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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs;

v.

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

Defendants.

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

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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

No Oral Argument Unless Requested by the Court

TABLE OF CONTENTS

Page (s)

TABLE OF AUTHORITIES

Page(s)

U.S. Supreme Court Cases:

TABLE OF AUTHORITIES- CONT'D.

Page(s)

U.S. Supreme Court Cases:

Federal Cases:

TABLE OF AUTHORITIES - CONT'D.

Page(s)

Federal Cases:

TABLE OF AUTHORITIES - CONT'D.

Other:

GLOSSARY OF DEFINED TERMS

1. "Anti-Islamophobia Initiative" or "Initiative" means the San Diego Unified School District's ("District") plan to address "Islamophobia" and the bullying of and discrimination against Muslim students and their families, as directed by the Board at its regular board meeting on July 26, 2016, under Agenda Item G5.

2. "Original Policy" means Superintendent Marten's "Vision 2020 Quality Schools in Every Neighborhood District Accountability Report" presented to the Board members for adoption as Agenda Item E-1 at the District's regular public board meeting on April 4, 2017. The Original Policy formalized the Initiative and outlined a series of "Action Steps" to implement and operate the Initiative.

3. "Action Steps" means the District's concrete steps as detailed in the Original Policy to implement the Initiative or any similar policy.

4. "Revised Policy" means the Board's policy change, "REVISED 7/25/17: Addressing Tolerance through the Comprehensive School Counseling and Guidance Plan," adopted under Agenda Item E-2 at the Board's regular board meeting on July 25, 2017.

5. "Islamophobia Toolkit" or "Toolkit" means the resources compiled by the CAIR Education Committee to "address Islamophobia" in the District after the adoption of the Revised Policy.

INTRODUCTION

Defendants concede away—explicitly or tacitly—everything needed to justify a preliminary injunction. For starters, Defendants concede that the Council on American-Islamic Relations ("CAIR") is a "religious organization" with a "religious agenda." They admit that CAIR is still advancing its "mission" in the San Diego Unified School District. And they do not dispute that their Anti-Islamophobia Initiative as enacted is unconstitutional. Then Defendants, without a hint of irony, assert that granting an injunction would unlawfully discriminate against … CAIR.[1]

In opposing Plaintiffs' Motion for Preliminary Injunction,[2] Defendants have three main contentions—all flawed. *First*, Defendants contend that this case is moot because the Board purportedly "reversed" the Initiative and replaced it with a neutral anti-bullying program. But Defendants' voluntary cessation does not moot this case, because it is "absolutely clear" that the District is still working with CAIR to "address Islamophobia."[3] *Second*, Defendants concede the merits of Plaintiffs' constitutional claims and instead argue that they are no longer suffering irreparable harm. That is wrong. Direct evidence shows that Defendants are continuously violating Plaintiffs' First Amendment rights, which constitutes irreparable injury. *Third*, Defendants complain that the injunction is too broad. But the extent of the violation dictates the scope of an injunction. The relief sought is narrowly tailored to enjoin Defendants' ongoing religious discrimination. Put together, Defendants' arguments cannot stand.

Then there are the facts. Defendants say that they addressed all of Plaintiffs' allegations, but the voluminous record indisputably shows that the Revised Policy is a "sham."

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[1] Defendants' Opp. to Plaintiffs' Motion for Preliminary Injunction ("Opp.") 15-16, ECF No. 32.

[2] Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction ("Mot."), ECF No. 26.

[3] *See, e.g.*, *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-CV-02471-BAS-AGS, 2017 WL 6541447, at *7 (S.D. Cal. Dec. 21, 2017); *Friends of Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

For example:

- District officials have met with CAIR at least six times since July 25, 2017, most recently in February 2018, to "continue the momentum" of their partnership in light of the Revised Policy;[4]
- Superintendent Cynthia Marten asked CAIR in November 2017 to "stay engaged as an important partner" with the District "in addressing Islamophobia";[5]
- The CAIR Education Committee continues to work with District staff about "addressing Islamophobia," including facilitating CAIR's "Islamophobia Toolkit" and other "supplemental" resources;[6]
- CAIR continues to lobby to provide "input" on "administrative procedures" and "district policy";[7] and
- The Board issued a formal "Proclamation" in November 2017 "in support" of CAIR's San Diego chapter.[8]

Despite this evidence and more, Defendants insist that they have met their heavy burden of proving that this case is moot. Settled law says otherwise. The Constitution simply does not permit government discrimination in favor of religion, in words or in action. Indeed, what Defendants are asking this Court is extraordinary. They ask this Court to disregard the absolute mandate of government neutrality in religion. They ask this Court to create a new rule by which a religious organization has a constitutional right to advance their sectarian agenda in public schools. And they ask this Court to ignore binding Ninth Circuit law recognizing the irreparable harm suffered by the loss of First Amendment freedoms. "[A] principle at the heart of the Establishment Clause is that government should not prefer one religion to another, or religion to irreligion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). To uphold this fundamental principle, Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.

