No. 22-15827

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES, AN OKLAHOMA CORPORATION, ET AL.,

Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Defendants-Appellees,

Appeal from the United States District Court
For the Northern District of California
Honorable Haywood S. Gilliam, Jr.
(4:20-cv-02798-HSG)

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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REASONS FOR REHEARING

In this case of exceptional importance, the panel majority ordered a public school district to exempt a single student club from a non-discrimination policy that is entirely constitutional under the precedents of the United States Supreme Court and this Court, and to grant the club official recognition and approval even though the club violates the district's lawful policy by prohibiting some students, including LGBTQ+ students, from serving in leadership positions. *But see Christian Legal Society v. Martinez*, 561 U.S. 661, 696 & n.27 (2010) (rejecting constitutional challenge to law school's requirement that officially recognized student clubs accept LGBTQ+ students); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648 & n.2 (9th Cir. 2008) (rejecting Equal Access Act challenge to similar school district policy). The panel did so notwithstanding the absence of *any* credible evidence that any students wanted to apply for official recognition but were unwilling to comply with the non-discrimination policy or any other evidence of ongoing injury. And it relied on a "selective enforcement" theory that is contrary to this Court's own precedents and that would make it effectively impossible for most school districts to implement lawful non-discrimination policies. Because the panel's decision cannot be squared with the precedents of this Court and the Supreme Court, rehearing or rehearing *en banc* should be granted.

The majority disregarded well-established Article III precedent in holding that plaintiffs have standing to seek to preliminarily enjoin a policy without presenting admissible or reliable evidence that they will face prospective injury from that policy, or that any such injury would be remedied by a preliminary injunction. The record before the district court and this Court contained *no* evidence that any student wanted to apply for official recognition of a local Fellowship of Christian Athletes ("FCA") club in the 2022-23 school year but was prevented from doing so by the school district's policy of requiring applicants to

affirm their compliance with the non-discrimination policy. To manufacture Article III standing in the absence of such evidence, the panel held that vague hearsay statements about future intentions from a non-student third party sufficed to establish Article III standing. Worse yet, the panel majority suggested that a defendant can *waive* constitutionally required standing—and that it may do so by entering into a stipulation that expressly disavows any such waiver. The majority's decision conflicts with governing precedent and, if allowed to stand, would render the limitations imposed by Article III meaningless, enabling parties to manufacture jurisdiction in every case.

On the merits, the majority held that Plaintiffs had shown likely success on their claim that San Jose Unified School District officials violated the Free Exercise Clause and the Equal Access Act by selectively enforcing the district's non-discrimination policy in a manner that disfavored religion. Besides disregarding the district court's contrary findings of uniform enforcement, the panel's decision contravenes this Circuit's precedent holding that the approval of a student club application that is ambiguous regarding compliance with a non-discrimination policy does *not* suffice to establish unconstitutional selective enforcement because the approval may have been unintentional or inadvertent. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (no constitutional claim under selective enforcement theory where approval of other noncompliant groups may have resulted from "administrative oversight" or reflect that groups had agreed not to discriminate). The panel's contrary rule, which treats inadvertent mistakes as anti-religious selective enforcement, will make it impossible for school districts to administer non-discrimination policies.

Finally, the remedy the panel ordered was entirely inconsistent with its theory. Rather than ordering the school district to enforce the non-discrimination policy uniformly going forward, the majority held that the appropriate remedy for

past selective enforcement is *continued* selective enforcement. That ruling is contrary to this Circuit's precedent, which provides that the remedy for unlawful selective enforcement is not to give a group special leave to discriminate, but to ensure that the policy is administered even-handedly going forward. *Hoye v. City of Oakland*, 653 F.3d 835, 856 (9th Cir. 2011). The majority's ruling would mean that school districts and other government entities could be forever foreclosed from enforcing their lawful non-discrimination rules equitably and uniformly simply because they mistakenly overlooked a secular group's violation of those rules at some point in the past.

For all these reasons, rehearing should be granted to secure and maintain the uniformity of this Court's decisions and to address issues of exceptional importance. Fed. R. App. P. 35(a); 9th Cir. R. 35-1.

BACKGROUND

In 2019, a Pioneer High School teacher and principal learned that a student club affiliated with the national Fellowship of Christian Athletes required that, to be eligible for club leadership positions, students must sign a pledge stating that same-sex intimacy is sinful. Op. 9-12. Because this requirement was contrary to the school district's non-discrimination policy, which requires allowing any student to join and run for office in any officially recognized student club, the district withdrew Associated Student Body ("ASB") recognition from the club. Op. 10-12, 14, 16. Pioneer FCA continued to meet and hold events on campus as a non-ASB-recognized student interest group. Diss. 60.

In 2020, two students and the national FCA filed suit. Op. 17-18. They were later joined by Pioneer FCA. The students' graduation mooted their claims for injunctive relief; their damages claims remain pending. Op. 23; Diss. 61, 68.

In 2021, the school district issued new guidelines to formalize and standardize its ASB club recognition practices. Op. 19. The "all-comers policy"

requires student clubs applying for ASB recognition to sign an affirmation stating that all students can be members and seek leadership positions regardless of their status or beliefs. Op. 19-20. Despite under-oath predictions that Pioneer FCA would apply for ASB recognition in fall 2021, no students applied at any district high school. Op. 21.

This appeal concerns the district court's denial of FCA and Pioneer FCA's motion for a preliminary injunction to prevent the school district from applying its all-comers rule against FCA clubs for the 2022-23 school year.

The district court denied Plaintiffs' motion, holding that the district's non-discrimination policy is consistent with *Christian Legal Society v. Martinez*, and that Plaintiffs had not established selective enforcement disfavoring religion. Op. 22. The panel reversed and remanded, "direct[ing] the district court to enter an order reinstating FCA's ASB recognition." Op. 46.

