

LAW OFFICES OF NICOLAI COCIS

Nicolai Cocis (204703)
nic@cocislaw.com
25026 Las Brisas Rd.
Murrieta, CA 92562
Phone: 951-695-1400

LIBERTY COUNSEL

Mathew D. Staver*
mstaver@lc.org
Horatio G. Mihet*
hmihet@lc.org
Daniel J. Schmid*
dschmid@lc.org
Mariah Gondeiro (323683)
mgondeiro@lc.org
P.O. Box 540774
Orlando, FL 32854
Phone: 407-875-1776
Fax: 407-876-0770
*Admitted Pro Hac Vice

Attorneys for Plaintiff Child Evangelism Fellowship of NorCal, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Oakland Division

CHILD EVANGELISM FELLOWSHIP)	Case Number: 4:24-cv-8945-HSG
NORCAL,)
)
Plaintiff,) REPLY IN SUPPORT OF MOTION FOR
) PRELIMINARY INJUNCTION
v.)
) Date: February 27, 2025
OAKLAND UNIFIED SCHOOL DISTRICT)) Time: 2:00 p.m.
BOARD OF EDUCATION; DR. KYLA)) Judge: Hon. Haywood S. Gilliam, Jr.
JOHNSON-TRAMMELL, in her official)) Courtroom: 2, 4th Floor
capacity as Superintendent of Oakland Unified)) 1301 Clay St., Oakland, CA 04612
School District,)
)
Defendants.)
)
)

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INTRODUCTION

1
2 Despite the unequivocal, unrefuted, and sworn allegations of Plaintiff's Verified Complaint (dkt.
3 1) and the documentary evidence before the Court on Plaintiff's Motion for Preliminary Injunction,
4 Defendants' Opposition (dkt. 33) pretends that none of it exists. Oakland Unified School District
5 ("OUSD") officials, on multiple occasions at multiple OUSD facilities, explicitly and unequivocally
6 denied Child Evangelism Fellowship NorCal's ("CEF") application to use district facilities on the basis
7 of the religious content of CEF's Good News Club, and that was just when OUSD officials even bothered
8 to respond to CEF's applications. Defendants' Opposition acts as if none of that ever happened, and does
9 not even attempt to refute the unequivocal documentary evidence of that express religious discrimination.
10 Far from refuting the need for a preliminary injunction, Defendants demonstrate why it is necessary here.

11 Defendants rely on a self-serving affidavit (dkt. 33-1) to suggest that none of the evidence before
12 the Court provides the actual reason that Defendants consistently, universally, and discriminatorily
13 denied CEF's constitutional right to equal access. Instead, Defendants make up an entirely different
14 reason CEF was denied access to OUSD facilities for two years—one that was never offered by the
15 OUSD officials who actually denied CEF's multiple applications at multiple OUSD facilities.
16 Defendants' self-serving affidavit offers post-hoc rationalizations for their discriminatory exclusion of
17 CEF from Defendants' facilities and asks this Court to ignore the unrefuted allegations and evidence in
18 the record before the Court. Such newly minted justifications—offered in response to a Motion for
19 Preliminary Injunction and never contemporaneously offered as a justification when CEF's applications
20 were actually denied by OUSD officials—plainly fails to refute the record and cannot serve as a basis to
21 deny CEF's entitlement to injunctive relief.

22 Defendants fail to even mention, let alone address, CEF's arguments that OUSD's policies are
23 unconstitutional prior restraints that fail to provide adequate guideposts to cabin the discretion of the
24 decisionmakers or impose time limits on the decisionmakers in direct violation of the First Amendment.
25 Defendants fail to mention, let alone address, that OUSD's policies unconstitutionally discriminate on
26 the basis of religion in violation of the Free Exercise Clause of the First Amendment. Defendants fail to
27 mention, let alone address, that OUSD's policies unconstitutionally treat CEF differently than similarly

1 situated organizations on the basis of CEF’s content and viewpoint in direct violation of the Equal
 2 Protection Clause. By failing to even mention, let alone address, these claims for relief and bases upon
 3 which injunctive relief should issue, Defendants have conceded each issue and waived argument against
 4 such bases for injunctive relief. Defendants’ concessions alone justify a preliminary injunction here.