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[4] *See, e.g.*, Opp 3-7; Supplemental Declaration of Charles S. LiMandri ("Supp. LiMandri Decl.") Exs. 52-56.

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

[6] Supp. LiMandri Decl. Exs. 53-59, 61.

[7] Supp. LiMandri Decl. Exs 66-67.

[8] Supp. LiMandri Decl. Exs. 61-63.

ARGUMENT

1. Plaintiffs Will Likely Succeed on the Merits of their Claims.

"'[A]s a general matter, a litigant must raise all issues and objections' before the trial court." *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015) (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 879 (1991)). Defendants do not address, and thus concede, Plaintiffs' standing to bring this action. Defendants also do not oppose, and therefore waive, Plaintiffs' constitutional claims.[9] Even so, Plaintiffs have demonstrated success on the merits because:

1. Defendants are violating the California Constitution's No Preference Clause because they are impermissibly favoring a religious sect;
2. Defendants are violating the California Constitution's No Aid Clause because they are advancing and aiding a sectarian agenda; and
3. Defendants are violating the Establishment Clause of the First Amendment to the United States Constitution because they are discriminating in favor of one religion in both purpose and effect.

2. This Case is Still Live because Defendants have not "Completely and Irrevocably Eradicated" their Religiously Discriminatory Policies.

2.1 Under the "voluntary cessation" doctrine, Defendants' evasive "policy change" does not moot Plaintiffs' constitutional claims.

Defendants' mootness argument is a study in denial. Defendants admit (Opp. 5-7) that they meet regularly with CAIR to address Islamophobia. And they concede (Opp. 4, 7) that District officials are collaborating with CAIR to develop resources for "addressing Islamophobia." Yet they insist (Opp. 8) that this case is moot because they voluntarily rescinded the Original Policy—and the entire Initiative for that matter—at the Board's meeting on July 25, 2017, and replaced it with a purportedly religion-neutral Revised Policy. But the wealth of direct and circumstantial evidence shows that Defendants' actions after

[9] Plaintiffs take notice that Defendants knew in advance that CAIR would file an *amicus curiae* brief defending the Initiative's constitutionality. It is no small wonder that when put together, Defendants' and CAIR's briefs form a complementary, 45-page opposition.

that board meeting have not mooted this case.

It is well-established that "voluntary cessation" does not moot a case unless "(1) there is no reasonable expectation that the wrong will be repeated, and (2) interim relief or events have *completely and irrevocably eradicated* the effects of the alleged violation." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992) (emphasis added). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012).[10] Thus, Defendants have a heavy burden in demonstrating that there is no effective relief left for this Court to provide. *See Reyes v. Educ. Credit Mgmt. Corp.*, 322 F.R.D. 552, 570 (S.D. Cal. 2017), *appeal granted*, No. 17-80199, 2017 WL 6762227 (9th Cir. Dec. 21, 2017). Defendants cannot meet that heavy burden: the Revised Policy not only fails to moot this case, it is unconstitutional.

2.1.1 Defendants already have reverted to their "old ways."

Defendants primarily argue (Opp. 1) that they "clearly reversed" the Initiative because they took "significant steps" to (1) implement a "broad-based anti-bullying program" and (2) form an "intercultural committee." The question, then, is whether an objective observer would reasonably expect them to return to their "old ways." *See Rosemere Neighborhood Ass'n v. U.S. Envt'l. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009). As the record shows, the Revised Policy is not "the kind of permanent change that proves voluntary cessation." *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). Nor is it a "genuine change[] in constitutionally significant conditions." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 848 (2005).

