Charles S. LiMandri, SBN 11084
Paul M. Jonna, SBN 265389
Jeffrey M. Trissell, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, California 92067
Tel: (858) 759-9948; Fax: (858) 759-9938
cslimandri@limandri.com

Attorneys for PLAINTIFFS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs;

v.

Richard Barrera, in his official capacity as Board President of the San Diego Unified School District, *et al.*,

Defendants.

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

MEMORANDUM OF POINTS & AUTHORITIES in Support of Plaintiffs' (1) Motion for Reconsideration of the Court's Order Denying Plaintiffs' Motion for Preliminary Injunction and (2) Motion for Leave to File Second Amended Complaint

Judge: Hon. Cynthia Bashant
Magistrate Judge: Hon. Jan Adler
Courtroom: 4B
Hearing Date: November 26, 2018, 9:00 a.m.

No Oral Argument Unless Requested by the Court

TABLE OF CONTENTS

/ / /

/ / /

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES — continued

TABLE OF AUTHORITIES — continued

TABLE OF AUTHORITIES — continued

TABLE OF AUTHORITIES — continued

RULES

INTRODUCTION

These motions arise from Plaintiffs' challenge to the San Diego Unified School District's anti-Islamophobia Initiative and the District's sustained collaboration with the Council on American-Islamic Relations.

Motion for Reconsideration. On September 25, 2018, this Court issued its order denying Plaintiffs' motion for a preliminary injunction. At issue here is the Court's conclusion that Plaintiffs are unlikely to succeed on the merits of their constitutional claims and that Plaintiffs are not suffering irreparable harm. Mindful that motions for reconsideration are generally disfavored, Plaintiffs respectfully request that the Court reconsider its conclusion for the following reasons:

1. The Court clearly erred in overlooking decisive facts demonstrating Plaintiffs' likelihood of success on the merits of their claims while accepting as fact a number of Defendants' unsupported assertions;

2. The Court's misapprehension of the strict scrutiny analysis as applied to the Initiative was both manifestly unjust and squarely in conflict with established Ninth Circuit and Supreme Court precedent; and

3. More broadly, the Court misinterpreted and drew unjustifiable inferences from several of Plaintiffs' allegations that weighed heavily on the Court's analysis and conclusion.

Motion to Amend and Supplement First Amended Complaint. Per the Local Rules and the Federal Rules of Civil Procedure, Plaintiffs respectfully request leave to file a Second Amended Complaint ("SAC"). Plaintiffs make this request in good faith to reflect the current status of the litigation, including prior rulings in the case and events that have arisen after the filing of the first amended complaint. The proposed SAC does not add any new plaintiffs or defendants. In addition, the SAC narrows the scope of the issues and removes several causes of action, which will streamline the litigation and conserve judicial resources. Granting leave to file a SAC will not prejudice Defendants.

MOTION FOR RECONSIDERATION

1. Procedural History

In May 2017, Plaintiffs brought this action against the San Diego Unified School District ("District"), its superintendent, and each member of the school board, alleging that the District's anti-Islamophobia Initiative ("Initiative") and collaboration with the Council on American-Islamic Relations ("CAIR") violated the Religion Clauses of the California and United States Constitutions.[1] Plaintiffs filed a First Amended Complaint[2] in June 2017; and after informal discovery, Plaintiffs filed their Motion for Preliminary Injunction[3] in February 2018. Defendants filed an opposition brief[4] in April 2018, to which Plaintiffs replied[5] that month, and to which Defendants filed a surreply[6] in May 2018. Third party CAIR filed an *amicus* brief[7] defending the Initiative's constitutionality. The Court heard oral argument in July 2018. On September 25, 2018, this Court issued its order denying Plaintiffs' motion for a preliminary injunction.[8] Plaintiffs now move the Court to reconsider its order.

2. Legal Standard

Under Rule 59(e) of the Federal Rules of Civil Procedure, a court may reconsider and amend a previous order. *See* Fed. R. Civ. P. 59. "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error

---

[1] Plaintiffs' Original Complaint ("Compl."), ECF No. 1.

[2] Plaintiffs' First Amended Complaint ("FAC"), ECF No. 3.

[3] Plaintiffs' Motion for Preliminary Injunction ("Mot."), ECF No. 26.

[4] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opp'n"), ECF No. 32.

[5] Plaintiffs' Reply in Support of Motion for Preliminary Injunction ("Reply Br."), ECF No. 47.

[6] Defendants' Surreply to Plaintiffs' Motion for Preliminary Injunction, ECF No. 55.

[7] CAIR's *Amicus* Brief in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("CAIR Br."), ECF No. 36.

[8] Order Denying Plaintiffs' Motion for Preliminary Injunction ("Op."), ECF No. 63.

or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Plaintiffs seek reconsideration under the second category. "Clear error occurs when 'the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.'" *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). A "manifest injustice" is "a direct, obvious, and observable error in a trial court." *Manifest Injustice*, Black's Law Dictionary (10th ed. 2014). "It is common for both trial and appellate courts to reconsider and change positions when they conclude that they made a mistake. This is routine in judging, and there is nothing odd or improper about it." *Smith*, 727 F.3d at 955.

