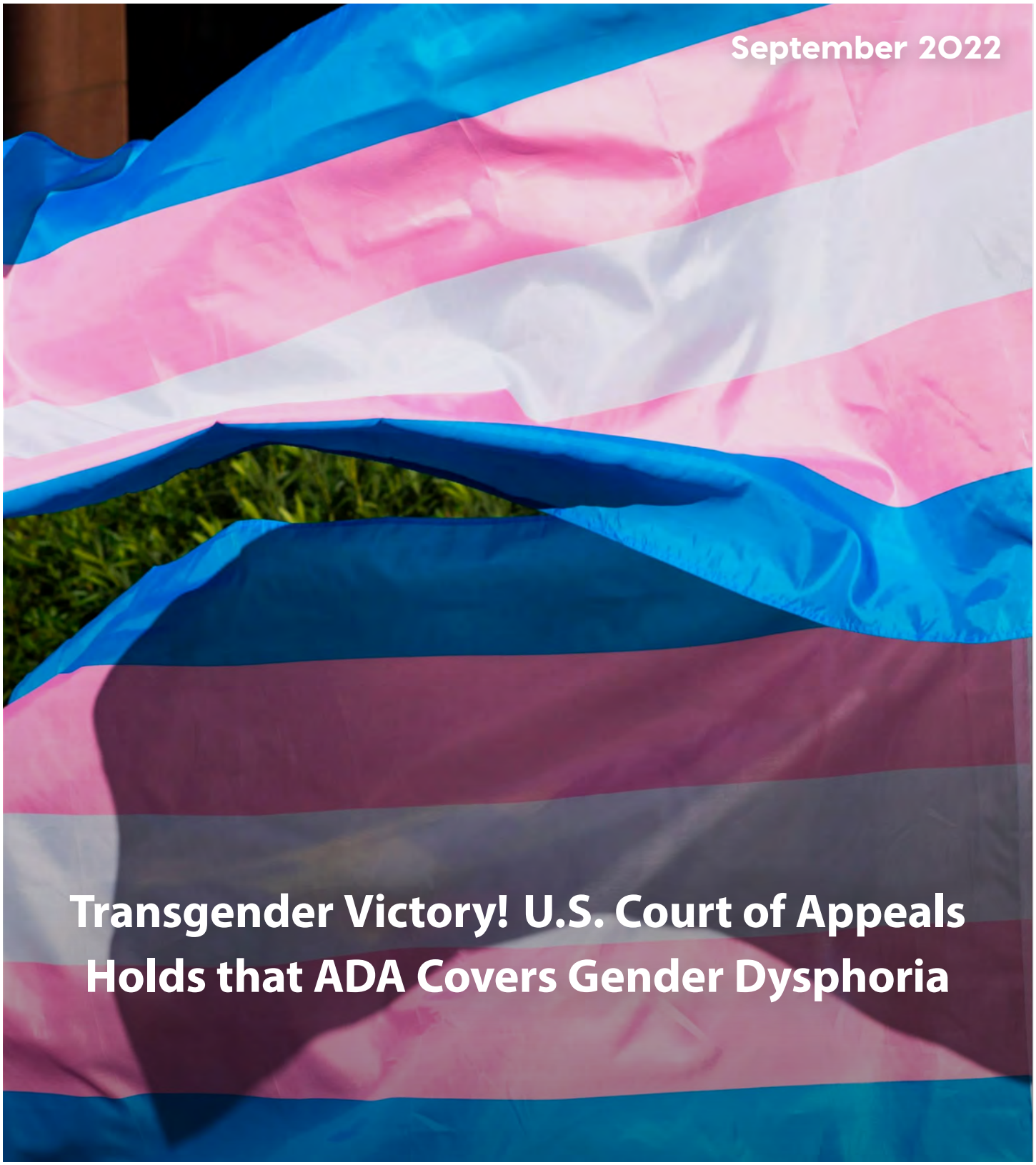
9-2022

# 9th Circuit Panel Orders San Jose School District to Restore Recognition of Discriminatory Student Club

Arthur S. Leonard

# LGBT LAW NOTES



September 2022

## Transgender Victory! U.S. Court of Appeals Holds that ADA Covers Gender Dysphoria

L G B T
# LAW NOTES

**Editor-In-Chief**

*Arthur S. Leonard,*
*Robert F. Wagner Professor of Labor & Employment Law Emeritus*
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
arthur.leonard@nyls.edu

**Associate Editor**

*Prisoner Litigation Notes:*
*William J. Rold, Esq.*

**Contributors**

*Matthew Goodwin, Esq.*
*Ashton Hessee, NYLS '24*
*Bryan Johnson-Xenitelis, Esq.*
*Jason Miranda, NYLS '24*
*Eric Wursthorn, Esq.*

**Production Manager**

*Leah Harper*

**Circulation Rate Inquiries**

LeGaL Foundation
120 Wall Street, Floor 19
New York, NY 10005
(212) 353-9118
info@lgbtbarny.org

**LGBT Law Notes Podcast**

Listen on iTunes (search "LGBT Legal") or Podbean at legal.podbean.com.