Defendants vigorously assert (*e.g.*, Opp. 8-14) that they have met their heavy burden

[10] Even though CAIR is not a party in this case, it is reasonable to note that it has a concrete interest in the outcome of the litigation. As this Court noted, "the resolution of the legal issues in this case is … likely to impact CAIR-CA," and CAIR's "interest is in the legal issues raised by this case is particularly heightened" because of Plaintiffs' allegations about Defendants and CAIR's relationship. (ECF No. 39.).

of showing that the case is moot. In support, they rely (Opp. 8) on the Ninth Circuit's decision in *Rosebrock v. Mathis*, which outlined five factors to determine whether voluntary cessation of a policy "not reflected in statutory changes or even in changes in ordinances or regulations" moots a case. 745 F.3d 963, 972 (9th Cir. 2014) (finding that that mootness is "more likely" if the language is "broad in scope and unequivocal in tone," the case was the "catalyst" for the change, the policy has been in place for a long time, and defendants addressed all of the "objectionable" conduct). The Court made clear, however, that it has never "set forth a definitive test" for voluntary cessation. Thus, the *Rosebrock* factors afford no basis for departing from the established rule that "[u]ltimately, the question remains whether the party asserting mootness has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur." *Id*. In any event, Defendants' failure to satisfy the *Rosebrock* factors is straightforward.

Defendants first contend (Opp. 9) that the Revised Policy is "broad in scope and unequivocal in tone." They point to the policy's religiously neutral text—reaffirming the District's "commitment" to protecting "all" students. But that argument collapses under closer scrutiny. The Supreme Court has long held that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Accordingly, courts should look "beyond the face of the challenged law," where, as here, there are "subtle departures from neutrality" and "covert [favoritism] of particular religious beliefs." *Id*. The reason why Defendants want the Court to focus on the Revised Policy's text rather than the context is clear: indisputable evidence shows that it was dictated entirely by the Initiative,[11] which was expressly enacted to discriminate in favor of Muslim students. Even though the Revised Policy may be facially neutral, Defendants cannot hide behind it.

[11] *See, e.g.*, Supp. LiMandri Decl. Ex. 65; Defs.' Opp. 3-7; Pls.' Mot., LiMandri Decl. Exs. 31-36.

In the face of squarely applicable Supreme Court precedent, Defendants offer up their purported trump card: their adoption of the Anti-Defamation League's ("ADL") "No Place for Hate" anti-bullying program, which they argue (Opp. 5) is neutral toward religion. True enough—Plaintiffs do not dispute the program's constitutionality as designed by ADL—but that does not redeem Defendants. When tested independently, CAIR's "supplemental" involvement in the ADL program cannot withstand scrutiny. *See, e.g.*, *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (testing religious symbols that were part of a broader holiday display at county courthouse separately because the symbols had the effect of endorsing religion).

Defendants fare no better with their Intercultural Relations Community Council ("IRCC"). They assert (Opp. 4) that the IRCC's purpose is "to obtain resources and input from diverse community groups regarding cultural sensitivities and needs of various diverse segments of the school population." That sounds neutral enough. But government must make it "absolutely clear" that it will not resume the challenged policy. *See Laidlaw*, *supra*, at 189. Here, both direct and circumstantial evidence shows that Defendants purposefully targeted CAIR, building the IRCC around them from the ground up as a means to preserve CAIR's status quo in the District. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements from decisionmakers, may be considered in evaluating whether a discriminatory purpose motivated a governmental action); *Larson v. Valente*, 456 U.S. 228, 254-55 (1982) (holding that a facially neutral statute violated the Establishment Clause because legislative history showed an intent to regulate particular religions).[12] In fact, Defendants established the IRCC (then called a "Diversity Roundtable") *leading up* to the Board's adoption of the Revised Policy. And Hanif Mohebi, CAIR-San Diego's Executive Director was one of the first, if not *the* first, representative

[12] *See, e.g.*, Supp. LiMandri Decl. Exs. 53-61, 65; *see also* Pls.' Mot., LiMandri Decl. Exs. 31-36.

invited to sit on the council.[13] Defendants also have not produced any evidence showing that CAIR is *not* the *only* religious group on the IRCC, nor have Defendants shown that the District ever invited other religious advocacy organizations.[14] Instead, Defendants only say (Opp. 4) that "several community organizations attended" the IRCC meeting on January 22, 2018, and "it covers multiple identity groups." The ambiguity says more than it does not say.