3. Argument

3.1 The Court's Disregard of Highly Probative Record Evidence Was Manifestly Unjust.

In holding that Plaintiffs are unlikely to succeed on the merits of their claims, the Court based its analysis on several mistaken factual premises. To begin, the Court found that Plaintiffs' claim about the Action Steps being the "polished product of months of close collaboration" between CAIR and the District was "not credibly supported."[9] But the "specific sequence of events leading up to" the Original Policy's adoption shows otherwise. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). On March 17, 2017, Defendant Marten emailed District official Linda Trousdale her notes from her September 2016 meeting with CAIR and its executive director, Hanif Mohebi. Marten specifically told Trousdale, "I hope the presentation you are preparing follows the format of these notes *that are based on their* [CAIR's] *requests* and the board's frame for how they wanted us to develop our plan." Trousdale wrote back that she "ha[s] been *meeting*

[9] Op. 6; Pls.' Mot. 3.

regularly with Hanif and the team."[10] And the night before the Board adopted the Original Policy, Marten told CAIR-San Diego's executive director Hanif Mohebi that District officials "made several changes to the [Action Steps] for tomorrow night *after you spoke* with Linda."[11] The Court's related conclusion that the Initiative merely "coincides with a focus of CAIR" is manifestly wrong.[12] The Islamic organization has repeatedly made public statements claiming the Initiative was "developed in collaboration with CAIR-San Diego" and that it was CAIR's pilot program for a nationwide campaign.[13] And Mohebi said in a newspaper interview on the Initiative that the "work ahead is something we will all be responsible for."[14] These readily available facts alone are enough to confirm that the District collaborated with CAIR to design and implement the Initiative.

3.1.1 The Court overlooked material facts in concluding that the District does not aid and advance CAIR's sectarian agenda.

In its analysis of Plaintiffs' No Aid Clause claim, the Court found that "Plaintiffs have not provided evidence that CAIR directs or has directed the District's use of taxpayer money pursuant to the Initiative."[15] That finding constitutes clear error, because the Court left out important parts of the story. For example, the Court critically downplays the $1,236.54 the District had spent on CAIR-recommended books.[16] The evidence cannot be any clearer—these resources were ordered, bought, delivered, and advertised under *CAIR's* direction and supervision. For instance, in an email to District officials, CAIR member Valerie Shields *specifically directed* the officials which CAIR-recommended books and how

---

[10] Declaration of Charles LiMandri in Support of Plaintiffs' Motion for Preliminary Injunction ("LiMandri Decl."), Ex. 24 (emphasis added).
[11] LiMandri Decl. Ex. 22 (emphasis added).
[12] Op. 50.
[13] FAC ¶¶ 113, 115.
[14] FAC ¶ 114.
[15] Op. 32.
[16] LiMandri Decl. Ex. 28.

many per school: "*Please only order*: 1. "Lailah's Lunchbox' [sic]; one per site for any site that has grades K-5." Shields then *dictated* to District officials what CAIR wants them to do with any leftover funds: "With any funds left over, *we* would like to order the 20 each of the other titles *that we have given u* [sic], to be kept at IMC & checked out by teachers." Shields then asked whether Stanley Anjan can give the money "he has for *us* cartel Blanche [sic]."[17] She then issued follow up orders to Anjan: "*Again*, *we need you* to send a communication to staff once these books become available."[18] The Court clearly erred in ignoring this substantial evidence, which supports the conclusion that the District delegated decision-making authority to CAIR members and empowered them to direct the use of taxpayer funds.

The Court further erred in its No Aid Clause analysis by concluding that the District has never lent its "prestige and power" to a "sectarian purpose." *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th Cir. 2002).[19] For example, the Court disregarded the record evidence showing the Board's ongoing, unequivocal support for CAIR's mission. In October 2017, Defendant Board members Kevin Beiser and Michael McQuary were invited to CAIR-San Diego's annual banquet. They were informed that "Hanif loves to get proclamations commending him and CAIR-San Diego" and that "if you get a proclamation from the board, you may present it from the stage."[20] The next month, the Board issued a formal "Proclamation" in "Support and Recognition of Council on American-Islamic Relations (CAIR), San Diego Chapter." The Proclamation declares that "with the *guidance* of Executive Director Hanif Mohebi, CAIR-San Diego *has joined* the district's Family and Community Engagement (FACE) Department" and that "CAIR-San Diego *has partnered* with the district."[21]

---

[17] LiMandri Decl. Ex. 27 (emphases added).
[18] LiMandri Decl. Ex. 28 (emphases added).
[19] Op. at 33.
[20] LiMandri Decl. Ex. 62.
[21] LiMandri Decl. Ex. 64 (emphasis added).

3.1.2 The Court's conclusion that the District is no longer partnering with CAIR is manifestly erroneous.

Likewise, the Court seriously erred in concluding that the District is no longer partnering with CAIR.[22] Plaintiffs do not dispute that in passing the Revised Policy, Defendants "expressly rejected a *formal* partnership with CAIR."[23] The record, however, shows that District officials are still partnering with CAIR to address Islamophobia. For example, District officials, including Defendant Marten, met with CAIR members four months after the Revised Policy's adoption to discuss "next steps *that were agreed upon* to *continue* the momentum regarding the CAIR/SDUSD *partnership*." And Defendant Marten "requested that CAIR stay engaged as *an important partner* with SDUSD in addressing Islamophobia and asked for extra *support* when there is negativity directed towards the district regarding their commitment to addressing Islamophobia."[24]

Moreover, along with "discuss[ing] past damage to the relationship between SDUSD and CAIR, healing, and moving forward," ongoing discussions with CAIR and District officials included "powerful potential next step[s] to strengthen the energy and efforts of the CAIR committee working schools."[25] Meeting notes described how CAIR wants "[a]ccountability and moving beyond meetings into policies and procedures" and "[i]nput on district policy."[26] And although Defendants never disclosed the total number of meetings, records produced show at least six meetings with CAIR representatives.[27] The Court "is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415,

---

[22] Op. at 51.