5 Curiously, Defendants cite *Child Evangelism Fellowship of Hawaii, Inc. v. Hawaii State*
 6 *Department of Education*, 2024 WL 3233996 (D. Haw. June 27, 2024) to suggest that a preliminary
 7 injunction is unwarranted, unnecessary, and inappropriate here. (Opp’n, 9.) Yet, Defendants completely
 8 ignore the fact that, here, CEF makes virtually identical claims on the basis of similarly flawed policies
 9 that resulted in a preliminary injunction in *Child Evangelism Fellowship of Hawaii*, 2024 WL 3233996,
 10 at *8–10. And, the preliminary injunction there was based on the fact that defendants’ policies in
 11 Hawaii—as here—failed to limit the unbridled discretion of district officials, failed to place time limits
 12 on decisionmakers, were used to discriminate against CEF’s religious viewpoint, and that post-hoc
 13 rationalizations were used as a pretext to mask religious discrimination. *Id.* And, as here, defendants in
 14 that case similarly failed to contest—and therefore conceded—many of the same points that Defendants
 15 fail to contest here. *Id.* More fatally for Defendants, the District of Hawaii also entered a permanent
 16 injunction in December 2024 for the same reasons CEF presents to the Court here. *See Child Evangelism*
 17 *Fellowship of Hawaii, Inc. v. Hawai’i State Dep’t of Educ.*, No. 1:24-cv-34-MWJS-WRP, Dkt. 56 (D.
 18 Haw. Dec. 26, 2024). Thus, far from supporting Defendants’ contentions, *Child Evangelism Fellowship*
 19 *of Hawaii* demonstrates why Defendants’ policies and religious discrimination against CEF here must be
 20 enjoined. Defendants’ Opposition fails at every turn. A preliminary injunction should issue.

21 ARGUMENT

22 I. PLAINTIFF IS PLAINLY LIKELY TO SUCCEED ON THE MERITS OF ITS FIRST 23 AMENDMENT CLAIM.

24 A. Defendants Concede That, On Their Face, OUSD Policies Vest Unbridled 25 Discretion In OUSD Officials.

26 Defendants suggest that CEF’s “fails to identify or cite the Court to any portion of the District’s
 27 policies in support of their facial attack on the policies.” (Opp’n, 11.) This is completely incorrect. In

1 fact, Defendant wholly ignore the fundamental flaw in OUSD’s Use Policies—namely, that they are
2 presumptively unconstitutional prior restraint on CEF’s speech and lack the requisite requirements.
3 Defendants do not even mention, let alone address, CEF’s facial attack on OUSD’s policies as a
4 presumptively unconstitutional prior restraint. Defendants do not contest, and therefore concede, that
5 OUSD’s Use Policies vest unbridled discretion in the hands of OUSD officials. Defendants do not
6 contest, and therefore concede, that there are no time limits restricting OUSD decision-makers from
7 endless delay in the decision on CEF’s speech and expression. Though not explicitly stating as much,
8 Defendants also *actually* concede that the OUSD Use Policies have permitted OUSD officials to exercise
9 unbridled discretion over CEF’s use applications. Each of these failures, concessions, and admissions
10 demonstrate that CEF is substantially likely to succeed on the merits of its First Amendment claim that
11 OUSD’s Use Policies are unconstitutional prior restraints. (*See* dkt. 2, Mot. Preliminary Injunction, 15-
12 19.) Without addressing or even mentioning CEF’s assault on OUSD’s policies as a presumptively
13 unconstitutional prior restraint, Defendants—by necessity—cannot overcome the presumption of
14 unconstitutionality, and therefore CEF is likely to succeed on the merits of its facial attack.

15 **1. Defendants do not contest, and therefore concede, that OUSD policies vest**
16 **unbridled discretion in the hands of OUSD officials.**

17 Defendants do not mention, let alone address, the constitutional flaws in the OUSD Use Policies
18 that vest unbridled discretion in the hands of OUSD decisionmakers. That silence is deafening, and
19 mandates that CEF prevails on its facial challenge. Indeed, OUSD “waived its [prior restraint] arguments
20 by not raising it in opposition to the motion.” *Avilez v. Pinkerton Gov’t Servs., Inc.*, 596 F. App’x 579,
21 579 (9th Cir. 2015). *See also Walsh v. Nevada Dep’t of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006)
22 (a party who “fails to raise the issue in response to [a motion] . . . has effectively abandoned his claim”);
23 *Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (holding that a party “abandons
24 [her claims] by not raising them in opposition” to a motion); *Qureshi v. Countrywide Home Loans, Inc.*,
25 2010 WL 841669, * 9 n.2 (N.D. Cal. Mar. 10, 2010) (“The Court construes his failure [to respond to
26 claims in the motion] as an abandonment of those claims.”). In fact, beyond mere waiver, Defendants’
27 “*silence [is] a concession*” that their policies represent an unconstitutional prior restraint. *Cal. Grocers*

