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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Citizens For Quality Education San Diego, *et al.*,

Plaintiffs;

v.

San Diego Unified School District, *et al.*,

Defendants.

Case No. 3:17-cv-1054-BAS (JMA)

PLAINTIFFS' RESPONSE TO BRIEF BY AMICUS CURIAE CAIR-CA

Date: April 30, 2018
Judge: Hon. Cynthia Bashant
Magistrate: Hon. Jan Adler

INTRODUCTION

CAIR portrays this case in nearly fictional terms. Plaintiffs do not allege, as CAIR wants this Court to believe, that learning about Islam represents radical indoctrination. Nor do Plaintiffs allege that teaching about Muslim culture constitutes militant proselytization. What Plaintiffs *do* allege, however, is that the San Diego Unified School District is collaborating with a sectarian organization on an initiative that discriminates in favor of one religion. Plaintiffs have firmly and deliberately made that clear since the beginning of this case. Yet CAIR spends twenty-five pages mischaracterizing Plaintiffs' claims, concocting new ones, and altogether spurning long-held Establishment Clause jurisprudence as interpreted by the Supreme Court, the Ninth Circuit, and about every other circuit.[1]

As to the real issue before this Court—whether the Anti-Islamophobia Initiative, in its ever-evolving-litigation-evading form, is neutral toward religion—CAIR offers little of merit.[2] Nor can it. Indeed, CAIR does not dispute it is a religious organization. Nor does it dispute that it actively promotes the religion of Islam. But it ignores a glaring problem of law: a religious organization cannot under any circumstance advance its sectarian agenda in a public school district. Instead, CAIR riddles its brief with amorphous reasons for the Initiative, none compelling. What does CAIR believe is the fundamental issue in this case? CAIR's brief sums (Br. 26) it up in the very last paragraph: it believes that this case is nothing more than a "curriculum dispute" that is "cloaked" in "anti-Muslim rhetoric." That is pure fiction.

CAIR vigorously defends the Initiative's constitutionality, but other than a failed attempt (Br. 14-21) at the *Lemon* Test and a misleading attack (Br. 22-25) on the merits of Plaintiffs' No Aid Clause claim, CAIR only emphasizes its lack of case support for its

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[1] Brief of *Amicus Curiae* CAIR-CA ("Br."), ECF No. 36.

[2] This Court has noted that it will not consider CAIR's outside-the-record factual information from its *amicus* brief (some 13 pages) (ECF No. 41.). Accordingly, Plaintiffs took reasonable care not to dispute those facts as they are irrelevant.

discriminatory scheme by filling its brief with quotations from Donald Trump and rehashing statistics from its own fundamentally flawed, self-contradicting surveys. Beyond that, CAIR craftily tries to divert the Court's attention from the Supreme Court's First Amendment jurisprudence by dangling (Br. 18-21, 25) the classic "alleged-indoctrination-disguised-as-lessons" cases, *Eklund v. Byron Union Sch. Dist.*[3] and *Brown v. Woodland Joint Unified Sch. Dist.*,[4] both of which have absolutely no bearing on Plaintiffs' claims. Hoping the Court will take the bait, CAIR presses misleading arguments and falsely complains (Br. 15) that Plaintiffs are up in arms about children being "forced to read the Qu'ran, participate in prayer, or otherwise practice Islam."

All wrong. This case is not a "curriculum dispute." It is about the irreparable harm Plaintiffs are suffering every day they send their children to school exposed to a religiously discriminatory policy. It is about Plaintiffs' feelings of marginalization and stigmatization from a taxpayer-funded program that divides students along religious lines. Above all, it is about the fundamental principles of equality and government neutrality as guaranteed by the California and United States Constitutions.

But CAIR rejects all that while even overlooking the consequences of its position as applied to other potential circumstances—such as what if a Zionist advocacy organization or a Christian civil rights group were in its exact place. For CAIR, there is simply too much on the line—from its fundraising efforts to its publicly touted plan of using this Initiative as a pilot program for a nationwide rollout—to accept that the Constitution applies to it like all other religious advocacy organizations. The law, however, is clear: "In no activity of the State is it more vital to keep out divisive forces than in its schools." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). The Court should see past CAIR's legal irrelevancies and factual distortions and in turn grant Plaintiffs' motion for preliminary injunction.

[3] 154 F. App'x 648 (9th Cir. 2005).

[4] 27 F.3d 1373 (9th Cir. 1994).