[23] Op. at 33 (emphasis added).

[24] Supplemental Declaration of Charles LiMandri in Support of Plaintiffs' Motion for Preliminary Injunction ("LiMandri Supp. Decl."), Ex. 53 (emphasis added).

[25] LiMandri Supp. Decl. Ex. 53.

[26] LiMandri Supp. Decl. 65.

[27] LiMandri Supp. Decl. ¶¶ 52-59; Anjan Decl. ¶¶ 8-10; Sharp Decl. ¶¶ 4-5; Santos Decl. ¶¶ 4-5.

1423 (9th Cir. 1984). Upon reconsideration, there can be no question that as this case moves forward, Plaintiffs have a high probability of proving that CAIR enjoys the "most-favored-nation status" in the District.

3.1.3 The Court's conclusion that Plaintiffs lacked the facts proving the District's misconduct neglects basic principles of evidence.

The Court noted that Plaintiffs "failed" to support their claim that the District does not, for instance, partner with Christian organizations or allow priests to teach students how to accommodate Catholic students during Lent.[28] But "factual allegations [do not] become impermissible labels and conclusions simply because the additional factual allegations explaining and supporting the articulated factual allegations are not also included." *Hassan v. City of New York*, 804 F.3d 277, 296 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (internal quotation marks omitted). Even assuming Plaintiffs' "failure" to support their assertions about CAIR's favored status weakens their No Aid Clause claim, the Court gave the District the benefit of a contrary—and unsupported—factual determination by relying heavily on District officials' declarations.[29] In doing so, the Court neglected the "maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51 (1927) (internal quotation marks omitted). The Court thus should revisit its reliance on Defendants' factual assertions.

"When a party has relevant evidence in his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Singh v. Gonzales*, 491 F.3d 1019, 1024 (9th Cir. 2007). In their declarations, District officials made sweeping claims such as "the current relationship between SDUSD and CAIR is the same as the relationship between SDUSD and any other community organization" and the District "welcomes and accepts input to its curriculum and anti-bullying programming from all

---

[28] Op. 33; *see* Pls.' Mot. at 13.
[29] Op. 33.

community organizations and individuals." But they provided zero evidence in support.[30] Likewise, District officials described their frequent meetings with CAIR "as part of [the District's] standard procedure to address the concerns of and maintain its relationship with a community organization who was disappointed by SDUSD's actions."[31] Once again, Defendants provided absolutely no evidence of that standard procedure.

Similarly, the Court was satisfied with Defendants' claim that the CAIR-recommended books "were subsequently incorporated into a Multicultural Text Set."[32] Again, Defendants provided no evidence of a so-called Multicultural Text Set. Nor did they show that CAIR's recommended books were "to make its offerings on par" with materials supplied by other religious advocacy organizations.[33] *See, e.g.*, *Carolina Power & Light Co. v. Uranex*, 451 F.Supp.1044, 1056 (N.D. Cal. 1977) (holding that defendant's failure to "to produce relevant evidence within its control gives rise to an inference that evidence is unfavorable to the defendant."). If there were such evidence, Defendants' counsel surely would have put it in the record. Indeed, Defendants could have *easily* defeated Plaintiffs' allegations of CAIR's preferential treatment with evidence that the District maintains relationships with other religious advocacy organizations or has programs focusing on other religious sects. Thus, the Court erred in not inferring that the absence of clear-cut evidence was adverse to Defendants. As the Supreme Court noted,"[s]ilence" is "evidence of the most convincing character." *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939).

///

///

///

///

///

---

[30] Defs.' Opp'n at 7; Santos Decl. ¶ 8; Villegas Decl. ¶ 6; Ranck-Buhr Decl. ¶ 3.
[31] Defs.' Opp'n at 6; Anjan Decl. ¶ 11; Sharp Decl. ¶ 6.
[32] Op. at 11-12.
[33] Woehler Decl. ¶ 5; Anjan Decl. ¶ 4.

3.2 The Court's Strict Scrutiny Analysis Rests on a Fundamental Misapprehension of Supreme Court and Ninth Circuit Precedent.

3.2.1 The Court's misreading of *Larson v. Valente* and its misapplication to Plaintiffs' claims conflict with established case law.

The Court correctly applied the proper legal standards to evaluate Plaintiffs' Establishment Clause claim, but it critically erred in its strict scrutiny analysis. First, the Court incorrectly stated that Plaintiffs consider their case indistinguishable to *Larson v. Valente*, 456 U.S. 228, 246 (1982).[34] Plaintiffs specifically pointed out that the Initiative is even more problematic than the statute in *Larson* because it expressly discriminates on the basis of one religion and its adherents.[35] Either way, the Court's conclusion is irreconcilable with *Larson* as applied by the Ninth Circuit and other courts. In *Larson*, the Supreme Court affirmed "the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can pass laws which aid one religion or that prefer one religion over another." 456 U.S. at 246. Under this Court's decision, however, *Larson* only applies to a policy that "makes explicit and deliberate distinctions between different religious organizations."[36] As a matter of law, that is incorrect.[37]

---

[34] Op. at 38.