1 *Ass'n v. City of Santa Ana*, 2021 WL 4439092, *2 (C.D. Cal. June 30, 2021) (emphasis added) (a party
2 concedes the argument when it “did not address this point in its opposition to the motion”). “CEF’s
3 arguments that the facility use policies are unconstitutional because they lack decision-making criteria . . .
4 are at least colorable in light of the authorities CEF cites; here again, Defendants do not dispute, and
5 therefore concede—at least at this stage—that this argument is persuasive.” *Child Evangelism Fellowship
6 of Hawaii, Inc. v. Hawaii State Dep’t of Educ.*, 2024 WL 3233996, *4 (D. Haw. June 27, 2024).

7 And, even if Defendants had not waived this argument, which they did, the unrefuted evidence
8 before the Court demonstrates beyond cavil that OUSD Use Policies vest unbridled discretion in the
9 hands of OUSD officials. Indeed, as the face of OUSD’s policies make clear: “All Facilities are made
10 available at the ultimate and sole discretion of the OUSD Superintendent or designee.” (dkt. 1-3, V.
11 Compl., Ex. 3 at 1.) There is nothing—absolutely nothing—limiting that discretion. It is “sole[ly]” and
12 “ultimate[ly]” vested in the Superintendent, and that violates the First Amendment. (*Id.*).

13 **2. Defendants actually concede that OUSD policies vest unbridled discretion**
14 **in the hands of OUSD officials.**

15 In addition to conceding by failing to respond, Defendants take their concessions a step further by
16 *actually* conceding that OUSD’s Use Policies permit OUSD officials to exercise unbridled discretion in
17 determining who may access OUSD facilities after school. Defendants contend that “[i]n 2021” the
18 California legislature altered certain statutes, which purportedly (though not actually) modified
19 Defendants’ Use Policies and Practices. (Opp’n, 6 (emphasis added).) And, in their sworn testimony
20 before this Court (dkt. 33-1, Declaration of Martha Peña, ¶¶17-21) and in their Opposition, Defendants
21 concede that OUSD officials have permitted community organizations to use OUSD facilities despite
22 OUSD’s allegedly changed policies. (Opp’n, 6.) Indeed, as OUSD’s officials testified under oath, “there
23 have been occasions when OUSD’s new policy has not been followed by site administrators.” (*Id.*) In
24 other words, OUSD officials have exercised their unfettered discretion to permit some organizations to
25 use OUSD facilities, despite OUSD’s alleged policies prohibiting it. And, only *if* Ms. Peña finds out
26 about it, has OUSD done anything about ensuring compliance with OUSD’s purported policy. The sworn
27 admission is fatal to OUSD’s efforts to escape a preliminary injunction for a simple reason: “the mere

1 *existence* of the licensor’s unfettered discretion” in any system of prior restraint is plainly
 2 unconstitutional—“even if the discretion and power are never actually abused.” *City of Lakewood v.*
 3 *Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988) (emphasis added). And, here, Defendants’ own sworn
 4 testimony demonstrates that not only does the discretion exist, it has been deployed in an unconstitutional
 5 manner. CEF is likely to succeed on the merits of its First Amendment facial challenge.

6 **3. Defendants do not contest, and therefore concede, that OUSD’s Use Policies**
 7 **fail to limit the time in which a decision must be made on CEF’s application.**

8 Defendants do not mention, let alone address, the other significant constitutional flaw in the OUSD
 9 Use Policies—they fail to restrict the time limit in which OUSD decisionmakers must issue a decision
 10 on CEF’s applications. That silence mandates that CEF prevails on its facial challenge. (*See supra* Section
 11 I.A.1 (citing *Avilez*, 596 F. App’x at 579; *Walsh*, 471 F.3d at 1037; *Jenkins*, 398 F.3d at 1095 n.4; *Qureshi*,
 12 2010 WL 841669, at * 9 n.2).) “CEF’s arguments that the facility use policies are unconstitutional
 13 because they . . . have no deadlines, and fail to require written explanations are at least colorable in light
 14 of the authorities CEF cites; here again, Defendants do not dispute, and therefore concede—at least at
 15 this stage—that this argument is persuasive.” *Child Evangelism Fellowship of Hawaii, Inc.*, 2024 WL
 16 3233996, at *4.