The IRCC's effect—enabling CAIR to advance its religious agenda in the District—is also probative. *See, e.g.*, *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2437-38 (2016) (Alito, J., dissenting from denial of certiorari) (because the "essence" of the challenged statutes was discriminatory, their effect fell "almost exclusively" on particular faiths). The best that can be said for the IRCC is that, as a means to prevent bullying, it is wildly over- and underinclusive. Indeed, Defendants do not even try to identify who or what has "needs" or "cultural sensitivities" (Opp. 4), or what those terms even mean. Yet Defendants have no problem working with CAIR "to create a really powerful and engaging unit that supports our Muslim students," which includes, of course, the Islamophobia Toolkit.[15] Even though this case is at the pre-discovery stage, Defendants had the opportunity to show that other religious organizations are on equal footing with CAIR, but they did not.

Any remaining doubt an objective observer might have about Defendants' actions after the Revised Policy's adoption would be erased by the District's ongoing meetings with CAIR to, as they assert (Opp. 5-7), "repair the damage," "move forward," "address concerns," and provide "healing." Defendants seek to cover up their blatant preferential treatment toward CAIR by describing (Opp. 6) these meetings as part of the "standard procedure" for maintaining relationships with "community organizations" that are "disappointed" by the District's actions. But Defendants have not produced evidence of any such "standard procedure," nor have they provided any proof of similar types of

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[13] Supp. LiMandri Decl. Ex. 65.
[14] *See* Anjan Decl; Opp. 4-7.
[15] Supp. LiMandri Decl. Ex. 59.

meetings with other organizations. Nonetheless, Defendants insist (Opp. 11-12)—in mid-litigation wordsmithing—that it is "exceedingly unlikely" that they will "seek out a formal relationship with CAIR or implement a new initiative focused solely on anti-Muslim bullying." That is not enough. "[T]he Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452 (1971) (internal quotation marks omitted). Along with showing that Defendants have not met their heavy burden of cessation, the following meetings cannot be explained on any grounds but lavishing singular preferential attention on a religious organization:

1. **July 25, 2017**. Defendants met with CAIR to explain that the Board had "overstated CAIR's role" and that it "was taking steps to correct that misunderstanding." (Opp. 5).[16]
2. **August 31, 2017**. Defendants met with CAIR "in light of CAIR's disappointment" with the Revised Policy to"air[] CAIR's concerns" and "repair[] the damage to SDUSD and CAIR's relationship." (Opp. 5).
3. **November 9, 2017**. Defendants and CAIR held a "restorative circle to discuss past damage to the relationship" and for "healing" and "moving forward."(Opp. 5-6).
4. **December 11, 2017**. Defendants and CAIR met to "follow up" on the "restorative circle" and "listen[] to concerns express by CAIR." (Opp. 6).
5. **January 11, 2018**. Defendants and CAIR held *another* "follow up meeting" to "plan" for the IRCC meeting on January 22, 2018. Once again, Defendants "listened to CAIR's concerns" about the IRCC and the "forum for accepting input" from CAIR. (Opp. 6).
6. **February 8, 2018**. Defendants had *yet another* "follow up meeting" to "listen[] to CAIR's concerns" about the IRCC and the "mechanism for accepting input and resources … for incorporation into district resources." (Opp. 6).

These meetings are precisely the "readily discoverable fact[s]" showing that Defendants have not met their heavy burden, *McCreary*, *supra*, at 862, and they no doubt

[16] *But see* Pls.' Mot., LiMandri Decl. Ex. 22 (email from Defendant Marten to Hanif Mohebi, in which she stated that "one thing is clear: you, and your organization—CAIR are key partners in any of our next steps" and "a very important partner as we move forward.").

undermine Defendants' assurances (Opp. 6-7) of treating CAIR just like any other "community organization." All things considered, the Revised Policy is an unconstitutional "religious gerrymander" with the purpose and effect of allowing CAIR to continue advancing its religious agenda. *Lukumi*, *supra*, at 535.