ARGUMENT

I. The majority's determination that Plaintiffs had established standing to seek prospective relief contradicts decisions of this Court and the U.S. Supreme Court.

The majority's determination that FCA made a showing of imminent injury adequate to establish Article III standing to seek prospective relief contravened governing precedent of this Court and the Supreme Court, including by holding that a party can waive Article III standing and create federal jurisdiction where the Constitution does not allow it.

As noted, Plaintiffs sought injunctive relief requiring school district officials to recognize FCA clubs notwithstanding their refusal to comply with the district's all-comers club recognition policy. But the Supreme Court has made clear that vague allegations of future plans are insufficient to establish impending injury

warranting prospective relief. *See* Diss. 68-71 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *Summers v. Earth Island Institute*, 555 U.S. 488, 490 (2009)). Rather, Article III requires "an adequate showing that sometime in the relatively near future [a student] *will*" apply for and be denied club recognition due to the non-discrimination policy. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (cited at Diss. 71). "Following the Supreme Court's lead, [this Court] ha[s] insisted upon 'concrete plans' or 'firm intentions' as an indispensable part of Article III's imminence analysis." Diss. 72 (citing *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010); *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1038-39 & n.9 (9th Cir. 2008)). And "at the preliminary injunction stage, a plaintiff must make a "'clear showing'" of each element of standing. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7 (2008)).

As Judge Christen's dissent explains, the school district's club recognition policy could "cause a real or immediately impending injury" (and an injunction could prevent that injury) only if a Pioneer High School student planned to apply for FCA club recognition for the 2022-23 school year if the policy were enjoined. Diss. 68. Yet no student applied for recognition for the 2021-22 school year. And there was no record evidence identifying any student who would apply for recognition of an FCA chapter in the 2022-23 school year but for the requirement to affirm compliance with the non-discrimination policy.

Instead of requiring a showing of "concrete plans" or "firm intentions" by a student who might suffer an injury, the panel majority found it sufficient for standing purposes to infer, from multiple speculative hearsay declarations by a non-student (FCA employee Rigo Lopez), that a student would apply for recognition. But that type of showing "does not come close to demonstrating

concrete plans or firm intentions to apply for ASB recognition for the 2022-23 school year." Diss. 77.

Because only students—and not Lopez—may apply for ASB club recognition, Lopez's declarations offer nothing more than speculation about what third parties might possibly do or intend. That is not enough to establish Article III standing. While inadmissible evidence may sometimes be considered in preliminary injunction proceedings "[d]ue to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development," *Herb Reed Enters., LLC v. Fla. Entert. Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013), this case has been pending for over two years, and discovery has not only commenced but been completed. The majority's holding would mean that the plaintiff environmental organization in *Defenders of Wildlife* could have established standing simply by submitting a declaration from a staffer asserting that some nameless member intended at some point in the future to visit the areas at issue (without even explaining the basis for the staffer's speculation).[1]

In addition to defending its consideration of speculation based on vague hearsay, the majority suggested that the school district waived standing by agreeing to a February 2022 stipulation (long after the preliminary injunction briefing had been completed) in which Plaintiffs, *to serve their own purposes*, agreed not to submit any additional student testimony. Op. 29. The panel chastised the school district: "The defendants cannot fault the plaintiffs for failing to submit evidence which they agreed not to require." *Id.* But as the dissent points out, Diss. 76, a party cannot waive Article III standing. Nor does the stipulation—which was entered into after Plaintiffs refused to produce highly relevant witnesses

[1] The majority's reliance on this speculative hearsay is even more egregious in that there were "ample reasons to discount" it, given that Lopez "walked back" the statements in his prior declarations when deposed. Diss. 76.

in support of their claims—even purport to do so. Rather, it expressly states that it "does not alter in any way the … requirements for Plaintiffs to establish jurisdiction" and "make[s] no admissions, explicit or implied, about what evidence is necessary…." D. Ct. Dkt. #180-2 at 5-6 ¶¶6-7; Diss. 76.

Finally, as Judge Christen emphasized, the FCA staffer's declarations, even if credited and strung together, did not establish any student's intent to apply for ASB recognition for the 2022-23 school year but for the non-discrimination policy. Lopez's September 2021 prediction that unidentified leaders would apply, "cobbled together" with his first identification of N.M. as a club leader in May 2022 (without stating that N.M. had any such intent), "fall woefully short" of Article III's requirements. Diss. 79.

If the majority's opinion is permitted to stand as the rule of this Circuit, litigants will be allowed to circumvent Article III by relying on speculative hearsay about "some day intentions," in contravention of Circuit and Supreme Court precedent. *See also*, *e.g.*, *Yazzie v. Hobbs*, 977 F.3d 964, 966-67 (9th Cir. 2020) (per curiam) (dismissing appeal from denial of preliminary injunction when plaintiffs did not establish intent to vote in upcoming election using challenged procedure).[2]

II. The majority's irreparable injury holding contravenes U.S. Supreme Court precedent.

The majority's holding that Plaintiffs established irreparable injury completely overlooked the need to establish that such injury is *likely*. The panel

[2] It is irrelevant that after the panel's opinion a student (who may or may not have been willing to comply with the non-discrimination policy) did in fact submit an FCA club application. What matters is that the evidence in the preliminary injunction record did not suffice to establish Article III standing, and the panel's contrary ruling is now governing Circuit precedent.

held (correctly) that the deprivation of First Amendment rights constitutes irreparable injury, Op. 43-44, but ignored that the school district's policy could cause such a deprivation only if a student actually would apply for FCA recognition but for the non-discrimination policy.