[35] *See, e.g.*, Pls.' Mot. at 14.

[36] Op. 39 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989)).

[37] *See Rouser v. White*, 630 F.Supp.2d 1165, 1195 (E.D. Cal. 2009) ("[T]he *Larson* test only applies where plaintiff has shown that the state law or action *manifests* a preference to some religions over others."(emphasis added)); *Droz v. Comm'r*, 48 F.3d 1120, 1124 (9th Cir. 1995), *as amended on denial of reh'g* (June 1, 1995) ("In *Larson*, the effect of the statute was to discriminate among religions, and in effect, the statute was a judgment that some religions were worthy of exemption and others were not."); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 623 (9th Cir. 1996) (O'Scannlain, J., concurring) (recognizing *Larson* applies to "cases where a government statute or *practice* explicitly discriminates against a certain religious group"(emphasis added)); *Kong v. Min de Parle*, No. C 00-4285 CRB, 2001 WL 1464549, at *6 (N.D. Cal. Nov. 13, 2001), *aff'd sub nom. Kong v. Scully*, 341 F.3d 1132 (9th Cir. 2003) (noting a statute fails the *Larson* test if it was "drafted to favor one religion, or group of religions, over others"); *cf. Hassan v. City of New York*, 804 F.3d 277, 295 (3d Cir. 2015)

Second, the Court erred in observing that Plaintiffs did not "attempt to undertake a meaningful textual analysis of the anti-Islamophobia Initiative."[38] Plaintiffs have repeatedly asserted that by its terms the Initiative—from its genesis at the July 26, 2016, board meeting to the Original Policy and its Action Steps to the District's ongoing efforts to "continue the momentum regarding the CAIR/SDUSD partnership"[39]—expressly draws a line in favor of one religion and its adherents.[40] The Initiative's clear purpose is to address *Islam*ophobia, the "[f]ear, hatred, or mistrust of *Muslims* or of *Islam*."[41] That "Muslim" and "Islam" are religious terms is simply beyond dispute. Indeed, the Opinion acknowledges that much.[42]

And to the extent the Court downplays the Initiative's classifications of *Islam*ophobia[43] and *Muslims*[44] as "mere references," [45] Plaintiffs respectfully submit that the Court's conclusion is a manifestly unjust simplification of the fundamental First Amendment issues in this case. A policy may "facially discriminate for or against any particular religion, or for or against religion versus non-religion" even if it only "contain[s] any term or phrase that can be *reasonably characterized* as having a *religious origin* or *connotation*." *Hawaii v. Trump*,

---

("Where a plaintiff can point to a facially discriminatory policy, the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis." (internal quotation marks omitted)).

[38] Op. at 38-39.

[39] LiMandri Decl. Ex. 53.

[40] *See, e.g.*, Pls.' Mot. 10-18; FAC ¶¶ 132, 147-149, 160-161, 164-169; Pls.' Reply to Defs.' Opp'n at 5; Pls.' Resp. to CAIR Br. at 3-4, 6.

[41] *See infra*, at n. 53.

[42] Op. at 34.

[43] "Islamophobia" is the "[f]ear, hatred, or mistrust of *Muslims* or of *Islam*." *Islamophobia*, American Heritage Dictionary (5th ed. 2018) (emphasis added); "Islam" is "[a] monotheistic *religion* characterized by the doctrine of absolute submission to *God* and by reverence for Muhammad as the chief and last prophet of *God*." *Islam*, American Heritage Dictionary (5th ed. 2018) (emphasis added).

[44] A "Muslim" is "[a] believer in or adherent of *Islam*." *Muslim*, American Heritage Dictionary (5th ed. 2018) (emphasis added).

[45] Op. 44.

241 F.Supp.3d 1119, 1134–35 (D. Haw. 2017) (emphasis added); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (city ordinances' asserted neutral terms "sacrifice" and "ritual" were evidence of singling out a particular religion (Santeria) for discriminatory treatment). In any event, "the minimum requirement of neutrality" is "that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533.

In addition to being manifestly unjust, the Court's "mere references" conclusion also conflicts with circuit precedent.[46] For example, in *Awad v. Ziriax*, the Tenth Circuit affirmed a lower court's preliminary injunction against the certification of a proposed Oklahoma state constitutional amendment forbidding courts from applying Sharia, which is the code of Islamic law. 670 F.3d 1111 (10th Cir. 2012). A Muslim resident of Oklahoma sued the state's election board, alleging that the proposed amendment violated the Establishment Clause because the amendment singled out his religion for negative treatment. *Awad*, 670 F.3d at 1119. In evaluating the plaintiff's Establishment Clause claim, the court applied the *Larson* test "because the proposed amendment discriminates among religions." *Id.* at 1128. In fact, the court found that the case "presents even stronger 'explicit and deliberate distinctions' among religions than the challenged statute in *Larson*," *id.* (quoting *Larson*, 456 U.S. at 247 n. 23), because the proposed amendment "specifically names the target of its discrimination," namely Sharia law. *Id.* To support its finding, the court pointed to the "amendment's plain language, which mentions Sharia law in two places." *Id.* The court therefore held that "[o]n this basis alone, application of *Larson* strict