2.1.2 Defendants unequivocally embraced, not "unequivocally reversed," their religiously discriminatory policies.

Defendants contend (Opp. 10) that they "fully addresse[d] all of the objectionable measures." But they conspicuously ignore the overwhelming evidence to the contrary. They ignore, for example, that the name of the Revised Policy is "REVISED 7/25/17: Addressing Tolerance through the Comprehensive School Counseling and Guidance Plan,"[17] *not* "Reversed," nor "Rescinded." They also ignore that the District still has a page on its website titled "Addressing Bullying of Muslim Students," which states the Initiative is a "forthcoming initiative" with the "intent to take action specifically to address the bullying of Muslim students."[18] They also do not explain why Superintendent Marten "requested" in November 2017 "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."[19] Nor do they explain why the District removed CAIR's recommended books in May 2017 only to ship them back to school libraries months after the adoption of the Revised Policy.[20] And Defendants fail to clarify why Superintendent Marten "welcomes the CAIR Committee's input to the ADL curriculum" in "teaching about addressing Islamophobia."[21] Finally, the fact that the Board issued a formal proclamation

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[17] Pls.' Mot., LiMandri Decl. Ex. 30.

[18] *Addressing the Bullying of Muslim Students*, San Diego Unified School District, https://perma.cc/4G4J-SJHV (last visited Apr. 27, 2018); Pls.' Mot., LiMandri Decl. Ex. 23.

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

[20] *See* Opp. 3.

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

"IN SUPPORT AND RECOGNITION" of CAIR-San Diego[22] in November 2017—over three months *after* the Revised Policy's adoption—speaks for itself.

At bottom, what Defendants are asking this Court to believe is mystifying. Defendants cannot, on one hand, work "to continue the momentum regarding the CAIR/SDUSD partnership,"[23] then, on the other hand, ask this Court to allow them to hide behind a supposedly neutral policy revision and platitudinous statements about religious impartiality.[24] A case is moot only "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted).[25]

Just like Plaintiffs' Establishment Clause claim, text, operation, history, and context are all relevant to Defendants' meritless mootness argument. *See Vill. of Arlington Heights*, *supra*, at 266-68. The record is clear: (1) Defendants still have a sustained and detailed relationship with CAIR; (2) they are still implementing key elements of the CAIR Committee's "Islamophobia Toolkit"; and (3) they are still unwilling to grasp the political and religious strife wrought by CAIR's sectarian activism. Defendants have failed to meet their heavy burden of showing that they will not renew the Initiative, much less that they completely and irrevocably eradicated the effects of their unconstitutional conduct. *See Barnes v. Healy*, *supra*, at 580. "For the purpose of an Establishment Clause violation, a state policy need not be formal, written, or approved by an official body to qualify as state sponsorship of religion." *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998). Accordingly, as the Supreme Court noted in *McCreary*, "the world is not made brand new every morning." 545 U.S. at 866. This case is still alive.

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[22] Supp. LiMandri Decl. Ex. 64.

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

[24] *See, e.g.*, Opp. 1.

[25] It is also telling that Defendants sought to file a response to CAIR's *amicus curiae* brief. Clearly, there are live issues at play.

2.2 This case is "capable of repetition, yet evading review."

Even if Defendants meet the stringent "voluntary cessation" standard, this case falls within the mootness exception for controversies that are "capable of repetition, yet evading review." A case meets the "capable of repetition, yet evading review" standard when (1) the challenged action is too short to be fully litigated before its cessation, and (2) the plaintiff is reasonably expected to be subject to the same action again. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Particularly given the monthly recurring basis of the Board meetings, "it would be entirely unreasonable" to expect that Plaintiffs could fully litigate their case before Defendants could alter their challenged conduct. *Id.* Furthermore, both the plaintiff families and organizations have a "reasonable expectation that [they] will again be subjected to" a school district policy that discriminates in favor of one religion. *Id.* at 463 (internal quotation marks omitted).[26]

3. Plaintiffs Will Continue to Suffer Irreparable Harm Without Relief.

3.1 Plaintiffs suffer an ongoing loss of their First Amendment freedoms.

Defendants contend (Opp. 13-14) that Plaintiffs are not suffering irreparable harm. Binding precedent forecloses that claim. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Accordingly, most courts hold that no further showing of irreparable harm is necessary when an alleged deprivation of a constitutional right is involved. *See* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (3d ed. Apr. 2018 update). Here, the Policy's Action Steps "are currently in force, the [Toolkit] is under consideration, and one or both of the policies may be enforced, which would violate Plaintiff[s'] First Amendment rights." *San Pasqual*, *supra*, at *8 (S.D. Cal. Dec. 21, 2017). Because Plaintiffs are likely to succeed on the merits of their constitutional claims, they will continue to suffer irreparable harm without injunctive relief.