**Law Notes Archive**

http://bit.ly/LGBTLawNotes-archive



**ISSN 8755-9021**

***If you are interested in becoming a contributing author to LGBT Law Notes, please contact info@lgbtbarny.org.***

## EXECUTIVE SUMMARY



**33** Notes **55** Publications Noted

# 9th Circuit Panel Orders San Jose School District to Restore Recognition of Discriminatory Student Club

*By Arthur S. Leonard*

A three-judge panel of the U.S. Court of Appeals for the 9th Circuit voted 2-1 on August 29 to reverse a decision by the district court concerning a claim by the Fellowship of Christian Athletes (FCA) at Pioneer High School in San Jose, California, that FCA's religious freedom rights were violated when the school rescinded their recognition due to their requirement that club leaders affirm a conservative religious credo that condemns all extra-marital sex and same-sex marriage. The district court recently denied FCA's motion for a preliminary injunction requiring the school to recognize the FCA chapter. The majority of the appellate panel, two judges appointed by President Donald J. Trump, found that FCA was likely to succeed on its Free Exercise of Religion claim and was thus entitled to a preliminary injunction ordering the school to reinstate FCA's recognition as a student group. Dissenting, a judge appointed by President Barack Obama asserted that the majority improperly resolved factual issues in dispute and should not have ordered injunctive relief at this stage in the litigation, also noting a significant question of FCA's standing to seek preliminary injunctive relief when there was no record evidence that it had applied for recognition for the upcoming school year. The case is *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education*, 2022 WL 3712506

FCA at Pioneer High School is one of about 7,000 student chapters at universities, colleges and secondary schools of the national organization, Fellowship of Christian Athletes, which describes itself as a Christian religious ministry with a mission "to lead every coach and athlete into a growing relationship with Jesus Christ and His church" by fostering a "steadfast commitment to Jesus Christ and His Word through Integrity, Serving, Teamwork, and Excellence." The chapters, as summarized by Circuit Judge Kenneth K. Lee from the complaint filed in this case in his opinion for the court, "routinely host religious discussions, service projects, prayer and worship, and Bible studies."

FCA purported to welcome all students regardless of religious "or any other characteristic" to become members and participate in events, but in order to serve as a chapter leader, they must "personally affirm FCA's Statement of Faith and abide by FCA's Sexuality Purity Statement." The Statement of Faith and the Sexual Purity Statement condemns sex outside of heterosexual marriage, and affirms that "the biblical description of marriage is one man and one woman in a lifelong commitment."

FCA alleges that no student is explicitly excluded from leadership because of their sexuality, so long as they agree to abide by the Statement of Faith and the Sexual Purity Statement.

The San Jose School District recognizes and supports student organizations through its Associated Student Body (ASB) program. Each fall, student groups seeking to participate in the program must apply for the school year. Groups in the program receive a panoply of benefits. Clubs approved by the program in the past have include Bachelor Nation, Communism Club, Girls Who Code, Mermaids Club, Persian Club, Shrek Club, and The Satanic Temple Club. (Wow, those San Jose students have diverse interests!)

FCA clubs were approved at three of the school district's high schools since the early 2000s. This changed in 2019, when some Pioneer High School students gave their social studies teacher a copy of the FCA Statement of Faith and Sexual Purity Statement. This teacher, Peter Glasser, hung the statement on his classroom whiteboard and wrote that he was "deeply saddened that a club on Pioneer's campus asks its members to affirm these statements." It turns out that two FCA officers were in Glasser's first period class and claim to have felt "insulted" and, as paraphrased in Lee's opinion for the court, "deeply hurt to be publicly shamed by their teacher without so much as a private conversation beforehand." Among other things, they pointed out that Glasser had misstated the membership requirements, as only chapter leaders were required to affirm the statements.