DISCUSSION

CAIR's entire brief collapses under the weight of its giant straw man argument: that Plaintiffs oppose the teaching of Islam and learning about Muslim culture. Nowhere have Plaintiffs made that claim. For good reason—it is utterly false. Learning about Islam and Muslim culture is critical to a child's understanding of world religions and diverse traditions. But CAIR deliberately fabricates (*e.g.*, Br. 3-4) its assertion because the Initiative itself cannot withstand constitutional scrutiny. CAIR also deliberately ignores (Br. 7) another reality, fatal to its anti-Islamophobia crusade, of what is happening in District schools. Here are a sample of official bullying reports made by District staff:[5]

- "Student was drawing swastikas on his journal in front of a Jewish student, who has complained about anti-semitic comments made by this student."
- "Student said to another 'Jews suck.' Student said this a few times. Told a female student he didn't want to sit next to her because she is a Christian."
- "Student said racial slurs to Jewish student. He also posted the word 'Cancer' to her Instagram online."
- "Student said racial slurs to a Jewish student. Motioning 'Hail Hitler.'"
- "For no apparent reason, student burst into a classroom loudly asking 'Is this the Jewish room'. Student was dared by peers to do this."

Blinded by its own agenda, CAIR fails to see that the Initiative simply "does not square with the First Amendment's promise" of religious and educational equality. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1842 (2014) (Kagan, J., dissenting).

1. CAIR Deliberately Flouts Longstanding Establishment Clause Principles.

1.1. The Initiative fails strict scrutiny because it lacks a compelling interest to justify religious discrimination.

The Initiative violates Plaintiffs' First Amendment rights by discriminating on the basis of religion. "The Establishment Clause requires that 'one religious denomination

[5] Pls.' Mot., LiMandri Decl. Ex. 4 (incidents of anti-Semitic bullying recorded in the District's state-mandated reports in 2015 and 2016) (typographical errors in original).

cannot be officially preferred over another.'" *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 357 (9th Cir. 2002) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Thus, it is well established that when a government policy discriminates in favor of one religion, that policy is reviewed under strict scrutiny. *See Larson*, 456 U.S. at 244; *see also Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 886 n. 3 (1990) (noting that the Court strictly scrutinizes "governmental classifications based on religion" just as it scrutinizes "classifications based on race."); *cf. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) ("The danger of stigma and stirred animosities is no less acute for religious line drawing than for racial.") (Kennedy, J., concurring). CAIR does not even address how the Initiative could survive strict scrutiny, much less assert any compelling interest. Nor could it.

There is no "plague of anti-Muslim bullying."[6] For an interest to be compelling enough to justify a discriminatory law, "[t]he State must specifically identify an *actual problem* in need of solving." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (emphasis added). When the Board adopted the Initiative, it relied on CAIR's self-administered bullying surveys, which declared there was a "growing epidemic" of Islamophobia in California schools.[7] But the District's state-mandated bullying reports listed only two incidents involving Muslim students in the 2015 and 2016 school years. On the other hand, it reported *eleven* incidents of anti-Semitic bullying.[8] To be sure, protecting students from bullying a valid concern, but CAIR's asserted (Br. 2) "plague of anti-Muslim bullying" is spurious at best.[9] "To sacrifice First Amendment protections for so speculative a gain is

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[6] Br. 2.

[7] Pls.' Mot., LiMandri Decl. Ex. 5.

[8] Pls.' Mot., LiMandri Decl. Ex. 4.

[9] Not only did CAIR distort the findings of its own surveys, its broad definition of bullying is utterly distinct from the definitions the District adopted pursuant to the California Education Code and the United States Department of Health and Human Services (HHS). *See* Pls.' Amend. Compl. ¶¶ 24-25, 40-44, ECF No. 3. For example, if a student makes a critical comment on women's rights in Muslim-majority countries during

not warranted." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Co.,* 412 U.S. 94, 127 (1973).

CAIR tries to neutralize the Initiative by asserting (Br. 17, 23) abstract principles like "promoting diversity" and "fostering tolerance." Under Supreme Court precedent, however, none of those interests is considered compelling. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-722 (2007); *cf. Shaw v. Hunt,* 517 U.S. 899, 909–910 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"). The reason is simple—interests such as "diversity" and "tolerance" could justify religious preferences "essentially limitless in scope and duration." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989). In fact, CAIR does not even define what those words mean. Justifying the Initiative according to such amorphous interests simply would have "no logical stopping point." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986).

Even if CAIR's abstractions were compelling interests, the Initiative is obviously not narrowly tailored to achieve them.[10] Under strict scrutiny, narrow tailoring demands "the most exact connection between justification and classification." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995) (internal quotation marks omitted). CAIR claims (Br. 12) its "anticipated role" was to (1) work with District officials "to increase their understanding of Muslim culture" and (2) supply the District with "resources … to

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a high school social studies class discussion, CAIR could and would consider this an example of "bullying" and "discrimination." *But see Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry."); *cf. W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. . . . The First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.").