[26] *See, e.g.*, Pls.' Mot. 18-21.

3.2 The timing of Plaintiffs' Motion is appropriate.

Defendants labor under the impression (Opp. 14) that the time from the adoption of the Revised Policy to the filing of Plaintiffs' Motion somehow dissipates the ongoing, irreparable violations of Plaintiffs' constitutional rights. That is false. Plaintiffs were continuing to both develop the evidentiary record and monitor the Board's actions to determine whether Defendants had completely abandoned the Initiative. "[W]aiting to file for preliminary relief until a credible case for irreparable harm can be made is prudent rather than dilatory. The significance of such a prudent delay in determining irreparable harm may become so small as to disappear." *Arc of Cal. v. Douglas*, 757 F.3d 975, 991 (9th Cir. 2014). Because Plaintiffs now have a more complete record showing the ongoing irreparable harm that they are suffering, any alleged delay "is not particularly probative in the context of ongoing, worsening injuries." *Id.* at 990. [27]

Defendants fault Plaintiffs for an "inexplicable" delay (Opp. 14), but a cursory review of the docket shows that the fault lies with them. Since the beginning of this case, Plaintiffs have demonstrated a good faith willingness to work with the District to avoid extensive litigation. To begin with, Plaintiffs amicably agreed to *Defendants'* request to wait until after the Board's July 25, 2017, meeting to serve their summons and first amended complaint to evaluate whether the Board fully addressed Plaintiffs' allegations (which, of course, it did not). [28] Plaintiffs also agreed to *Defendants'* request for an extension of time for service in exchange for expediting Plaintiffs' counsel's CPRA requests.[29] That motion was made on August 17, 2017, and granted by this Court on September 21, 2017.[30] Plaintiffs

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[27] Courts have consistently found alleged "delays" to be permissible. *See Rodriguez v. Robbins,* 715 F.3d 1127, 1145 n.12 (9th Cir. 2013) (roughly three-month delay not "particularly belated"); *see also Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (finding several-months delay not unreasonable); *Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1417 (D. Haw. 1997) (nine-month delay was permissible).

[28] Mendoza Decl. ¶ 2.

[29] Mendoza Decl. ¶ 3.

[30] ECF Nos. 4, 5.

also agreed to *Defendants'* request for a joint motion for an extension of time to answer Plaintiffs' first amended complaint, which was filed on November 20, 2017, and granted by the Court on the same day.[31]

Defendants then filed their motion to strike on December 12, 2017, which further prolonged the litigation and required Plaintiffs to file an opposition four days after Christmas.[32] Plaintiffs paused on filing their motion for preliminary injunction to await the Court's order on Defendants' motion to strike, which was issued on February 12, 2018.[33] Plaintiffs modified their Motion in light of the Court's ruling and *promptly* filed it six days later.[34] Plaintiffs concurrently filed an ex parte motion for expedited discovery, requesting District documents possibly relevant to their Motion.[35] And once again, *Defendants* asked if Plaintiffs would agree to a nearly four-week continuance of the hearing on Plaintiffs' Motion in return for producing the responsive documents without an order.[36] Even after that, *Defendants* failed to deliver the documents within a reasonable period, instead delivering 1,400 pages of documents six days before this Reply was due.[37] *Defendants'* tactic made it necessary for Plaintiffs to seek an extension of time to respond to Defendants' Opposition on April 10, 2018, which this Court granted the next day.[38]

After stringing Plaintiffs along with requests for extensions and a time-consuming motion to strike, the fact that Defendants accuse Plaintiffs of an "inexplicable" delay is simply disingenuous. In any event, even if the Revised Policy has some bearing on the timing of Plaintiffs' Motion, courts routinely hold that "delay is but a single factor to

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[31] Mendoza Decl. ¶ 4; ECF Nos. 15, 16.
[32] ECF Nos. 18, 20.
[33] ECF No. 24.
[34] ECF No. 26.
[35] ECF No. 25.
[36] Mendoza Decl. ¶ 5.
[37] Mendoza Decl. ¶¶ 6-7.
[38] Mendoza Decl. ¶ 8; ECF Nos. 40, 41.

consider in evaluating irreparable injury, and they are 'loath to withhold relief solely on that ground.'" *Douglas*, *supra*, at 990.

4. The Balance of Harm and the Public Interest Tip Sharply in Plaintiffs' Favor Because Defendants are Violating the First Amendment.