[46] *See, e.g.*, *Sklar v. Comm'r*, 282 F.3d 610, 619–20 (9th Cir. 2002) (applying *Larson* and finding that a tuition payment deduction for Scientologists grants a denominational preference); *Col. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (holding that "[b]y giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado necessarily and explicitly discriminate[d] among religious institutions"); *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (citing *Larson* for the proposition that "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns" because it would "discriminat[e] between kinds of religious schools").

scrutiny is warranted." *Id.* at 1129. So too here. The Initiative "specifically names the target of its discrimination": *Islam*ophobia and *Muslim* students. *Id.* at 1128.

Third, the Court holds—without citing to any authority—that the Initiative does not discriminate in favor of one religion because its "focus is not religion, but on conduct and behavior."[47] But the Ninth Circuit maintains that "[w]hen interpreting a statute, the court begins with the statutory text and interprets statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary." *I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015) (internal quotation marks omitted). As discussed above (*supra* at 11), the Initiative's statutory text contains terms that are unambiguously religious.

Even if the Initiative's focus is on "conduct and behavior," the Board intended to address only a *specified* sub-category of "bullying" or "harassment": *Islamophobia* and anti-*Muslim* bullying. If Defendants intended to launch an initiative in April 2017 that would address all forms of bullying and harassment they would have adopted a holistic anti-bullying program "unaccompanied by any complicating adjectives." *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F.Supp.2d 1005, 1022 (N.D. Cal. 2007). Instead, the Superintendent, District officials, and CAIR designed an exclusive plan to address the fear and hatred of *one* religion and the bullying of *one* religious group. It is clear error, therefore, to conclude the Initiative's "focus" is on "conduct and behavior" even though the Initiative specifically names *Islam*ophobia and anti-*Muslim* bullying as its *raison d'être*.[48] Reconsideration is warranted to reconcile the Court's limited conclusion with Supreme Court and circuit precedent.

///

///

///

[47] Op. 39.

[48] *Id.*

3.2.2 The Court's presumption that Plaintiffs carry the burden of proof under strict scrutiny constitutes clear error.

Despite concluding that the Initiative does not trigger strict scrutiny, the Court addressed Plaintiffs' arguments and found that "Plaintiffs have not made a clear showing that the Initiative lacks a compelling interest or that the District's measures have not been narrowly tailored."[49] This seriously erroneous finding illustrates precisely why reconsideration is necessary. The Supreme Court has made clear "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Although Plaintiffs have the burden to show that injunctive relief is necessary, *see Stein v. Dowling*, 867 F.Supp.2d 1087, 1095 (S.D. Cal. 2012), *Defendants* bear the burden to prove their allegedly unconstitutional policy is justified by a compelling government interest. *See Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012) (holding that where a party seeks injunctive relief for an alleged constitutional violation, under strict scrutiny the burden shifts to the government to assert a compelling interest). [50] The Ninth Circuit has made this point clear in the free speech context:

> Courts asked to issue preliminary injunctions based on First Amendment grounds face an inherent tension: the moving party bears the burden of showing likely success on the merits—a high burden if the injunction changes the status quo before trial—and yet within that merits determination the government bears the burden of justifying its speech-restrictive law.

---

[49] Op. 39.

[50] *See Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008) (noting that the government bears the burden of proving the regulation is narrowly tailored); *Mtn. W. Holding Co. v. Montana*, 691 F. App'x 326, 329 (9th Cir. 2017) (stating the government bore the burden to justify racial classifications);
see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 744 (2007) (noting the school districts bear the burden to show their race-based policies are justified); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (holding the government "bears the burden of proving the constitutionality of its actions").

Thalheimer v. City of San Diego, 645 F.3d 1109, 1115 (9th Cir. 2011). Plaintiffs no doubt bear the burden to satisfy the four preliminary injunction factors, *see Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008), including that they will likely succeed on the merits, but Defendants must prove that the Initiative can survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997). Reconsideration is necessary to resolve the conflict between the Court's decision and Supreme Court and Ninth Circuit decisions holdings that the government bears the burden under strict scrutiny to justify a presumptively unconstitutional policy.

3.2.3 The Court's disregard for the statistical data showing the absence of Islamophobia in the District was manifestly unjust.

Plaintiffs do not ask the Court to reconsider its holding that "addressing bullying of students, including bullying directed at students of a particular background, is a compelling government interest."[51] The Court, however, critically erred in overlooking the District's state-mandated statistical data showing the "paucity of evidence" of anti-Muslim bullying or Islamophobia in the schools. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 667 (1994). Strict scrutiny "requires that the relationship between the asserted justification and discriminatory means employed be substantiated by objective evidence." *Hassan*, 804 F.3d at 306 (citation omitted). The Supreme Court thus has made it "unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (internal citation and quotation marks omitted). "Without a statistical foundation, the picture is incomplete. Strict scrutiny demands a fuller story." *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991).