17 **B. Defendants Fundamentally Ignore The Evidence Before The Court As To The**
 18 **Reasons CEF Was Denied Access To OUSD Facilities.**

19 **1. Defendants’ post-hoc justifications provided in response to CEF’s Motion,**
 20 **which bear no resemblance to the actual reasons given to CEF when OUSD**
 21 **officials denied its use applications, demonstrates CEF is likely to prevail**
 22 **on its First Amendment claim.**

23 Defendants’ Opposition papers do nothing to aid their prior restraint concessions. In fact,
 24 Defendants’ Opposition and its self-serving affidavit attempting to evade constitutional condemnation of
 25 their defunct policies demonstrate the First Amendment problem of prior restraints that fail to place
 26 limitations on the decisionmaker. As the Supreme Court has made plain, “the absence of express
 27 standards makes it difficult to distinguish” between constitutional and illegitimate schemes to silence

1 religious viewpoints. *City of Lakewood*, 486 U.S. at 758.. “Standards provide the guideposts that check
2 the licensor and allow courts quickly and easily to determine whether the licensor is discriminating
3 against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official
4 and the use of shifting or illegitimate criteria are far too easy.” *Id.* See also *Am. Jewish Cong. v. City of*
5 *Beverly Hills*, 90 F.3d 379, 386 (9th Cir. 1996) (holding that a “standardless” system for ruling on use
6 applications “lend[s] itself to abuse” because the censor “can always justify an application’s refusal” on
7 any shifting or illegitimate criteria). This is precisely what occurred here.

8 Defendants’ Opposition proves this point. CEF applied to use facilities throughout OUSD for over
9 two years, and were denied on religious grounds (V. Compl., ¶¶46-51, 58-60; 90-91), denied on
10 pretextual grounds (V. Compl., ¶76), or otherwise denied by silence. (V. Compl., ¶¶68-71, 77-78, 79-
11 85,111-112, 116-117.) CEF was never instructed that there had been a change in the policies in 2021 as
12 a result of a change in the law, or that there was any requirement that CEF become the Lead Agency of
13 an ASES program or join into a ELOP program. For over two years, CEF had been following the
14 processes that are clearly set out in OUSD’s own policies governing facilities use and was never once
15 told those policies were defunct, that there was some new policy CEF was required to follow, or that
16 OUSD purportedly even has a new policy. The reason is simple: OUSD has no “new” policy.

17 Defendants have instituted a newly minted justification (*i.e.*, post-hoc rationalization) for denying
18 CEF equal access to OUSD facilities. Upon being sued for their unconstitutionally discriminatory
19 treatment of CEF, OUSD and its officials now claim that OUSD’s two-year exclusion of CEF from
20 OUSD facilities had nothing to do with its religious content, but rather arises from OUSD “new policy”
21 and “new practices.” (*See* dkt. 33-1, Peña Decl., ¶¶17-20.) Defendants—aided with the help of counsel—
22 have developed this entirely new theory used to justify their two-year exclusion of CEF from OUSD
23 facilities, and—in essence—ask this Court to accept their request for a redo and whitewashing of their
24 past and egregious discrimination. Never mind the evidence before the Court, say Defendants, focus on
25 our self-serving affidavit that provides the real reason (heretofore unmentioned by anyone) for OUSD’s
26 consistent denials over two years. And, that reason? Board Policy 1330 (dkt. 1-1), Administrative
27 Regulation 1330 (dkt. 1-2), and the Terms of Use for OUSD (dkt. 1-3) do not exist and do not govern

1 “OUSD’s *new policy*” (dkt. 33-1, Peña Decl., ¶17) or its “changed practices.” (*Id.*, ¶18.) Rather, CEF
2 was denied because it was not a Lead Agency at any OUSD facilities, so it was prohibited by law from
3 permitting CEF to access OUSD facilities. (Opp’n7-9; dkt. 33-1, Peña Decl., ¶¶27-33.) If ever there was
4 a post-hoc rationalization to justify the unequivocal evidence of religious discrimination, this is it.