In *Winter v. Natural Resources Defense Council*, the Supreme Court rejected this Circuit's "possibility" of injury standard as "too lenient," and reaffirmed that "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." 555 U.S. at 22. For the same reasons that Plaintiffs' evidence is insufficient to establish Article III standing, it also does not meet the standard for establishing *likely* imminent injury.

III. The majority's selective enforcement analysis is contrary to Circuit precedent.

The majority held Plaintiffs likely to succeed on the merits of their claims for injunctive relief because the school district selectively enforced its all-comers policy in a manner that disfavored religion. Op. 34-35 & 43 n.10. The majority based this finding (which contradicted the district court's factual findings) on the approval of a single student club application by an administrator at a high school other than Pioneer (where the underlying events had occurred). In doing so, the majority failed to follow Circuit precedent providing that an inadvertent mistake does not establish discrimination in violation of constitutional protections.

As the majority acknowledges, in 2021 the school district moved from a complaint-driven system to a requirement that all clubs affirm their compliance with the non-discrimination policy in order to obtain ASB recognition. Op. 19-20. Since the adoption of the new system, the evidence was that only a *single* student club (Senior Women), at a different high school (Leland, another of the six comprehensive district high schools), signed the affirmation but also wrote on its

application that "[m]embers are considered students who are seniors who identify as female." Diss. 65; Op. 37. The district court found that the written statement was in tension with the signed affirmation, but that there was "'no clear proof that the district allows the club to violate the [non-discrimination p]olicy,'" nor any evidence "that the club actually discriminates." Diss. 65. In keeping with that factual finding, the district court faithfully followed this Court's decision in *Alpha Delta*, in which the Court remanded for consideration a claim that a school was selectively enforcing its non-discrimination policy against a religious club while permitting other clubs to discriminate on prohibited grounds. 648 F.3d at 804. The Court explained that a remand was required because "it is possible that these groups were approved inadvertently because of administrative oversight, or that these groups have, despite the language in their applications, agreed to abide by the non-discrimination policy." *Id.*; *see also Truth*, 542 F.3d at 648 & n.2 (remanding for similar factual determinations). This Court properly recognized that the *inadvertent* recognition of a non-compliant secular student club would not give rise to a claim premised on intentional selective enforcement against religious groups.

Without even mentioning *Alpha Delta*, the majority held that "[t]he School District's refusal to apply the All-Comers policy against the Senior Women Club shows that the plaintiffs will likely prevail on the merits." Op. 41; *see also* Op. 36-38.[3] The majority suggested that the school district's recognition of clubs with

[3] The majority reasoned that the school district's purported "double standard was no aberration." Op. 41. The majority acknowledged, however, that its examples of non-compliant groups predated the school district's adoption of a requirement that all ASB-recognized student clubs sign an affirmation that they do not discriminate based on status or belief, *id.*—and so shed no light on the current practice. That the school district's previous process for identifying violations was complaint-driven (such that FCA itself was recognized for many years until the district received complaints about its noncompliance with the non-discrimination

names suggesting affinity associations (like "Black Student Union") would also be inconsistent with its non-discrimination policy, Op. 38-39 n.7, despite record evidence that these groups were open to and had participation from all students. *E.g.*, 7-ER-1164 (Black Student Union had white members and leaders). School districts reading the majority's decision will thus be misled into thinking that if they have a non-discrimination policy, they may no longer allow student clubs that aim, for example, to improve opportunities for girls in STEM or advocate for the rights of particular cultural or ethnic groups, even if those clubs are in fact open to all students.

The reason for *Alpha Delta*'s rule is straightforward. The inadvertent approval of a student club whose submitted application may be in tension with a school district's non-discrimination policy might show sloppiness, but it does not establish that the reason school officials "exempted certain student groups from the non-discrimination policy" or "declined to grant [a religious club] such an exemption [was] because of [its] religious viewpoint." 648 F.3d at 804. In a school district with six large high schools comprising tens of thousands of students, hundreds of student clubs, and thousands of teachers and school officials, there can be no question that administrative errors will occasionally occur. The fact that a single ambiguous application slipped through the cracks does not in itself show that clubs are being treated differently based on whether they are religious or secular. The panel's contrary ruling would seem to mean that school districts' club-approval process must be utterly error-free to be constitutionally permissible.

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policy) does not establish a past constitutional violation, much less a prospective one. On the contrary, as this Court held in *Stormans, Inc. v. Wiesman*, where a policy's enforcement is complaint-driven and the record contains no indication that similar complaints against non-religious entities went uninvestigated, there is "no evidence of selective enforcement." 794 F.3d 1064, 1084 (9th Cir. 2015).

The panel's selective-enforcement theory also ignores that the grant of recognition to "Senior Women" at Leland High School cannot be attributed to the same decision-makers as the denial of recognition to Pioneer FCA, as would be required to support a selective enforcement theory. A selective-enforcement claim requires a showing of different treatment of similarly situated persons. *Austin v. Univ. of Or.*, 925 F.3d 1133, 1138 (9th Cir. 2019); *see also Stormans*, 794 F.3d at 1083-84. Ignoring these principles, the majority cherry-picked applications approved in the 2021-22 school year at sites other than Pioneer by site-specific decision-makers, and then used those applications to conclude that Pioneer FCA was treated differently even though Pioneer FCA never even applied for 2021-22 recognition.