Defendants cite (Opp. 8) *Amoco Prod. Co. v. Vill. of Gambell, Alaska* for the proposition that courts must balance the competing claims of injury and are "not mechanically obligated to grant an injunction for every violation of law." 480 U.S. 531, 542 (1987). But this is not an oil lease dispute. Defendants are violating Plaintiffs' First Amendment rights—the balance of harm and the public interest tips sharply in Plaintiffs' favor. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). On the other hand, the only harms Defendants have identified are either abstract or nonexistent.

To begin with, Defendants contend (Opp. 15) that an injunction would "sever SDUSD's relationship with CAIR," which "would harm SDUSD, CAIR, and the community members that CAIR represents." But Defendants fail to cite any case or constitutional provision in support. No surprise. "[T]he public school must keep *scrupulously free* from entanglement in the strife of sects. . . . from *divisive conflicts* ... [and] from *irreconcilable pressures by religious groups*. . . ." *McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 216–17 (1948) (Frankfurter, J., concurring) (emphasis added). Regrettably, Defendants crossed that line when they launched the Initiative.

Defendants also contend (Opp. 15) that an injunction would force them "to discriminate against CAIR because of their religious mission," which they complain "runs counter to the Free Exercise Clause." That breathtaking position has no basis in law or precedent. In support, Defendants cite (Opp. 15) the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (*supra* at 3), but that holding compels the *opposite* conclusion. In *Lukumi*, the Court struck down a facially neutral ordinance that banned animal sacrifice, an essential ritual in Santeria liturgy. 508 U.S. at 520. The Court found the ordinance neither "neutral" nor "generally applicable" because, in practice, it was clear that the object of the law was to exclude "Santeria adherents but almost no others." *Id.*

The Court called this a "religious gerrymander," an impermissible attempt to target [the church] and their religious practices." *Id.* at 535.

That is precisely what is happening here, but not in the way Defendants would have this Court believe. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (pregame invocations were not "private speech" because they were "authorized by a government policy and [took] place on government property at government-sponsored school-related events").[39] Defendants have failed to recognize one of those limitations—when entrusted with the care of 130,000 impressionable children in a *religiously neutral* setting, leave religion out of the equation.

The Supreme Court affirmed this principle in *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, where it invalidated a New York statute that carved out a special school district for practitioners of a strict form of Judaism. 512 U.S. 687 (1994). The Court held that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Id.* at 696 (internal quotation marks omitted). The law violated the principle of government neutrality because it impermissibly extended preferential benefits to a particular religious sect. *Id.* at 703-07. The law also provided no guarantee that other religious and nonreligious groups would be given similar preferential treatment. *See id.* at 696 ("The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way."); *see also Mitchell v. Helms*, 530 U.S. 793, 809 (2000) ("If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would

[39] *See, e.g.*, *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 600 (1989)("[T]he Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations.").

conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

Here, Defendants have impermissibly carved out a religious gerrymander for Muslim students without according the same treatment to other religious sects and without the assurance that another religious advocacy organization would be afforded the same access that CAIR has long enjoyed. When tested for neutrality toward religion, Defendants have crossed the bright line drawn by the Supreme Court, striking "a principle at the heart of the Establishment Clause": "[G]overnment should not prefer one religion to another, or religion to irreligion." *Kiryas Joel*, 512 U.S. at 703. In light of the heightened judicial scrutiny in public schools, Defendants' novel arguments quickly wither.

Defendants further contend (Opp. 16) that protecting CAIR is in the public interest. On the contrary, the substantial controversy surrounding CAIR's presence in a public school district illustrates the extraordinary public interest implicated in this case—in favor of Plaintiffs. There can be no doubt that it is in the public interest to keep a divisive force like CAIR out of public schools. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("In no activity of the State is it more vital to keep out divisive forces than in its schools.").[40] This Court, in keeping with the Ninth Circuit, has recognized "the significant public interest" in upholding "First Amendment principles," especially in the public school context. *San Pasqual Valley*, *supra*, at *8. The balance of harm and the public interest factors merge when the government is a party, *see Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014), and taken together, Plaintiffs merit injunctive relief.