[10] CAIR asserts (Br. 3) that the "actual services" for the District were "quite narrow." But that statement is directly contradicted by the "Proposed Outline of Services" that Hanif Mohebi, the executive director of CAIR's San Diego chapter, submitted to the District just before the April 4, 2017, board meeting. *See* Pls.' Mot., LiMandri Decl. Ex. 7.

instruct students about Muslims." But CAIR has offered no plausible way to evaluate whether these means would actually ameliorate any perceived anti-Muslim bullying. Indeed, the plans are both so overinclusive and underinclusive there are can be no doubt that CAIR's motive was to carve out a religious gerrymander in the District. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Because the Initiative is not narrowly tailored to further any compelling governmental interest, it fails strict scrutiny.

1.2. The Initiative fails the *Lemon* Test because it has the purpose and effect of government preference for one religion.

Deploying conclusory assertions and ignoring the real issues in this case, CAIR attempts to justify (*e.g.*, Br. 15-16) the Initiative under the disjunctive *Lemon* Test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). To begin, *Lemon* "is not necessary to the disposition" of this case because the Initiative expressly classifies based on religion. *Larson*, *supra*, at 252 (*Lemon* applies to "laws affording uniform benefit to all religions, and not to provisions ... that discriminate *among* religions"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989) (same).[11] Even so, the District fails to satisfy any of the *Lemon* prongs.

Secular Purpose. Predictably, CAIR contends (Br. 16) that the Initiative is "patently secular"; yet in the same stroke, it declares that the Initiative's "stated purpose" is to "address Islamophobia and bullying." Indeed, the illogic of CAIR's reasoning can be based on a simplistic syllogism:

> The Initiative's purpose is to address Islamophobia.
> Islamophobia is bias against Islam.
> Islam is a religion.
> Therefore, the Initiative's purpose is to address bias against a religion.

[11] *See supra*, at 3; *see also* Pls.' Mot. 13; *id.*, LiMandri Decl. Exs. 2, 5.

This cannot be any clearer. The Establishment Clause "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to *favor the adherents of any sect* or *religious organization*." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9 (1989). The Initiative is patently sectarian.

Primary Effect. CAIR contends (Br. 17) that "the primary effect" of the Initiative is "to educate and promote diversity." That argument is meritless. The effects prong asks whether the policy conveys a message that one religion is preferred, regardless of the government's actual purpose. *See Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1045 (9th Cir. 2007); *see also Lynch v. Donnelly,* 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Here, Defendants designed and implemented an educational program associated with a single religion to the exclusion of all others. *See Town of Greece*, *supra*, at 1844. In doing so, Defendants "advanced one faith, [Islam], providing it with a special endorsed and privileged status in the school board." *Bacus*, *supra*, at 357. This exclusionary criterion leaves a reasonable person with little doubt that the Initiative conveys a message of favoritism towards Muslim students.

Entanglement. CAIR asserts (Br. 21) that it is not "excessively entangled" with the District. But CAIR does not even dispute (Br. 1) that it is an Islamic civil rights organization, nor does it dispute that its mission is to "create a religious educational environment" in public schools.[12] In fact, entanglement can be excessive merely when the government's entanglement has the *effect* of advancing religion. *See Agostini v. Felton*, 521 U.S. 203, 232–33 (1997) (holding that the factors assessing "excessive" entanglement are similar to those assessing a policy's primary "effect"). To this, CAIR has no answer. Moreover, the decisions that CAIR relies on are inapposite. In *Nurre v. Whitehead*, the Ninth Circuit "confine[d] [its] analysis to the narrow conclusion" that a school official prohibiting "the performance of an obviously religious piece" of music did not violate the

[12] Pls.' Mot. 5 (citing *CAIR-Foundation, Inc. d/b/a Council on American-Islamic Relations*, Case 05-RC186732 (N.L.R.B. Apr. 7, 2017) (decision and direction of election)).

Establishment Clause. 580 F.3d 1087, 1095 (9th Cir. 2009). In *Cholla Ready Mix, Inc. v. Civish*, F.3d 969, 977 (9th Cir. 2004), the alleged "religious community" was, in fact, Native Americans; and in *Williams v. California*, 764 F.3d 1002, 1016 (9th Cir. 2014), the challenged "aid" was furnished to a nonreligious vendor. In any event, each of the cases CAIR cites stands for the same proposition— the government cannot entangle itself with a pervasively sectarian organization. *Never once in history* has the Supreme Court upheld such blatant government entanglement with religion such as here.