The majority props up Plaintiffs' selective enforcement case by relying on the stated views of a small number of individual teachers to ascribe a discriminatory purpose to the school district and its officials. Devoting numerous pages to quotations reflecting individual teachers' views about FCA's requirement that student leaders sign a discriminatory pledge (*e.g.*, Op. 11-14, 16-17)—without mentioning evidence of other teachers' support for FCA—the majority reasons that the all-comers policy was "enacted and implemented by the same School District and Pioneer officials that expressed hostility towards FCA's religious views (more on that later)." Op. 42. But the purportedly hostile statements the majority cites were all made by individual teachers (three out of over 1,400 in the school district), not by officials with any decision-making authority. There was no evidence that these teachers had any role in the decision to derecognize FCA, which the evidence shows was made by school district officials whom the Pioneer principal relied upon for guidance. 3-SER-709, 5-ER-751-52, 8-ER-1321-30, 1348-52. And there was certainly no evidence that the decision-maker who approved the Senior

Women club at *Leland* High School for the 2021-22 school year was even aware of those statements.[4]

In relying on individual teachers' statements from various points in time, the majority disregarded well-established Circuit precedent requiring a causal link between non-decision-maker statements and the adverse action at issue. *See, e.g.*, *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) ("subordinate's bias is imputed to the employer" only "if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process"); *Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 807 (9th Cir. 2009) (no First Amendment violation where "the initial report of possible employee misconduct came from a presumably biased supervisor, but [supervisor's] subsequent involvement in the disciplinary process was so minimal as to negate any inference that the investigation and final termination decision were made other than independently and without bias"). Under the majority's approach, stray remarks by a single teacher who has no role in the adoption or enforcement of a non-discrimination policy or the approval of student clubs could threaten a school district's ability to enforce that policy—even if the district does not make any errors at all in its club recognition process. This will not only threaten schools' efforts to prevent discrimination and promote equality, but could also lead schools to stifle their teachers' own First Amendment-protected speech for fear that offhand remarks by individual teachers will be attributed to decision-makers.

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[4] The statements and conduct of student journalists also cannot be ascribed to the district. *See, e.g.*, Cal. Educ. Code §48907(a) (prohibiting school districts from restricting pupils' freedom of speech or press, including in school-sponsored publications); *but see* Op. 17 (citing such conduct).

IV. The majority's remedy directive departs from Circuit precedent.

Finally, even if the majority were otherwise correct, its directive that the district court enter an injunction granting recognition to FCA is inconsistent with this Circuit's treatment of selective-enforcement challenges to facially neutral policies. Op. 45-46. The proper remedy for a school district's selective enforcement of its policy is an order requiring consistent and equitable application, not one requiring the district to *continue* enforcing its policy selectively by exempting certain student groups.

In *Hoye*, this Court acknowledged that developing a remedy for selective enforcement of a facially constitutional rule "present[s] a remedial puzzle," and explained that the task was to "craft a remedy designed to foreclose" selective enforcement "while preserving the facially valid" law. In other words, the remedy must "ensure that the rule enforced … is a content-neutral one … and not a content-discriminatory rule." 653 F.3d at 856. That objective, this Court held, was served by granting the plaintiffs a declaratory judgment and remanding for the district court to decide whether further relief would be required "to change the [defendant's] enforcement policy." *Id.* at 856-57. In so concluding, the Court recognized that "[t]he District Court, with its greater familiarity with the facts and parties, is better positioned … to address this remedial question," and that "declaratory relief alone" may be sufficient "to change the … enforcement policy." *Id.*

The majority's remedy directive thus breaks from Circuit precedent by requiring the school district to enforce its policy in a content-discriminatory manner. The school district should not be required to allow discrimination by a single student group in contravention of an even-handedly and fairly applied non-discrimination policy. The Court should grant rehearing to address the majority's anomalous remedy directive.

At a minimum, the Court should clarify that the remedy for past selective enforcement of the district's non-discrimination policy is not to forever enjoin the district from prohibiting discrimination by FCA or any other student club, and that, if the district can show that it is consistently enforcing its policy, it will be entitled to enforce that policy with respect to *all* student groups. *See id.* at 857 n.17 (emphasizing that defendant initially enjoined from enforcing facially neutral policy "could later apply for the injunction to be lifted or modified if it made a sufficient showing that it had adopted and would apply an evenhanded enforcement policy"); *Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965) ("the settled rule of our cases is that district courts retain power to modify injunctions in light of changed circumstances").[5]

CONCLUSION

For these reasons, panel or *en banc* rehearing should be granted to correct the majority's erroneous rulings, which conflict with Circuit and Supreme Court precedent.

[5] Past selective enforcement can provide the basis for a §1983 damages claim, but for injunctive relief to issue against government officials, the violation must be ongoing. *See Papasan v. Allain*, 478 U.S. 265, 278 (1986); *see also Christian Legal Soc. v. Eck*, 625 F.Supp.2d 1026, 1046-47 (D. Mont. 2009) ("Absent some evidence of ongoing viewpoint discrimination, such as the granting of exemptions to other non-complying student groups, there is no basis for forever and indefinitely precluding Defendants from enforcing their non-discrimination policy against CLS–UM, which is the relief sought in the Complaint.").

Dated: October 3, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Stacey M. Leyton **Date** 10/3/2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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RESPONSE TO DEFENDANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION

Defendants do not come close to satisfying the high standard for rehearing. Instead, they selectively ignore the facts, disregard or misstate controlling law, and raise erroneous new arguments for the first time.

Defendants start by simply ignoring the "stench of animus against the[ir] students' religious beliefs" that "pervades" their actions. Op.46-47 (Lee, J., concurring). Appellant Fellowship of Christian Athletes is a religious organization with student clubs that have long been officially recognized by the San José Unified School District—as FCA clubs are at thousands of schools nationwide. But that changed in 2019, when District employees targeted FCA's beliefs in class, attacked FCA's beliefs about traditional marriage as " bullshit" that "needed to be barred from a public high school campus," demeaned FCA students as "charlatans" who "choose darkness over knowledge," convened school leadership (the "Climate Committee") to "take a united stance" against FCA, recognized a new club (the Satanic Temple Club) formed to mock FCA's beliefs, and called for protests at FCA meetings. Opening Br.9-13, Dkt.23.