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[40] According to a report from the Anti-Defamation League, CAIR was founded by leaders of "an anti-Semitic propaganda organization," it "continues to partner with anti-Israel groups that seek to isolate and demonize the Jewish State," and it is "undermined by its anti-Israel agenda." *Profile: The Council on American Islamic Relations*, Anti-Defamation League (2015), https://goo.gl/H2fySR.

5. The Scope of the Preliminary Injunction is Proper Because It Preserves Plaintiffs' Constitutional Rights While the Merits of the Case Are Decided.

Defendants argue (Opp. 17) that the requested injunctive relief is vague, unnecessary, and overbroad. That is wrong. The extent of the constitutional violation dictates the scope of relief. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Defendants are assuming that the status quo has been operative since the Board adopted the Revised Policy. But "[t]he status quo is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001) (internal quotation marks omitted). Here, an injunction would preserve the status quo while the merits of the case are being decided as it existed before Defendants launched the Initiative. *See Hawaii v. Trump*, 878 F.3d 662, 700 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018). In any event, "maintenance of the status quo is only one of the reasons for which a preliminary injunction may be granted," the other being "to prevent irreparable injury." *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 199 (9th Cir. 1953).

5.1 Plaintiffs' requested relief is necessary and narrowly tailored.

Defendants contend (Opp. 17) that "implementing and executing the Initiative as detailed in the Policy's Action Steps or any similar policy" would suffocate policies unrelated to Plaintiffs' claims. That argument contradicts itself. A preliminary injunction "must be tailored to remedy the specific harm alleged." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991). Plaintiffs only seek an injunction related to the fatal flaw of the Anti-Islamophobia Initiative and its subsequent manifestations: its non-neutrality toward religion.[41] And by "any similar policy," Plaintiffs clearly do not seek suspension of all policies; they simply want Defendants to return to the course of government neutrality in religion as mandated by the California and United States Constitutions. When an "entire policy [is] tainted with the vice of illegality," courts usually enjoin the entire

[41] *See* Pls.' Mot. 21-22.

action. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960) (quotation marks and alteration omitted). The requested relief is appropriate.

Equally meritless is Defendants' remarkable contention (Opp. 18-19) that this injunction would violate CAIR's constitutional rights. According to Defendants (Opp. 18), "there is no need to prevent all instances in which CAIR seeks to advocate for Muslim students" in the classrooms, or "any of its other organizational objectives." But the Supreme Court has long noted that families "condition their trust on the understanding that the classroom will not purposely be used to advance religious views." *Edwards*, 482 U.S. at 583–84. "One can conceive of a case in which a governmental entity manipulates its administration of a public forum … in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995). That is the case here.

Using carefully crafted phrasing, Defendants also contend (Opp. 19) that enjoining the use of the "Islamophobia Toolkit" is unnecessary because "no materials created by CAIR have been implemented into SDUSD's bullying program or curriculum." That argument is irrelevant: the requested relief does not seek just to enjoin materials *created by* CAIR. Rather, Plaintiffs object to *all* materials and resources strategically advanced by a sectarian organization with a history of racial and religious animus. [42]

5.2 The Court has the power to fashion the injunction's scope.

"[D]istrict courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions." *McCreary*, *supra*, at 844. In determining the scope of an injunction against the government, a court should ensure that it

[42] Although none of the plaintiff families is Jewish, they take great exception to the District's partnership with an organization that has a dark history of anti-Israel bigotry. That Defendants imply (Opp. 15) that Plaintiffs—who are Chinese, Hispanic, white, atheist, Christian, and Buddhist—are biased against Muslims shows how utterly detached the Superintendent and Board are from the fundamental principles of equality and neutrality. *See* Pls.' Mot. 22.

is "close to the identified violation and is not overly intrusive and unworkable and would not require for its enforcement the continuous supervision by the federal court over the conduct of state officers." *Armstrong v. Davis*, 275 F.3d 849, 872–73 (9th Cir. 2001). Accordingly, this Court has the authority to narrowly tailor Plaintiffs' requested relief or afford the parties the opportunity to stipulate to a workable remedy.

CONCLUSION

This is an uncomfortable case. On one side is a presumably well-meaning school board caught up in a controversial organization's calculated religious agenda. On the other side are five diverse families and two community groups falsely accused of being anti-Muslim bigots simply because they challenge a discriminatory double standard. Sadly, schoolchildren are in the middle of it. The Supreme Court has long held that students do not shed their First Amendment rights at the schoolhouse gate. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Accordingly, Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

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

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