2. CAIR's Purposefully Misconstrues Plaintiffs' No Aid Clause Claims.

CAIR's nearly four-page attack on Plaintiffs' No Aid Clause claim begins with spin. Right away, CAIR seeks to create confusion by characterizing (Br. 22) Plaintiffs' claims as being concerned simply with "educating students about a world religion." But CAIR's conjuring does not insulate itself from "the d[e]finitive statement of the principle of government impartiality in the field of religion." *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 520 (1974). CAIR evidently recognizes this because it does not respond to any of Plaintiffs' arguments; instead, it opts to deflate the No Aid Clause's enormous breadth by boldly declaring that the provision "*only*" prohibits the District—and here CAIR cites the provision—from "granting *anything* to or in aid of *any* religious sect ... or sectarian purpose." (emphasis added). CAIR's attempt at misdirection, which fails on its own terms, should be rejected.

First, CAIR contends (Br. 23) that the Initiative does not benefit a sectarian purpose. Sticking to its false "curriculum dispute" narrative, CAIR tries to reshape (Br. 23) the No Aid Clause to pertain only to monetary grants to religious organizations. That is a straw man. The Ninth Circuit rejects the very same argument that CAIR makes, holding that the No Aid Clause "is so broad" that a financial benefit is irrelevant, and a government may violate the provision "by doing no more than lending their prestige and power to a sectarian purpose." *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th Cir. 2002) (en banc) (internal quotation marks omitted). CAIR's avoidance of all this speaks volumes.

CAIR also makes the claim (Br. 24) that "teaching cultural awareness is not a sectarian purpose." That is hardly an answer to Plaintiffs' *actual* argument—that CAIR is advancing its religious agenda in a public school district through a taxpayer-funded educational program. *See Paulson*, 294 F.3d 1124 at 1130 (observing that "sectarian purpose ... simply means aid to a sectarian use") (internal quotation marks and alterations omitted).

CAIR further tries to distract this Court by citing (Br. 25) the Ninth Circuit's decision in *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994). But comparing a handful of stories about witches and sorcerers to a government program that *directly* and *substantially* singles out one religious sect for preferential benefits is meritless. In both design and operation, the Initiative directly benefits Muslim students and advances CAIR's sectarian agenda, thus violating the No Aid Clause.

3. The Initiative Cannot Be Redeemed Under Any Deferential Standard Because It Violates the First Amendment.

CAIR contends (Br. 15) that the Court should defer to the District's judgment and pass on reviewing Plaintiffs' constitutional claims because the Initiative was "designed to educate students about an often unfamiliar religion in order to combat a surge in discrimination. CAIR, however, is effectively urging for a "blind judicial deference" that is fundamentally at odds with constitutional jurisprudence. *Croson*, *supra*, at 501. Citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, CAIR correctly notes (Br. 15) that the Supreme Court has long recognized that school boards have broad discretion in managing school affairs. 457 U.S. 853, 870. But the Court also has consistently recognized that a school board's discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Id.* at 864. Simply because the Board may pursue a well-meaning goal does not mean it is free to discriminate on the basis of religion to achieve it.

CAIR relatedly claims (Br. 16) that the District merely "followed the legislature's

directive" under the Safe Place to Learn Act.[13] But as the Supreme Court made clear, "[a]n asserted motivation of religious accommodation, even if justified by reference to a state statute, cannot shield governmental actions that otherwise violate the principle of neutrality embedded in the establishment clause." *Kiryas Joel*, *supra*, at 705; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) ("[T]he statute, by delegating a governmental power to religious institutions, inescapably implicates the Establishment Clause.").[14] And Plaintiffs do not suggest that the District turn a blind eye to any instance where a Muslim student is being bullied; rather, Plaintiffs are asking this Court to determine, in light of Supreme Court precedent and the strictest form of judicial scrutiny known to American law, whether the District has a compelling interest to expressly discriminate in favor of one religion. The answer is that it does not, and it cannot.

CONCLUSION

CAIR asks this Court to place the mores of "cultural awareness" and "promoting tolerance" above the First Amendment and turn a blind eye to its sectarian agenda. But "Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (Blackmun, J., concurring). CAIR may freely advance its religious mission in the public square, but it may not do so in the public school—the Constitution forbids it. An injunction is warranted.

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[13] CAIR fails to note it was a co-sponsor of AB 2845, and it lobbied for the law using the same spurious bullying surveys it used with the District. *See* A.B. 2845, 2016 Leg. (Cal. 2016).

[14] CAIR also ignores the statutory provision that expressly states "[n]othing in this section shall be construed to require school employees to engage with religious institutions in the course of identifying community support resources pursuant to this section." Cal. Educ. Code § 234.1 (West).

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: April 30, 2018 By: /s/ Charles S. LiMandri

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CERTIFICATE OF SERVICE

Citizens for Quality Educ. San Diego, et al. v. San Diego Unified School District, et al.
Case No.: 3:17-cv-1054-BAS-JMA

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9520, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **PLAINTIFFS' RESPONSE TO BRIEF BY AMICUS CURIAE CAIR-CA.**

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

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I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed on April 30, 2018, at Rancho Santa Fe, California.

Kathy Denworth