Why? The "heart of the problem," according to the District, is that FCA selects its leadership "based on religious beliefs." 9-ER-1778. While all students (including LGBT students) are welcome to join and can apply to lead FCA clubs, club leaders must sincerely affirm FCA's religious beliefs because they are uniquely responsible for expressing and embodying

those beliefs. Defendants said this leadership rule violated District non-discrimination policies and derecognized FCA clubs District-wide.

No other club has ever faced remotely similar treatment. FCA was the first and only District club to be derecognized for its leadership rules. And while no students had ever actually applied for and been rejected from leadership for failing to share FCA's religious beliefs, secular honor-society clubs regularly exclude students who do not meet club views on "good moral character." Answering Br.44, Dkt.59. The District has knowingly approved clubs that limited leadership based on sex or race, and actively runs a "multitude" of student programs that similarly "segregate students." Opening Br.38-39; Answering Br.40.

Defendants' rehearing petition never disavows their actions against FCA. Indeed, Defendants testified that this conduct was consistent with District policies, that they never did anything wrong, and that they would do it again. Defendants' petition instead repeats justiciability and merits arguments rightly rejected by the panel and trots out new remedial arguments that are as wrong as they are waived.

Defendants' justiciability arguments blinker reality. The District essentially complains that the case is moot because the court can't know whether FCA clubs plan to apply for recognized status. But of course they do—that's why they sued. Defendants also ignore extensive evidence showing that the clubs exist, have student leaders, planned to apply for

official approval once the District's exclusion was enjoined, and—fatally—have *already* applied for recognition this year.

On the merits, Defendants fare no better. They concoct a new holding for *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), and argue that the panel both ignored and contradicted it. But the panel cited *Alpha Delta* repeatedly and correctly applied its selective-enforcement analysis. And even if Defendants' imagined holding that the Free Exercise Clause forbids only animus were real, it would be both easily satisfied by Defendants' religious discrimination and plainly superseded by recent Supreme Court precedent.

Finally, Defendants complain that they are "forever foreclosed" from resuming their discrimination against FCA because the panel granted FCA's requested preliminary injunction restoring FCA clubs' official recognition. But that argument is waived (Defendants never made it below or on appeal), misplaced (*preliminary* injunctions do not last "forever"), and wrong (courts often grant similar relief for similar violations).

Defendants fret that the panel's opinion restoring FCA's status will make it "impossible" for schools to enforce non-discrimination policies. But thousands of school districts nationwide manage to both have non-discrimination rules and accommodate FCA every day. The District itself did so for over a decade. The problem is not the panel's analysis but the District's animus. Rehearing is not warranted.

ARGUMENT

I. Defendants' justiciability arguments do not identify a conflict with precedent and are wrong.

Defendants' justiciability arguments are premised on the claim that the FCA club at Pioneer High School, Pioneer FCA, cannot show a need for forward-looking relief. Pet.5. Indeed, throughout this litigation, Defendants have variously claimed that Pioneer FCA ceased to exist, Mot. to Dismiss 16, ECF 127; no longer has student leaders, Answering Br.16; and no longer has any intention of seeking official recognition, *id.* at 21.[1] But Defendants now grudgingly admit—in a footnote—that Pioneer FCA not only exists and has student leaders but also successfully applied for official approval. Pet.7 n.2. Defendants' entire justiciability argument therefore relies on a factual premise that Defendants *concede* is false. *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) ("The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." (citation omitted)). It thus fails.

A. Defendants ignore dispositive facts and precedent.

Defendants stumble right out of the gate because they completely ignore facts and precedent—raised by FCA and relied on by the panel—which confirm that the panel's decision was correct.

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[1] "ECF" citations are to the district court's docket; "Dkt." citations are to this Court's docket.

First, Defendants have not shown that this case is moot. Defendants complain only about factual developments that occurred *after* the complaint was filed. *E.g.*, Mot. to Dismiss 16 ("The fact that there used to be a student group is not sufficient."); Answering Br.21-22 (taking issue with post-complaint factual developments); Pet.5-6 (same). Defendants therefore do not challenge standing; they instead assert mootness. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001), as amended (Aug. 15, 2001); Reply Br.27, Dkt. 75. But Defendants provide no evidence to carry their "heavy burden" of proving this case is moot. *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017). Instead, they *admit* that Pioneer FCA's student leaders applied for ASB approval in 2022-23, immediately after the panel enjoined the District's discriminatory policy. Pet.7 n.2; *see also* Exhibits 1-3 of Motion for Leave to Supplement (forthcoming motion with 2022-23 application and approval). This case is not moot and the panel was correct to reject Defendants' justiciability challenge.

Second, Defendants ignore key Ninth Circuit precedent—raised by FCA, Reply Br.28, and relied on by the panel, Op.23-24, 27—that further confirms standing and undermines their justiciability arguments.

For example, Defendants ignore precedent confirming that justiciability does not require exercises in futility. And here, Defendants *admitted* that reapplication for ASB approval by Pioneer FCA would be futile. Op.27; Answering Br.8 (admitting the "District's nondiscrimination policy, mak[es] FCA clubs ineligible for ASB recognition"). This, together

with the undisputed evidence of past denied ASB applications by Pioneer FCA, Op.16, is sufficient to show standing for forward-looking relief, Op.27; *Namisnak v. Uber Techs.*, 971 F.3d 1088, 1092-93 (9th Cir. 2020) (plaintiffs "need not engage" in "futile gesture … to show injury in fact").