5 And, to add insult to constitutional injury, Defendants lay all the blame at CEF’s feet, saying that
6 it was “[CEF’s] misunderstanding about why its requests were denied” that is the true problem here.
7 (Opp’n, 13.) In essence, Defendants’ “message is, don’t believe your lying eyes.” *Tran v. Clark*, 2009
8 WL 995559, *35 (C.D. Cal. Apr. 10, 2009). The evidence before the Court, and the explanations given
9 to CEF—when CEF was given a reason at all, instead of just being ignored like a constitutional orphan—
10 was that it was because CEF’s program was religious. Defendants’ newfound justifications never existed
11 before its Opposition, and are plainly pretextual and illegitimate.

12 **2. Defendants completely ignore the sworn evidence before the Court that**
13 **OUSD officials denied CEF’s requested use applications because of their**
14 **religious viewpoint.**

15 Defendants completely ignore the sworn allegations of CEF’s Verified Complaint and the unrefuted
16 evidence before the Court, and—instead—offer a perfunctory claim that religion had nothing to do with
17 OUSD’s denials of CEF’s facilities use requests. The undisputed evidence before this Court tells a
18 completely different story than the post-hoc whitewashing Defendants attempt in their Opposition and
19 sworn testimony.

20 At Lincoln Elementary School, Defendants say that “[t]he denial of Plaintiff’s request for the use
21 of this site was not based on the content of Plaintiff’s program.” (Opp’n, 8; dkt. 33-1, Peña Decl., ¶27.)
22 That is not what OUSD officials at Lincoln Elementary said when denying CEF’s facilities use request.
23 The unrefuted sworn evidence before the Court demonstrates that CEF was denied access to Lincoln
24 Elementary School, not because a purported Lead Agency was occupying the facility, but because OUSD
25 officials at Lincoln Elementary School did not want a religious group meeting at its facilities. Lincoln
26 Elementary School’s principal stated that CEF’s application was denied because OUSD officials at
27 Lincoln Elementary did not believe CEF was a “good match” for Lincoln Elementary. (V. Compl., ¶48;

1 dkt. 1-6, V. Compl., Ex. 6 at 2 (“We do not think that Good News Club is a match for Lincoln Elementary
2 School. I will not be granting the facilities request.”). OUSD’s denial of CEF’s application because its
3 religious program was not a “good match” is identical to what the District of Hawaii found was an
4 unconstitutional exclusion based on religious viewpoint. *See Child Evangelism Fellowship of Hawaii*,
5 2024 WL 3233996, at *6 (noting that the principal’s statement that “school administrators did not like
6 the idea of a Good News Club” was religious discrimination).

7 But, Lincoln Elementary did not stop with just the implication that CEF’s application was denied
8 for religious reasons. The Principal of Lincoln Elementary School went a step farther and made the
9 religious discrimination explicit. (V. Compl., ¶51.) Specifically, Lincoln Elementary’s principal stated
10 unequivocally: “I discussed the request from the Good News Club with teacher leadership at Lincoln.
11 We reviewed your website As a public school, **we are not in support of evangelism on our**
12 **campus.”** (*Id.*; dkt. 1-6, V. Compl., Ex. 6 at 5 (emphasis added).) That is explicit and unconstitutional
13 viewpoint-based discrimination. *See Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 106
14 (2001). Astoundingly, Defendants’ Opposition and self-serving affidavit pretend as though this evidence
15 does not exist. In fact, Defendants do not even mention this fact of overt religious discrimination and act
16 as though OUSD officials never excluded CEF on the basis of its “evangelism” (*i.e.*, religion). More
17 astounding, still, is Defendants’ suggestion that the fault for CEF not obtaining equal and constitutionally
18 required access to OUSD facilities was “[d]ue to Plaintiff’s misunderstanding about the reasons its
19 requests for facility use were denied.” (Opp’n, 13.) CEF misunderstood nothing. OUSD officials at
20 Lincoln Elementary made it abundantly clear to CEF that its “evangelism” and religion were unwelcome
21 by OUSD and its use applications were denied on that basis. It is Defendants who misunderstand both
22 the record and the Constitution.

