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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs;

v.

Richard Barrera, *et al.*,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

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

No Oral Argument Unless Requested by the Court

SUMMARY

In their Motion for Reconsideration,[1] Plaintiffs argue that this Court committed clear error in denying their motion for a preliminary injunction because it (1) disregarded highly probative facts about the San Diego Unified School District's Anti-Islamophobia Initiative and (2) misapprehended and misapplied the strict scrutiny analysis to Plaintiffs' Establishment Clause claim.[2] Reconsideration is appropriate to correct these errors because the Court's decision conflicts with numerous decisions of the Supreme Court, the Ninth Circuit, and other courts of appeals.[3] More broadly, reconsideration is particularly warranted because of the special Establishment Clause sensitivities in public schools.

Defendants oppose Plaintiffs' motion for reconsideration.[4] In doing so, Defendants erroneously follow the Court in trying to evade the First Amendment's strictures, formulating a wide-angle lens to obscure the fundamental issue in this case—the Initiative's lack of neutrality toward religion. Defendants' semantical smokescreen cannot obscure their failure to explain why, after the Board publicly "affirm[ed] its ongoing commitment to its religiously neutral anti-bullying policy that ensures its schools are safe for all students," they continue to partner with the Council on American-Islamic Relations (CAIR) to specifically "address Islamophobia."[5] In any event, Defendants' arguments fail to justify the Court's clearly erroneous and manifestly unjust decision.

ARGUMENT

1. Defendants Embrace the Court's Erroneous Disregard of Decisive Facts.

1. In their Motion, Plaintiffs explain how the Court conspicuously ignored much of the clearest evidence showing that Plaintiffs are likely to succeed on the merits of their

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[1] Pls.' Mot. Recons. ("Mot."), ECF No. 68.

[2] Order Denying Pls.' Mot. Prelim. Inj. ("Op."), ECF No. 63.

[3] Because Defendants do not oppose Plaintiffs' Motion for Leave to File Second Amended Complaint, Plaintiffs do not address it in this reply brief.

[4] Defs.' Opp'n to Pls.' Mot. Recons. ("Opp'n"), ECF No. 71.

[5] Defs.' Opp'n to Pls.' Mot. Prelim. Inj. 1, ECF No. 32.

claims. In particular, evidence discovered after Plaintiffs filed this action show that CAIR had been thoroughly involved in designing and implementing the Initiative.[6] These "perfectly probative" facts, which included email communications and CAIR's public statements, raise serious questions about whether the District aided CAIR's sectarian agenda and discriminated in favor of Muslim students. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005). In overlooking these critical facts, the Court committed clear error that warrants reconsideration.

Defendants agree with the Court's erroneous conclusion that the District's facilitation of CAIR's recommended resources did not further the Islamic organization's sectarian agenda. The reason, Defendants assert (Opp'n 3), is because CAIR merely "suggested" the materials, and ultimately it was the District that "vetted the books," "purchased them," and "made them available to teachers and students on an equal basis." In light of the record, Defendants' contention is unpersuasive. Defendants ignore—as did the Court—that CAIR had control over the *entire* process, from selecting the books, to shepherding District staff, to coordinating the logistics of distribution. This "united civic and religious authority" is "an establishment rarely found in such straightforward form in modern America." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 697 (1994).

2. Defendants contend (Opp'n 12) that they offered "clear evidence" that the District's "relationship with CAIR is the same as it is with any other community organization."[7] But Defendants fail to show whether the District allocates staff, time, and resources to helping other sectarian organizations on an "equal basis" with CAIR. *Paulson*

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[6] Mot. 3-4.

[7] By misleadingly portraying CAIR as a "community organization," Defendants repeatedly try to obscure the fact that the Islamic organization is a national sectarian syndicate headquartered in Washington, D.C. (*See Amicus Curiae* CAIR-CA's Br. Supp. Defs.' Opp'n to Pls.' Mot. Prelim. Inj., ECF No. 36.). Defendants' recurrent description of CAIR as simply a community organization is nothing more than a "convenient litigating position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

v. City of San Diego, 294 F.3d 1124, 1131 (9th Cir. 2002). In fact, *nothing* in the record supports that claim. Defendants relatedly assert (Opp'n 4) that the Court "properly reasoned that a future formal partnership with CAIR was not possible." But Defendants have given no assurance that they would not again formally partner with CAIR if this case is concluded in their favor. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In fact, Defendants have offered no "conclusive evidence . . . to show that it would not reenact any challenged part" of the Initiative in the future. *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 903 F.3d 829, 845 (9th Cir. 2018).

