpoint nor allow the government to dictate qualifications for leaders of associations—particularly religious associations.

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. To hold otherwise would not just infringe FCA's constitutional rights, but would establish that public schools may purge from campus religious views with which they disagree; teachers may persecute students in the classroom on the basis of religious belief; "open-mindedness" requires repressing disfavored views; principals may denounce students' views in the school newspaper; teachers may accuse students of sexual harassment to target their religious beliefs; school staff may incite student protests against other students on the basis of religion; and

faculty may encourage students to physically intimidate disfavored students.

Martinez cannot be squared with the Court's decisions before or since. And the Supreme Court's subsequent decisions and avoidance of the case counsel against stretching the opinion to reach this case. Regardless of what remains of *Martinez*, these facts provide no sure footing for invigorating and applying it here.

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

The Supreme Court has consistently recognized "[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 their role in "educating the young for citizenship is reason for scrupulous protection of 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." *Id*. at 507 (citing *Barnette,* 319 U.S. at 637). These assertions depart from school efforts here to teach children that constitutional freedoms may be ignored in favor of other goals.

Here, the District defends its discriminatory action in the name of "equal opportunity for all individuals in district programs and activities" 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 to impose uniformity of belief have foundered on the rocks of compulsion 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.

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 educates the next generation that this is the kind of relationship citizens should expect with their government. 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. Schools should teach students 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, which the Policies cannot survive. The Court should reverse the district court and remand the case with instructions to enter FCA's requested injunction.

Dated: February 22, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am counsel for *amici curiae* Americans for Prosperity Foundation and Professor Luke Sheahan. This brief contains 6,994 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I certify that this brief is an *amicus* brief and complies with the word limit of Federal Rule of Appellate Procedure 29-2(c)(3)

Dated: February 22, 2023

s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2023, I electronically filed the above Brief of *Amici Curiae* Americans for Prosperity Foundation and Professor Luke Sheahan in Support of Appellants with the Clerk of the Court by using the appellate CM/ECF system.

I further certify that service will be accomplished by the appellate CM/ECF system.

s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford

Dated: February 22, 2023