Similarly, Defendants ignore precedent holding that "plaintiffs 'may demonstrate that an injury is likely to recur by showing that the defendant had ... a written policy, and that the injury 'stems from' that policy.'" Op.24; *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 642 (9th Cir. 2008), *overruled on other grounds by Los Angeles County v. Humphries*, 562 U.S. 29 (2010) (quoting *Fortyune v. Am. Multi-Cinema*, 364 F.3d 1075, 1081 (9th Cir. 2004)). Plaintiffs' injury is undisputedly the result of Defendants' written non-discrimination policy, Op.21-22, thus creating "an implicit likelihood of its repetition in the immediate future." *Truth*, 542 F.3d at 642.

Defendants thus ignore two lines of precedent elemental to the panel's standing analysis. Defendants cannot bluff their way into en banc rehearing by selectively recasting the panel's actual holding.

Finally, while Defendants complain about Pioneer FCA's associational standing, they say nothing of FCA National's standing, which the panel separately found sufficient for forward-looking relief. Op.24-25; *see Mecinas v. Hobbs*, 30 F.4th 890, 897 (9th Cir. 2022) (only one plaintiff needs standing for each form of relief sought). Defendants' entire justiciability

argument, then, would have no actual impact on the justiciability of this case—a point Defendants do not dispute.

B. The panel's decision follows precedent.

The two aspects of the panel's justiciability analysis that Defendants *do* manage to address come through unscathed. Neither was erroneous, warrants rehearing, or would change that "the standing inquiry tilts dramatically toward a finding of standing" in cases that "implicate[] First Amendment rights." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174 (9th Cir. 2018) (cleaned up).

First, Defendants claim the panel's decision failed to follow *Lujan* and will allow parties to "circumvent Article III by relying on speculative hearsay." Pet.7. Far from it. The panel cited *Lujan* and correctly articulated its rule: a plaintiff seeking forward-looking relief must show "he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way." Op.24 (quoting *Bates v. United Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). And everyone agrees this is the appropriate test. Pet.5; Op.24; Answering Br.21 (Plaintiffs must show "sufficient likelihood that [they] will again be wronged in a similar way"); Reply Br.28.

Defendants then try to concoct a conflict with a line of aesthetic-injury cases, which rejected standing to bring claims based on "a vague desire to return to the area 'without any description of concrete plans, or indeed

any specification of *when* the some day will be.'" *Wilderness Soc'y v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010). But, as the panel explained, this line of cases is not only easily distinguished but actually *supports* Pioneer FCA's standing. Pioneer FCA repeatedly applied for and was denied ASB approval and had a concrete plan to apply again once the District's policy was enjoined—which was the whole point of this lawsuit. Op.21, 28 n.4; *Rey*, 622 F.3d at 1256 ("repeated[]" past visits and "concrete plans to do so again" are "sufficient").

Defendants' complaints about the "speculative" quality of FCA's evidence likewise fail, because they are simply wrong. *See* Reply Br.23-27 (reciting record evidence). And even if they had merit, factual quibbles are not the stuff of en banc review. *Kipp v. Davis*, 986 F.3d 1281, 1285 (9th Cir. 2021) (Paez, J., concurring) (rehearing en banc inappropriate to resolve "the application of settled legal standards to a set of facts").

Second, Defendants complain that the panel "waived" Article III requirements. Pet.6. Hardly. The panel never suggested that requirements of Article III were waived or even relaxed. Instead, the panel spent seven pages analyzing standing. Op.23-29. Defendants take issue with the panel pointing out their oft-repeated complaint about the lack of one *type* of evidence (student testimony). Op.29. But this was not a suggestion (much less a holding) that Defendants waived anything. Rather, the panel explained why there was no student testimony in the record—

namely, Defendants' stunning intimidation, harassment, and discrimination against the minor students under their near-daily legal control—and why this type of evidence wasn't necessary to show standing. Op.29. The panel found standing based on its assessment of the evidence in the record—not based on waiver. Op.27. This Court does not rehear holdings a panel did not make.

C. Defendants' irreparable harm argument fails.

As Defendants admit, their irreparable harm arguments rise and fall with their justiciability arguments, Pet.7, and thus fail for the reasons above.

II. Defendants' merits argument does not identify a conflict with precedent and is wrong.

The panel correctly articulated and applied the rule that, under the Free Exercise Clause, a law will trigger strict scrutiny if it is "selectively enforced against religious entities but not comparable secular entities." Op.33 (citing *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021)); *accord Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876 (2021). The panel then found that the District had "selectively enforced—and continues to selectively enforce—[its non-discrimination policies] against FCA while exempting secular ASB student groups." Op.35. Specifically, FCA was the first and only group against which the District had ever enforced its policies, and it did so while allowing clubs like Senior Women, Big Sisters/Little Sisters, the South Asian Club, and Interact to limit not just

leadership but also membership based on gender identity, sex, race, and secular standards of "good moral character." Op.20, 40 n.8.

The District complains that this conclusion contradicts *Alpha Delta Chi-Delta Chapter v. Reed*, a case which it says the panel failed to "even mention[]."Pet.9. Both assertions are wrong.

First, the panel cited *Alpha Delta* four times, including right at the start of its analysis, and correctly articulated *Alpha Delta* as requiring strict scrutiny because Defendants "selectively enforce[d] their policies against FCA only" while "secular student groups were granted exemptions." Op.35 (similarly citing *Truth*).