3. Defendants moreover join (Opp'n 4) the Court in erroneously concluding that the mere makeup or existence of the Intercultural Relations Community Council (IRCC) somehow affects the constitutionality of CAIR's sectarian activism. Common sense and binding caselaw foreclose that argument. Indeed, that the District may invite a religious organization to advance its sectarian agenda in the public schools as long as it also invites *non*religious organizations to advance their secular agendas is an unprecedented proposition. Such an approach, which the Court erroneously adopts, flips the First Amendment on its head.

The Court's error is compounded by the complete absence of any evidence showing that the District has created meaningful guidelines to ensure that the IRCC's activities comply with the Establishment Clause. Indeed, perhaps most troubling is what Defendants say about the District's policies regulating CAIR's conduct: Nothing. As it stands, Defendants simply have no "effective means of guaranteeing" that CAIR's role on the IRCC "will be used exclusively for secular, neutral, and nonideological purposes." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780 (1973). Furthermore, the Court should not presume as a matter of law that other groups like CAIR will receive similar preferential treatment in the future—the Supreme Court has flatly rejected such an approach. *See, e.g.*, *Kiryas Joel*, *supra*, at 703. In fact, the Supreme Court has expressed concern about the problems precisely like those posed by CAIR's role on the IRCC. As Justice O'Connor noted, "[a]t some point . . . a private religious group may so dominate a public forum that a formal

policy of equal access is transformed into a demonstration of approval." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment). This is especially concerning here because Defendants have offered *not one* name of a religious group other than CAIR that takes part on the IRCC.

4. Defendants relatedly assert (Opp'n 4) that "any resources suggested by CAIR are subject to review by SDUSD or the ADL." To say the least, "the potential for conflict inheres in th[is] situation." *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472, 480 (1973).[8] For one, Defendants claim that adopting CAIR's resources and removing books CAIR deems offensive will combat Islamophobia. To be sure, the Board has the authority "to establish and apply their curriculum in such a way as to transmit community values." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982). But the Ninth Circuit has "view[ed] with considerable skepticism charges that reading books causes evil conduct." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998). In any event, allowing CAIR to "eliminate" everything it finds objectionable or "inconsistent with any of [its] doctrines . . . will leave public education in shreds." *Monteiro*, 158 F.3d at 1032 n. 10 (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 205 (1948) (Jackson, J., concurring)).

5. Defendants' claim (Opp'n 12) that their proffered declarations are "clear evidence" is baseless. Nothing in those declarations explains how the District's inextricably intertwined relationship with CAIR is the same as with other sectarian organizations. Nor do those declarations describe the procedures for how CAIR's recommended resources are vetted and adopted. Indeed, Defendants offer no contrary argument other than saying (Opp'n 5) that Plaintiffs' "second-guessing" of the detail of the District's evidence is insufficient to raise an adverse inference. That is unconvincing. Considering the critical

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[8] The Court implies (Op. 34) that ADL is a "religious group." Following this reasoning, by conferring government authority on ADL to "review" CAIR's recommended materials, the District is currently empowering one religious organization to curate another religious organization's resources for distribution to public schoolchildren.

issues at play, Defendants' inability to "produce evidence more concrete than the conclusory statements in its affidavits" should lead to an adverse inference that no such evidence exists. *Ho by Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir. 1998). Defendants nevertheless try to avoid that necessary conclusion by attacking (Opp'n 5) Plaintiffs' citation to *Hassan v. City of New York*, 804 F.3d 277, 296 (3d Cir. 2015). But whether that case involved a Rule 12(b)(6) dismissal does not alter the fact that Defendants simply cannot rebut Plaintiffs' argument (Mot. 9) that CAIR enjoys preferential "most-favored nation-status" in the District.[9]

2. Defendants Follow the Court's Misapprehension of Fundamental Establishment Clause Jurisprudence.

1. To begin with, Defendants mischaracterize Plaintiffs' argument about the Court's misreading of *Larson v. Valente*, 456 U.S. 228 (1982), contending (Opp'n 6-7) that Plaintiffs dispute the Court's "description" of the case. Defendants are incorrect. The Supreme Court plainly concluded, and this Court correctly noted (Op. at 38), that the statute in *Larson* made "explicit and deliberate distinctions between different religious organizations." *Larson*, 456 U.S. at 247 & n. 23. This Court, however, clearly erred by analyzing the Initiative *as if* it was *indistinguishable* from the statute in *Larson*. As Plaintiffs have repeatedly argued, the Initiative is even more suspect because it facially classifies on the basis of religion (*e.g.*, "*Islamophobia*" and "anti-*Muslim*"). Thus, the Court's clear error was not its "description of *Larson*," as Defendants put it (Opp'n 7), but rather its narrow reading of *Larson* and its misapplication to the Initiative.