In this case, Plaintiffs presented objective evidence *proving* that claims of widespread Islamophobia in the District are false. Defendants did not show otherwise. The District

[51] Op. 40.

reported to the California Department of Education only *two* incidences related to Muslim students in the 2015 and 2016 school years.[52] Further, according to a District "Protected Class" report, from July 2016 to December 2016, just seven out of approximately 130,000 children were reported to have been bullied because of their religion.[53] That report did not disclose how many of those seven students, if any, were Muslim. To be sure, the Court acknowledged these statistics in the Opinion's Statement of the Case,[54] but the Court overlooked them in its strict scrutiny analysis—a clear error.

Instead, the Court criticized Plaintiffs for not showing that "the reports and testimony by Muslim students on which the District allegedly relied to adopt the Initiative are not credible."[55] But "[w]ithout a statistical basis, the State cannot rely on anecdotal evidence alone." *Mtn. W. Holding Co. v. Montana*, 691 F. App'x 326, 331 (9th Cir. 2017); *cf. Coral Const. Co.*, 941 F.2d at 919 ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.").

Moreover, the Court declared the District could "take into account Islamophobia and anti-Muslim bullying that occurs outside the District."[56] Specifically, the Court deferred to the Defendants' (and CAIR's) purported rationale for adopting the Initiative—namely, "[i]n the wake of the increased instances of Islamophobia following Donald Trump's election campaign."[57] Under Supreme Court precedent, however, the basis for the Court's stated deference is simply erroneous. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). To survive strict scrutiny, the Board must have done *more* "than simply posit the existence of the disease sought to be cured." *Turner*, 512 U.S. at 664 (internal quotation marks and citation omitted). Thus, a policy subject to strict scrutiny "cannot rest upon a

---

[52] LiMandri Decl. Ex. 3.
[53] LiMandri Decl. Ex. 4.
[54] Op. at 5.
[55] Op. 41.
[56] Op. 42.
[57] Op. at 48.

generalized assertion as to the classification's relevance to its goals." *Croson*, 488 U.S. at 500.

The Supreme Court's decision in *Croson* is instructive. There, the Court struck down under the Equal Protection Clause the City of Richmond, Virginia's plan requiring prime contractors to subcontract a part of their projects to minority business owners. City officials claimed the plan was "remedial" in nature, yet it was enacted only after a public hearing during which no evidence was presented that the city had racially discriminated or that prime contractors had discriminated against minority subcontractors. The district court upheld the plan, relying in part "on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry in this area, and the State, and around the nation." *Croson*, 488 U.S. at 500 (internal quotation marks omitted). The Court disagreed. Applying strict scrutiny, the Court found that the statements had "little probative value in establishing identified discrimination in the Richmond construction industry." *Id.* The Court noted that the judiciary generally entitles government "to a presumption of regularity and deferential review," but it nonetheless held that the government "cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." *Id.* at 500–01.

Here, the District was *required* to "specifically identify an actual problem in need of solving." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011) (internal quotation marks omitted). And even if "nationwide information about identity-based bullying and harassment" is a "relevant consideration,"[58] Defendants did not "show a direct causal link" between the 2016 Presidential campaign and anti-Muslim bullying *in the District*. *Id.*[59]

---

[58] Op. 42.

[59] The Court moreover noted that CAIR provided "detailed insight" into these points. (Op. 42.) Those insights, however, are articles from *Al Jazeera* and the *Huffington Post*, among other newspapers, which in turn cite CAIR's own surveys. CAIR Br., Kaba Decl. ¶¶ 10-12. More broadly, Plaintiffs respectfully suggest that the Court revisit its reliance on CAIR's factual assertions and accompanying arguments. "Declarations, anecdotal evidence, facts, and numbers

In short, "these general principles, detached from any evidence in the record," cannot justify a government program that discriminates on the basis of a religion or its adherents. *Barone v. City of Springfield*, No. 17-35355, 2018 WL 4211169, at *9 (9th Cir. Sept. 5, 2018). The Court should reconsider its analysis accordingly.

3.2.4 The Court's erroneous conclusion renders "narrow tailoring" meaningless, especially in light of the record evidence.

Even if its "compelling interest" analysis was correct, the Court should reconsider its "narrowly tailored" analysis as a matter of law. In the Court's view, the Initiative "aims to address the behavior and conduct of 'Islamophobia' and 'anti-Muslim bullying.'"[60] But narrow tailoring requires more than addressing "behavior and conduct." For example, how and when would a court determine whether Islamophobia has been eradicated? The same goes with the Court's endorsement of CAIR's argument that the Initiative's benefit "accrues to all of the students."[61] If the Initiative truly advantages all students by helping them to understand "the culture of a growing segment of the Nation," how and when would a court determine that the students have adequately learned enough about this "growing segment" (especially in light of other "growing segments")?[62] If a school district can justify its religiously preferential initiative based on "nebulous goals," then "the narrow tailoring inquiry is meaningless." *Fisher v. Univ. of Texas at Austin* (*Fisher II*), 136 S. Ct. 2198, 2223

---

taken from amicus briefs are not judicial factfindings." *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Breyer, J., dissenting). Plaintiffs also respectfully suggest that the Opinion's reliance on CAIR's non-legal arguments may conflict with the Court's Order Granting Plaintiffs' *Ex Parte* Motion to Extend Time to File Replies. (ECF No. 41.) In its Order, the Court stated:

> To the extent CAIR-CA's *amicus curiae* brief contains factual information not a part of the record submitted by a party to this case, the Court will not rely on that information for any evidentiary issues necessary to resolving Plaintiffs' preliminary injunction motion.