Second, Defendants' imagined conflict is based on a misreading of *Alpha Delta*. They argue that the "holding" of *Alpha Delta* is that approval of a facially noncompliant club application "does *not* suffice to establish unconstitutional selective enforcement because the approval may have been unintentional or inadvertent." Pet.2. Not so. *Alpha Delta* was an appeal from summary judgment for the defendant school. The relevant issue was not the quantum of proof necessary for injunctive relief but whether plaintiffs had raised a triable issue of fact sufficient to remand. The relevant holding was that they had. Moreover, the evidence there only showed that the school "may" have granted exemptions to secular groups, thus raising a triable question of whether the plaintiffs were, "in fact," "treated differently." *Alpha Delta*, 648 F.3d at 804.

Here, the panel correctly found there was no such uncertainty: FCA had undisputedly been treated differently. The panel started by focusing on a comparison to the Senior Women club. For FCA, the "mere existence" of its religious leadership standards was enough for the District to immediately derecognize FCA and fight for years to keep it excluded, without ever seeking *any* evidence that FCA had *ever* denied a student a leadership position based on those standards. Op.38-39. By sharp contrast, the panel found, the Senior Women's exclusionary membership standards—hand-written twice into their application to bar anyone who does not identify as female—was met with a literal stamp of approval by the District. *Id.* And, the panel explained, the District's insistence that FCA must prove Senior Women *actually* excluded students is just another form of selective enforcement, since the District didn't apply an actual-exclusion test for FCA's abrupt (and continued) derecognition. *Id.*

Moreover, the panel found that other exemptions made the District's discrimination even clearer. Unlike FCA, numerous secular clubs are allowed to restrict membership and leadership based on their definition of "good moral character." Op.40 n.8. And the same Pioneer official who exercised the "final say" to exclude FCA admitted that the Big Sisters/Little Sisters club was approved not as an oversight but precisely "*because* it was … a mentorship for [Pioneer] students who are females to be mentored by … senior female students." 5-ER-852-53 (emphasis added); Op.15, 38 n.7. And the District admitted that clubs may exclude students

on the basis of race, sex, and other criteria in the purpose and benefits of a group. Oral Arg. 31:24 (agreeing "white nationalist group" permissible); 8-ER-1414; 9-ER-1764; SER.703; Op.38-39 n.7.

The District also complains that the panel should have ignored approvals under the version of the non-discrimination policy in force at the time of FCA's initial derecognition, since it "shed[s] no light on the current practice." Pet.9. But the District conceded at oral argument that the current policy is "not a change" from the earlier one, but merely a "formalization of a long-standing practice." Op.41. Nor would this explain away the current good-moral-character exemption, 7-ER-1215, Opening Br.14-15; its exception allowing clubs to have exclusionary purposes, 8-ER-1414; or the District's approval of the South Asian club's race-based preference, 2-ER-109. *See also* 9-ER-1632, 1638-41, 1653; 9-ER-1816, 1654 (admitting District provides a "multitude" of student programs like the Latino Male Mentor Group and Girls Circle that exclude students based on race, age, and sex).

Thus, the panel's holding is a straightforward application of *Alpha Delta* in a case where the facts remove any doubt about Defendants' discrimination.[2]

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[2] The District faults the panel for failing to defer to the district court's view of the facts, but that claim is misplaced here. First, it is irrelevant to the asserted (but nonexistent) conflict with *Alpha Delta*. Second, the

And, to the extent Defendants argue that *Alpha Delta* requires evidence of not just discriminatory *treatment* but also discriminatory *intent*, they fare no better. *See, e.g.*, Pet.9 (arguing "inadvertent" discrimination permissible); Pet.11-12 (arguing proof is required that same "decision-maker" intentionally discriminated). Even if they were right on the law, that does not help their bid for rehearing given the "stench of animus" pervading their mistreatment of FCA. Op.46 (Lee, J., concurring). Far from being a case about "stray remarks by a single teacher," Pet.12, this is a case of coordinated, explicit, and ongoing religious discrimination by government officials against the religious students entrusted to their care. Moreover, the District has not disavowed its employees' blatant misconduct—never correcting it (even when an employee vowed to do it all over again), never even *investigating* it (despite claiming otherwise to state officials), and still defending it in substance today. Opening Br.18-19; *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S.Ct. 1719, 1731-32 (2018) ("factors relevant" to neutrality "include" the "historical background of the decision," "specific series of events leading to" it, and refusal to disavow); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508

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panel confirmed it was not "find[ing] facts" but just refusing to "shut our eyes to 'uncontested facts.'" Op.39. And third, the panel had a duty to keep its eyes open to scrutinize the entire record and "review constitutional facts *de novo*." *Thunder Studios v. Kazal*, 13 F.4th 736, 742 (9th Cir. 2021).

U.S. 520, 534, 541 (1993) (courts must "survey meticulously the circumstances" of religious discrimination).[3]

Defendants are also wrong on the law: "the Free Exercise Clause is not confined to actions based on animus." *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.). Even "incidental[]" burdens on religious exercise must be generally applicable. *Fulton*, 141 S.Ct. at 1876. And the Supreme Court has made "clear" that "under the Free Exercise Clause, whenever [regulations] treat *any* comparable secular activity more favorably than religious exercise," they are not generally applicable and must pass strict scrutiny. *Tandon*, 141 S.Ct. at 1296; *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2423 (2022) (religious burdens must be "applied in an evenhanded, across-the-board way"). While ill intent can support that result, it is not necessary to it. *Kennedy*, 142

[3] Defendants also attempt to seal off their FCA derecognition decision from the extensive evidence of anti-FCA hostility "pervad[ing] the Pioneer High School campus," Op.47, insisting the derecognition "decision-makers" were entirely at the District level and not at Pioneer. Pet.11-12. That is irrelevant, as explained above, and incorrect. The District's primary liaison regarding FCA's derecognition testified repeatedly that the ultimate decision was "handled at the individual school level" and not by the District—albeit with the District's full knowledge and support. 8-ER-1320-21, 1347-48, 1386. And the principal likewise testified that he had the "final say" over FCA's derecognition, 5-ER-782, authority he exercised immediately after his staff told him to "attack[]" and "bar[]" FCA's "bullshit" beliefs and his "Climate Committee" leadership team called for a "united stance" against FCA. 10-ER-1897-98, 10-ER-1924-27.