A week later, Glasser brought his concerns to the attention of the school's principal, stating that these "views on LGBTQ+ identity infringe on the rights of others in my community to feel safe and enfranchised on their own campus, even infringing on their very rights to exist," and he "objected strenuously to the 'love the sinner, hate the sin' mentality" held "by some Christians." He felt that allowing FCA to operate on the campus signaled that Pioneer High School approved of "these values." After a meeting of Pioneer's "Climate Committee" during which Glasser's concerns were discussed, the principal brought the matter to School District administrators, who withdrew FCA's recognition as an ASB club. The administrators determined that this officer requirement violated the district's non-discrimination policy because "a student could not be an officer of this club, if they were homosexual."

The school newspaper subsequently reported that the "Climate Committee and district officials made the decision to revoke status from the FCA," and quoted the principal's explanation that the purity pledge "is of a discriminatory nature" and that the school "decided that we are no longer going to be affiliated with them.

The court characterized this action as "unusual," in that the school did not systematically check on membership and officer requirements of all student clubs. This "ad hoc" enforcement of the discrimination policy, wrote Judge Lee, "meant that other student clubs retained

ASB recognition despite having membership – not just leadership – criteria that excluded groups of students in violation of the Non-Discrimination Policy." He cited as examples Big Sisters/Little Sisters and the Senior Women's Club, which he apparently assumed had limited membership to female students. He pointed out that because nobody had ever complained to the ASB program administrator about these exclusionary policies, these other clubs maintained their official status.

FCA lost its ASB status during spring 2019, and was denied recognition for the 2019-20 school year, but FCA continued to meet at the high school and hold events without official recognition, which stirred Glasser to further action. A fellow teacher who was faculty advisor to the school's Gay-Straight Alliance (GSA), an ASB-recognized club, encouraged students to rally against FCA's presence, resulting in protests whenever FCA held an event. "During one such protest," wrote Judge Lee, "GSA members tried to enter an FCA meeting, but were blocked by a school police officer."

The COVID-19 pandemic caused a shutdown of on-campus club activities from the spring of 2020 until April 2021, and Pioneer granted all student clubs, including FCA, "conditional ASB approval" during that period. Two Pioneer FCA student leaders and the national organization, represented by Becket Fund for Religious Liberty and the Center for Law & Religious Freedom, filed suit in the Northern District of California, seeking injunctive relief for FCA. The case was assigned to Judge Haywood S. Gilliam, Jr., an appointee of President Barack Obama.

The plaintiffs sought a preliminary injunction while the case was pending and the district court is considering the school district's motion to dismiss the complaint, which has previously been dismissed in part and subsequently amended. Plaintiffs claimed in their original complaint that exclusion of FCA from the ASB program violates their First and Fourteenth Amendment rights as well as the Equal Access Act, a federal statute that was originally passed to protect the right of students to form Bible study groups, but which has also been successfully pressed into service by LGBT student groups who were denied official club status at various schools. Almost every suit by an LGBT student group under the Equal Access Act has resulted in federal court orders to school districts to extend recognition to those groups as long as the schools recognized other non-curricular student organizations.

In preparation for the 2021-22 school year, the San Jose School District issued a set of new "Student Organization Guidelines" for the ASB program, in response to the FCA controversy. The new policy states that ASB-recognized clubs must "Allow any currently enrolled student of the school to participate in, become a member of, and seek or hold leadership positions in the organization, regardless of his or her status or beliefs." This is generally referred to as the "all-comers policy." The grounds of discrimination forbidden under the existing Non-Discrimination Policy are used to interpret and apply the policy, which is patterned on a student organization policy that was upheld by the U.S. Supreme Court in a 5-4 decision written by Justice Ruth Bader Ginsburg, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), in which the Court rejected a constitutional claim against the dean of a state university law school who refused official recognition to a CLS chapter on his campus.

FCA did not formally apply for ASB recognition for the 2021-22 school year, but pushed forward its lawsuit, claiming that despite the all-comers policy, the school had recognized groups that limited their membership on grounds forbidden by the Non-Discrimination Policy. In June 2022, Judge Gilliam denied FCA's request for a preliminary injunction, holding that FCA had failed to show that the "facts and law clearly favor" their position such that they were likely to succeed on the merits of their claim. Judge Gilliam found that the "all comers" policy was "content neutral" and thus did not violate FCA's rights under the Equal Access Act, and that it was reasonable in light of the school district's legitimate concerns for inclusivity and non-discrimination at the district's schools. The court specifically rejected FCA's free exercise claim on the ground that the policy was "generally applicable" and did not "treat comparable secular activity more favorably than religious exercise," thus only "incidentally" burdening FCA's exercise of religion and not subject to constitutional attack.