ECF No. 41, at 3 n. 1.

[60] Op. 34 (quoting LiMandri Decl. Ex. 2; FAC ¶ 30).

[61] *Id.* (quoting CAIR Br. at 24).

[62] *Id.*

(2016) (Thomas, J., dissenting).

The Court notes it is "at a loss to understand how the District could meaningfully address Islamophobia and anti-Muslim bullying through measures that do not account for the fact that, by Plaintiffs' own definitions, 'Islamophobia' and 'anti-Muslim bullying' target an individual precisely because he or she is Muslim (or perceived to be)."[63] But narrow tailoring *requires* "a careful judicial inquiry" into whether the District *could* address the bullying of Muslim students without using religious classifications. *Fisher v. Univ. of Texas at Austin* (*Fisher I*), 570 U.S. 297, 312 (2013).

Turning to the Revised Policy, the Board expressly declared that "[s]taff have not been assigned specifically to address the bullying of students of any single religion" because the District's "anti-bullying program is developed to comprehensively address the issue of bullying of all students through the No Place for Hate program."[64] Moreover, the Board "clarifie[d] that our Muslim students will be treated equally with respect to bullying."[65] Despite this purported "commitment to ensure our schools are safe for all students," Defendants nonetheless "requested that CAIR stay engaged as an important partner with SDUSD in addressing Islamophobia"[66] and invited CAIR to contribute resources to "supplement" ADL's anti-bullying curriculum.[67] And they did so without presenting *any* evidence that ADL's curriculum—a neutral, generally applicable program—is failing "to comprehensively address the issue of bullying of all students" and therefore needs supplementing.[68] To be sure, "[n]arrow tailoring does not require exhaustion of every conceivable [religion]-neutral alternative," *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), but strict scrutiny required the District (*not* Plaintiffs) to prove that the ongoing Initiative is necessary because "available" and "workable" religion-neutral measures "do not suffice." *Fisher I*,

---

[63] Op. 44.
[64] Op. 10; LiMandri Decl. Ex. 30.
[65] Op. 10; LiMandri Decl. Ex. 30.
[66] LiMandri Decl. Ex. 53.
[67] LiMandri Decl. Exs. 53, 56, 59.
[68] Op. 10; LiMandri Decl. Ex. 30.

570 U.S. at 312.

3.3 The Court's Conclusion that Plaintiffs Have Not Suffered Irreparable Harm Conflicts with Binding Precedent.

The Opinion states in a footnote that Plaintiffs' argument—specifically, that no further showing of irreparable harm is needed because they have alleged the deprivation of their constitutional rights—is "misguided."[69] The Court's reasoning is that "[m]ere allegations are insufficient for a plaintiff to meet his or her burden at the preliminary injunction stage."[70] But in the context of showing *irreparable harm*, the Court is mistaken. "The Ninth Circuit has explained that '[i]rreparable harm is relatively easy to establish in a First Amendment case.'" *Nat'l Assoc. of Wheat Growers v. Zeise*, 309 F.Supp. 3d 842, 853 (E.D. Cal. 2018) (quoting *CTIA-The Wireless Assoc. v. City of Berkeley*, 854 F.3d 1105, 1123 (9th Cir. 2017), *cert. granted, judgment vacated sub nom. CTIA-The Wireless Ass'n v. City of Berkeley*, 138 S. Ct. 2708 (2018)). For that reason, "[a]n alleged constitutional infringement *will often alone* constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984).[71] Based on the record, the public's interest in this case, and even CAIR's solicitude about the case's outcome, Plaintiffs have at least raised serious questions about the Initiative's constitutionality. The Court therefore should revisit its finding that Plaintiffs have not suffered irreparable harm.

///

///

---

[69] Op. 52 n. 29.

[70] *Id.*

[71] *See Harman v. City of Santa Cruz*, 261 F.Supp.3d 1031, 1050 (N.D. Cal. 2017) ("Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim."); *Duncan v. Becerra*, 265 F.Supp.3d 1106, 1135 (S.D. Cal. 2017), *aff'd*, No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief." (internal quotation marks omitted)).

3.4 The Court Misapprehends Key Facts that Bear Directly on Plaintiffs' Need for Injunctive Relief.

The Opinion is premised on a number of inferences and omissions that factored heavily in the Court's analysis and conclusion. For example, the Court's decision is based on the factual assumption that Plaintiffs oppose teaching Islam or incorporating resources about Islamic history and Muslim culture.[72] As Plaintiffs have argued repeatedly, they do not object to students learning about Islam and its religious practices. Nor do they object to students and staff learning about Muslim culture. And they do not challenge the District's aim to adopt and implement "instructional materials" that are "consistent with state standards which address all major world religions in the context of world history and culture."[73] Indeed, the FAC cannot make it any clearer: "Plaintiffs do not object to programs that teach about religion and its role in the social and historical development of civilization, nor do Plaintiffs object to School District initiatives that foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values, and customs."[74] Once again, Plaintiffs simply object to a religiously preferential initiative that is driven in part by a controversial sectarian organization with a calculated religious agenda. Plaintiffs are not, therefore, pushing the District to "resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion[.]"[75]

The Court also speculated that Plaintiffs "faulted Defendants for their alleged failure to develop initiatives on 'anti-Semitism bullying' or 'religion-based, Asian American

---

[72] *See, e.g.*, Op. at 49-50 (citing *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994), and concluding: "The Court sees no reason to distinguish [the *Brown* court's] rationale in the school classroom curriculum context from trainings and resources provided to teachers, both of which are elements of the Initiative and its implementing measures.").