2. Defendants follow the Court's error in assuming (Opp'n 8) that Plaintiffs did not

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[9] Defendants make a similar mistake relying on *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399 (9th Cir. 1993). There, the movants sought a *mandatory* injunction, which are generally disfavored because they order the responsible party to take some type of "affirmative action." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). In this case, however, Plaintiffs seek a *prohibitory* injunction to "preserve the status quo" as the case moves forward. *See, e.g.*, *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (explaining prohibitory injunctions).

undertake a "meaningful analysis" of the Initiative. Plaintiffs' Motion for Reconsideration refuted (Mot. 10-13) that manifestly unjust conclusion in detail. In further support of the Court's conclusion, Defendants contend (Opp'n 8) that Plaintiffs' citation to *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017), is "misleading." Not so. In *Hawai'i*, the district court concluded (as Defendants correctly note) that the challenged Executive Order "does not facially discriminate for or any against any particular religion, or for or against religion versus non-religion" because the order has "no express reference . . . to any religion nor does the Executive Order . . . contain any phrase that can be reasonably characterized as having a religious origin or connotation." *Id.* at 1135. The reasoning in that district court's opinion is clear: if the Executive Order had such phrases (like the Initiative and its policies do), then the law on its face would be presumptively discriminatory.

Moreover, Defendants embrace the Court's flawed premise and declare (Opp'n 8-9) that "all references to religion are not unconstitutional." Defendants accordingly assert (Opp'n 9) that "using the terms 'Muslim' and 'Islam' does not render the Initiative unconstitutional when SDUSD serves a student population that includes Muslim students." To be sure, the Supreme Court has not required "that legislative categories make no explicit reference to religion." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989). Here, however, by targeting the "phobia" of *Islam* and the bullying of *Muslim* students, Defendants impermissibly "single[d] out a particular religious sect for special treatment." *Kiryas Joel.*, *supra*, at 706–07. In any event, "[t]o facially discriminate among religions, a law need not expressly distinguish between religions by sect name." *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000). "Such discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation." *Id.* (citing *Larson*, 456 U.S. at 232 n. 3).

Defendants try (Opp'n 8-9) to distinguish *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), but Defendants only reinforce why the Court committed clear error. Both of those cases

involved laws that targeted a particular religion for distinctive treatment, evidenced by the statutory language (*e.g.*, "sacrifice," "ritual," and "Sharia"). Here, *Islam*ophobia and anti-*Muslim* bullying are blatantly religious terms related to a specific religion—Islam. And that the Establishment Clause unequivocally forbids.

3. Defendants echo (Opp'n 9) the Court's conclusion that "the Initiative's focus is not religion, but on conduct and behavior." But the express purpose of the Initiative is to "address Islamophobia" and "the bullying of Muslim students." The phrase "of Muslim students" is a prepositional phrase. A preposition describes the relationship between its object and other words in a sentence. Here, the structure of the Initiative compels a single question: *What type* of bullying does the Initiative address? The answer is crystal clear: Muslim students. In other words, "Muslim students" modifies "bullying," therefore forming a *specific* relationship. Or, take the way Defendants put it. They assert (Opp'n 9) that the Initiative "sought to address negative bullying conduct directed at Muslim students." Once again, the question is simple: bullying and conduct "directed" at *who*? *At Muslim* students. Viewed as a whole, the Initiative was not intended to just address "behavior and conduct" but *specifically* the bullying "of Muslim students."

4. In its Opinion, the Court erroneously concluded (Op. 39) that the Initiative survives strict scrutiny because it is narrowly tailored to achieve a compelling interest. Defendants' supporting legal arguments are the same as the Court's—and remain overstated as a matter of law. Conceding that the government bears the burden under strict scrutiny, Defendants assert (Opp'n 9-10) three reasons to justify the Initiative. None passes muster under Supreme Court and circuit precedent. First, Defendants rely (Opp'n 10) on anecdotal "student testimony" given at District Board meetings in 2016.[10] Defendants cite no authority for this justification. Nor do they reconcile its assertion with the cases

[10] That Plaintiffs allege that the Muslim students' testimonies were "prepared" does not offset the fact that without "a proper statistical foundation," the testimonies cannot serve as an evidentiary basis sufficient to justify a religiously preferential government policy. *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991).