S.Ct. at 2422 (distinguishing intent-based claims from unequal treatment); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 66 (2020) (same); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (speech restrictions are "subject to strict scrutiny regardless of benign motive" or "lack of animus"; plaintiffs "need adduce no evidence of improper censorial motive"); *accord* Prof. McConnell Br. 12-15 ("no need to read" *Alpha Delta* to require animus, but if so read, "no longer good law"); Cardinal Newman Br. 9-12 ("obsolete").

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Unable to identify a conflict with circuit law, the District resorts to threatening that the panel's ruling reinstating FCA clubs on District campuses will somehow "make it impossible for school districts to administer non-discrimination policies." Pet.2. Yet the District itself managed that feat in the decade-plus that FCA clubs were officially recognized in District schools before 2019. So too have thousands of schools nationwide, as have colleges with far more student clubs than the District. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996); *see also* U.S. Census Bureau, *Top 10 Largest School Districts* (May 21, 2019), https://perma.cc/PB9C-XZAC (identifying largest school district as New York City, which is within the Second Circuit); *InterVarsity v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021); *InterVarsity v. Wayne State Univ.*, 534 F. Supp. 3d 785 (E.D. Mich. 2021).

III. Defendants' new remedial argument is waived and wrong.

Defendants' argument challenging the injunctive relief FCA received is both waived and wrong.

The panel granted the relief FCA has consistently sought throughout this litigation. *See* Compl., ECF 1 at 47 (requesting "a preliminary injunction … prohibiting Defendants from denying Plaintiffs recognition"); Mot. for Prelim. Inj., ECF 102 at 2 (seeking injunction to "restore recognition" to FCA clubs); Mot. for Inj. Pending Appeal Reply, Dkt. 40-1 at 10-11 (requesting "an injunction restoring Pioneer FCA's ASB-approved status"). Defendants did not take issue with this requested relief before the district court or the panel. Only now, in a rehearing petition, do Defendants fabricate this new theory. But this Court will "not consider on rehearing new issues previously not raised, briefed or argued." *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006) (per curiam); *SNJ Ltd. v. Comm'r of Internal Revenue*, 28 F.4th 936, 939 n.1 (9th Cir. 2022). Defendants have accordingly waived the argument.

Even if it wasn't waived, Defendants' argument would still fail. Defendants assert rehearing is required so that the District is not "forever enjoin[ed]" from prohibiting discrimination by any student club. Pet.14. But that is not at issue. This appeal regards FCA's *preliminary* injunction motion. By its very nature, the requested relief is temporary. And even permanent injunctions remain subject to modification should justice

require. *See Brown v. Plata*, 563 U.S. 493, 542 (2011). Defendants' argument is baseless.

Moreover, Defendants' novel rule runs directly contrary to the law of the Supreme Court, this Circuit, and several other circuits. The Supreme Court and this Circuit have repeatedly found that a proper remedy under the Free Exercise Clause for a scheme that discriminates, or allows discrimination, against religion is to raise religious groups up to the level of exempt secular comparators. *Tandon*, 141 S.Ct. at 1296 (granting preliminary injunction requiring government to treat religious institutions as favorably as secular ones); *Diocese of Brooklyn*, 141 S.Ct. at 65 (same); *Calvary Chapel Dayton Valley v. Sisolak,* 982 F.3d 1228, 1233 (9th Cir. 2020) (same). That approach applies to non-discrimination policies like those here. *Fulton*, 141 S.Ct. at 1882. Defendants' rigid rule would also conflict with precedent from multiple other circuits, which have remedied selective enforcement with injunctions like the one here. *Intervarsity*, 5 F.4th at 859; *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866-67 (7th Cir. 2006); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 152 (3d Cir. 2002).

Defendants suggest *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011), supports their position. Pet.13. But *Hoye* is inapposite. First, *Hoye* expressly declined to direct the district court to order any particular form of injunctive relief. 653 F.3d at 856. Second, while Defendants argue the

proper remedy here is to require the district to uniformly *enforce* its policy, *Hoye* suggested the opposite: that selective enforcement could be addressed by "enjoining the City *from continuing to enforce* the Ordinance." *Id.* at 857 (emphasis added). Third, *Hoye* is a unique case that presented a "remedial puzzle" because Oakland refused to acknowledge the gap between its discriminatory enforcement and its facially valid policy. *Id.* at 856 ("Oakland has insisted that there is no distinction between the actual Ordinance and what it enforces."). That is not this case, where the District's discrimination is plain and where a targeted injunction provides the relief to which FCA is entitled.

Defendants' novel remedial rule would create perverse incentives. If the only available remedy for selective enforcement is not to treat plaintiffs better but to treat everyone *worse*, plaintiffs have little reason to challenge such unconstitutional conduct. By contrast, governments could choose to begin equal enforcement only after a court order advised them to do a better job enforcing the challenged law.

Finally, rehearing would not change the remedy here. FCA's alternative arguments that do not rely on selective enforcement—including the Free Exercise Clause's neutrality requirements, the Religion Clauses' protection for the autonomy of religious groups to have religious leadership, and the Equal Access Act—would require at least the same result: injunctive relief restoring FCA clubs' recognized status during this litigation. And, again, Defendants never argued otherwise.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 14, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Daniel H. Blomberg
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FOR THE NINTH CIRCUIT

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