[73] Op. 10; LiMandri Decl. Ex. 30.

[74] FAC ¶ 124; *see also* He Decl. ¶ 16.

[75] Op. 44 (quoting *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989)).

bullying.'"[76] The Court was mistaken. Plaintiffs were merely pointing out that the Board never considered the bullying of other religion-based groups, thereby highlighting CAIR's lobbying had persuaded the Board to discriminate in favor of one religious group. The Court similarly erred in speculating that Plaintiffs had alleged in their FAC that "the District has failed to protect students of other backgrounds."[77] Once again, Plaintiffs were merely pointing out that the Board's discriminatory focus on Muslim students ignored the fact that District students of other faiths and backgrounds experienced bullying too.[78]

In addition to concluding that Plaintiffs did not introduce any evidence showing the "alleged methodological flaws" of CAIR's surveys,[79] the Court stated that Plaintiffs did not provide a copy of CAIR's survey with their motion papers.[80] Plaintiffs respectfully point out that they indeed attached with their Motion a copy of CAIR-California's survey, "Mislabeled: The Impact of Bullying and Discrimination on California Muslim Students."[81]

4. Conclusion

Based on the foregoing, Plaintiffs respectfully submit that this Court should reconsider its September 25 order and conclude that Plaintiffs are entitled to a preliminary injunction.

---

[76] Op. 40 n. 24 (citing FAC ¶¶ 45-49).

[77] Op. 41 n. 25.

[78] *See* FAC ¶ 136.

[79] Op. 41.

[80] Op. 4 n. 4. As for the link to the survey in the FAC (FAC 8 n. 1), it appears CAIR-CA removed the webpage from its website. According to Internet Archive's "Wayback Machine," which archives web pages, the link was valid as of March 22, 2018. *See* Internet Archive Webpage Search, WayBack Machine, https://archive.org/web/ (enter https://ca.cair.com/sfba/wp-content/uploads/2015/10/CAIR-CA-2015-Bullying-Report-Web.pdf (shortened in FAC to https://goo.gl/t5iKuG) into form; then select "Browse History" for result; see March 22, 2018, "capture" for archived webpage, https://web.archive.org/web/20180322190056/https://ca.cair.com/sfba/wp-content/uploads/2015/10/CAIR-CA-2015-Bullying-Report-Web.pdf).

[81] *See* LiMandri Decl. Ex. 37; *see also* CAIR Br., Kaba Decl. Ex. 1 (a copy of the survey).

MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

1. Legal Standard

Under Federal Rule of Civil Procedure 15(a)(2), a party may amend a pleading with the court's leave. Fed. R. Civ. P. 15(a)(2). Leave to amend a complaint "shall be freely given when justice so requires." *Id.*; *see* CivLR 15.1 (amended pleadings). In addition, Rule 15(d) specifically allows the filing of supplemental pleadings to allege new facts that occur after the filing of original pleadings. *See* Fed.R.Civ.P.15(d). The Ninth Circuit has explained that leave to amend is to be interpreted with "extreme liberality." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.1990). When deciding whether to grant leave to amend, a court must consider: (1) whether the amendment was filed with undue delay; (2) whether the movant has requested the amendment in bad faith or as a dilatory tactic; (3) whether the movant was allowed to make previous amendments which failed to correct deficiencies of the complaint; (4) whether the amendment would unduly prejudice the opposing party; and (5) whether the amendment is futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (outlining factors).

2. Argument

Here, the *Foman* factors overwhelmingly favor allowing Plaintiffs to file their Second Amended Complaint. *First*, Plaintiffs are not acting in bad faith, with undue delay, or dilatory motive. They are seeking leave to amend their complaint in light of the Court's previous rulings and because they have discovered new evidence they neither knew nor were able to know when drafting the FAC. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). *Second*, while Plaintiffs would be significantly prejudiced if they are not granted leave to amend, Defendants would not be. The facts described in the SAC are well-known to Defendants because it is they who triggered a new complaint by continuing to work with CAIR to address the alleged Islamophobia in the District. Also, discovery so far has been limited. Plaintiffs also intend to remove several causes of action to narrow the issues and

streamline the litigation. Thus, filing a SAC would not prejudice Defendants. *Third*, there are no issues related to failure to cure or futility, because the additional allegations do not contradict the allegations in the FAC. *See United States v. Corinthian Coll.*, 655 F.3d 984, 995 (9th Cir. 2011). In short, Plaintiffs would be substantially prejudiced if they are not allowed to amend their complaint to challenge the Initiative's constitutionality. *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Plaintiffs therefore respectfully request that the Court, in the interest of justice, grant leave for Plaintiffs to file a second amended complaint.

3. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs leave to amend and supplement their First Amended Complaint.

Dated: October 25, 2018

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

By: /s/ Charles S. LiMandri
Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell

Attorneys for PLAINTIFFS