Plaintiffs cited flatly rejecting it. "[A]necdotal evidence, which includes testimony based on significant personal experience, rarely suffices to provide a strong basis in evidence." *Wessmann v. Gittens*, 160 F.3d 790, 806 (1st Cir. 1998). To be sure, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989). But "only in the rare case will anecdotal evidence suffice standing alone." *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cty.*, 122 F.3d 895, 925 (11th Cir. 1997). This is not one of those "rare cases." *Id.*

Second, Defendants dismiss (Opp'n 10) the District's state-mandated statistics showing zero evidence of Islamophobia as merely "two sources of information"; instead, they contend that CAIR's professed survey of bullied Muslim students in California public and private schools provided a strong evidentiary basis to enact the Initiative. But Defendants do not identify any case law holding that the government may rely on a religious organization's own self-serving surveys to design and implement a religion-based policy. That is unsurprising—none exists. Indeed, as the Supreme Court noted, the strict scrutiny standard should not be left "at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists [or in this case, religious activists]." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 766 (2007).

Even if they could rely on CAIR's survey, Defendants fail to point out where in CAIR's survey it shows any evidence of anti-Muslim bullying in the District. In fact, the ***only*** specific evidence Defendants offer to show that "Islamophobia is indeed alive and well in San Diego" is a copy of an email from a random person to the Board complaining about the Initiative.[11] And Defendants do not explain how that email is related to Islamophobia. Common sense dictates that if there were evidence of widespread Islamophobia in the District, Defendants *unquestionably* would have included it in the record. In any

[11] Defs.' Opp'n to Pls.' Mot. Prelim. Inj. 15 n. 7; Sharp Decl. ¶ 7, Ex. L., ECF No. 32-5.

event, allowing a religion-conscious program to address bullying untethered to any evidence of an actual problem would justify "a legislative preference for almost any ethnic, religious, or racial group with the political strength [like CAIR] to negotiate 'a piece of the action' for its members." *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting).[12]

Third, Defendants parrot (Opp'n 9) the Court's supposition (Op. 48) that President Donald Trump's election campaign is a "sincere and plausible" justification for the Initiative. Aside from CAIR's lobbying, the only evidence Defendants provide for this theory is a *New York Times* article about the purported rise in Islamophobia nationwide.[13] That Defendants ascribe more weight to hearsay newspaper articles than its own state-mandated data is simply absurd and should need no further discussion.

5. Without a shred of corroborating evidence, Defendants restate the Court's conclusion that the Initiative is narrowly tailored. Like the Court, Defendants contend (Opp'n 11) that the District could not otherwise "meaningfully address Islamophobia and anti-Muslim bullying" without a religiously conscious initiative. That is wrong. The term "narrowly tailoring" mandates the District to consider "whether lawful alternative and less restrictive means could have been used." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279

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[12] In response to Defendants' position that Muslim students are most deserving of a special "phobia" initiative, Plaintiffs respectfully direct the Court's attention to a just released government report, the FBI's 2017 Hate Crime Statistics, released on November 13, 2018, which reports documented nationwide bias-motivated incidents. According to the 2017 data, which was submitted by 16,149 law enforcement agencies, there were 8,828 victims of hate crimes, of which 1,749 were victims of anti-religious hate crimes. Of these, 58.1% were victims of crimes motivated by their offenders' anti-Jewish bias; 18.6% were victims of anti-Islamic bias; and 11.5% were victims of anti-Christian bias. FBI, Hate Crime Statistics, 2017 (2018), https://ucr.fbi.gov/hate-crime/2017. *See, e.g.*, *Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (court may take judicial notice of government report).

[13] Defs.' Opp'n to Pls.' Mot. Prelim. Inj. 2 n. 1. Interestingly, the *New York Times* article was published on September 17, 2016, nearly two months *after* the Board directed the Superintendent to develop the Initiative.

n. 6 (1986). In fact, Defendants' argument is fatally undercut by the District's adoption of the "No Place for Hate" program, which it identified as "a strong anti-bullying effort that highlights and fosters positive school environments, climates, and cultures for *all* students" and which "*does not emphasize any one religion*."[14]

These critical points should have been the central consideration of the Court's strict scrutiny analysis. Instead, the Court gave them little weight. In all events, Defendants failed to show that the Initiative is narrowly tailored to achieve a compelling government interest. The Initiative violates the Establishment Clause.

CONCLUSION

For the foregoing reasons, the Court should reconsider its order denying Plaintiffs' motion for a preliminary injunction.

Dated: November 19, 2018

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

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[14] Defs.' Opp'n to Pls.' Mot. Prelim. Inj., Villegas Decl. ¶ 3 (emphasis added), ECF No. 32-6.

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' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION.

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 November 19, 2018, at Rancho Santa Fe, California.

Kathy Denworth