The majority of the 9th Circuit panel disagreed with this analysis, finding that FCA was likely to prevail on its free exercise claim because Pioneer had given ABS recognition to other clubs that had apparently had exclusionary policies, particularly identifying the Senior Women's Club. There had been some controversy about transgender women being members, which that club resolved several years ago by saying that anybody who identified as female could be a member. "When the School District approved the Senior Women's Club application," wrote Judge Lee, "It assented to the club's discriminatory condition."

Thus, concluded the majority of the 9th Circuit panel, if the school district is willing to allow other clubs to discriminate on grounds of sex, it would have the burden of showing a compelling reason not to allow FCA to be recognized despite its officer eligibility policy.

The court based its ruling heavily on the Supreme Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), where the court held that as long as the city retained discretion to make exceptions to its non-discrimination policy in administering its foster care program, it could not refuse to contract with a Catholic agency that refused to certify same-sex couples as foster parents, because its anti-discrimination policy was not "generally applicable" to all foster care agencies. Judge Lee wrote that "the School District's unspoken a*d hoc* exemption practice poses a more insidious and severe danger to the Free Exercise right than the formalized exemptions in *Fulton*: It provides the School District almost unfettered and silent discretion to make exceptions. In short, plaintiffs have presented clear evidence that the School District

selectively applies its All-Comers Policy against FCA because FCA requires its student leaders to abide by its statement of belief. That means that the School District's policies are not generally applicable or neutral, triggering strict scrutiny. And that, in turn, is the ballgame. At this stage, the plaintiffs have shown that they are likely to prevail on their selective-enforcement claim."

The court found that because of this "selective enforcement," FCA would suffer the irreparable harm of being denied ASB recognition if it applied, so it didn't matter that FCA had not formally applied for 2021-22, and the district court should have granted its request for a preliminary injunction.

Judge Lee supplemented his opinion for the panel, which was joined by Trump-appointee Danielle J. Forrest, with a separate opinion going into great detail about the factual allegations to support his conclusion that the school district had exhibited hostility to religion, in violation of the requirement in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018, that government decision-makers provide a forum that is "neutral" to religion in deciding discrimination claims.

Judge Morgan Christen, the Obama appointee on the panel, dissented, arguing that FCA lacked standing under Article III of the Constitution to seek recognition through the judicial process when it had not applied for recognition for the 2021-22 school year. He wrote, "In their haste to reach the merits of this dispute, plaintiffs urge us to resolve fact-laden questions relevant only to their claims for past injuries, not to the prospective ones at the center of their motion for a preliminary injunction. They then insist that the district court's adherence to binding precedent constitutes an abuse of discretion. Our court responds by reaching the merits and adopting plaintiffs' version of disputed facts – before parsing whether plaintiffs established the 'irreducible constitutional minimum' of Article III standing."

Judge Christen pointed out that Lee's opinion jumped to conclusions about the Senior Women's Club that were not clear from the record – indeed, that the Senior Women's Club had not met since 2015 and there was no indication that it had applied for recognition in the current round. Judge Lee had also mentioned the Big Sisters/Little Sisters Club, but Judge Christen pointed to factual allegations that this club and a Big Brothers/Little Brothers Club had basically functioned together. He pointed out various relevant contested factual issues, criticizing the majority for reaching conclusions about them in the absence of a hearing process in which both sides can present evidence.

As to standing, he pointed out that "student groups like FCA must reapply each fall for official ASB recognition," and that only student club leaders can file an application. "Because the District's nondiscrimination policy cannot cause a real or immediately impending injury to FCA if no students apply for ASB recognition," he stated, "FCA cannot establish standing without evidence that a Pioneer FCA student has applied, or intends to apply, for ASB recognition for the upcoming school year. FCA failed to make that showing. Plaintiffs thus lack standing to seek prospective preliminary relief, and our court lacks jurisdiction over this preliminary injunction appeal."

The court's ruling drew immediate media attention, not least because twelve amicus briefs were filed with the court of appeals, representing the views of numerous states and national associations, heavily weighted on religious freedom arguments. Perhaps Judge Christen's dissent will lead to a move within the 9th Circuit to reconsider this ruling. There are 29 active judges on the 9th Circuit bench, of whom 16 were appointed by Presidents Clinton, Obama, and Biden, and 13 by Presidents Bush and Trump. If a majority of the active judges vote for rehearing, an 11-judge *en banc* panel will be constituted including the three panel judges, the chief judge (an Obama appointee), and seven judges drawn at random. One cannot presume that judges line up precisely in accordance with the parties of their appointing presidents, but recent voting patterns in the courts of appeals suggest that this is frequently the case, especially in "hot button" issues such as religious freedom and LGBTQ rights. Any judge of the circuit can ask that the judges be polled on the question of *en banc* review, and the school district could also ask for such consideration. ■