23 **3. Defendants completely ignore that CEF sought to become a subcontractor**
24 **under Defendant’s own pretextual scheme and were denied access to the**
25 **subcontractor forum on the basis of its religious viewpoint.**

26 Defendants also suggest that they have been magnanimous with CEF by offering to permit CEF to
27 apply for subcontractor status that would otherwise have given CEF access to OUSD facilities. (Opp’n,

1 13.) This, too, ignores the record before the Court. CEF attempted to secure that status as a means of
2 securing access to host its Good News Club program at Greenleaf Elementary School, and its pursuit of
3 that access was also immediately denied because of CEF’s religious viewpoint. Defendants’ self-serving
4 affidavit again suggests that CEF was not denied access to Greenleaf Elementary on the basis of its
5 religious viewpoint. (Opp’n, 8-9; dkt. 33-1, Peña Decl., ¶31. (“The denial of Plaintiff’s request for the
6 use of this site was not based on the content of Plaintiff’s program.”).) Rubbish. When CEF was denied
7 access to Greenleaf Elementary, it sought out subcontractor status from the local after-school program
8 coordinator (after seeking and finding her on its own accord (V. Compl., ¶¶87-90), not with the help of
9 OUSD officials, as Defendants suggest). Immediately upon seeking that alternative arrangement, CEF
10 was denied access to that forum as well on the basis of its religious viewpoint. (V. Compl., ¶91.) Indeed,
11 after being denied traditional access under the Facilitron request forum, CEF’s request for access to the
12 subcontractor forum was unequivocally denied for its religious viewpoint. Specifically, CEF was
13 informed that its access to the subcontractor forum was denied because it was a “Bible club.” (*Id.*) CEF
14 was told: “[W]e cannot have any [B]ible clubs at school. Sorry.” (Dkt. 1-21, V. Compl., Ex. 21 at 6
15 (emphasis added).) The flippant apology at the end may be nice, but it does not excuse unconstitutional
16 religious discrimination.

17 More fatally, too, is that OUSD explicitly denied CEF’s request for become a community partner
18 with OUSD that could otherwise make it a Lead Agency or partner in the expanded learning program.
19 (V. Compl., ¶118.) OUSD officials suggested that it would not be possible for CEF to be granted access
20 to that forum. When the topic of subcontractor status was again raised by CEF, OUSD officials again
21 shut down CEF on the basis of its religious viewpoint. Specifically, OUSD officials specifically and
22 unequivocally told CEF that “**it was very unlikely the District would approve a partnership**
23 **application for CEF due to its religious programming.**” (V. Compl., ¶121.) Again, Defendants’
24 Opposition and its sworn testimony before this Court completely ignore this fact, and act as though it
25 does not exist. Despite Defendants’ suggestions to the contrary, CEF was excluded from every possible
26 forum in OUSD, and it was explicitly denied such access on the basis of its religious viewpoint.

1 Thus, Defendants’ newfound excuses for its overt and unequivocal religious discrimination offered
2 in their Opposition and sworn testimony are unmerited, contradicted by the record, and reflect their post-
3 hoc efforts to un-ring the bell of religious discrimination that CEF faced at every turn. Even its newly
4 minted rationale that CEF could simply seek to become a contractor or subcontractor for OUSD and
5 alleviate the religious discrimination it faced in the traditional facilities use forum fails because CEF was
6 likewise denied access to that particular avenue on the basis of religion. As such, Defendants’ suggestion
7 that it “made efforts to advise Plaintiff on alternative ways in which it could host its meetings” (Opp’n,
8 13) is untrue because the road to those alternative pathways was also blocked by religious discrimination
9 in blatant violation of the First Amendment.

10 **4. Defendants completely ignore that OUSD officials at other elementary**
11 **schools exercised their unbridled discretion and lack of any time limits to**
12 **deny CEF’s application without any explanation for over two years.**

13 At Oakland Academy of Knowledge, Fruitvale Elementary School, Montclair Elementary School,
14 Sequoia Elementary School, and Allendale Elementary School, Defendants suggest that CEF was not
15 denied because of its religious viewpoint but because “OUSD could not approve Plaintiff’s request for
16 use of this facility during the requested time period.” (Opp’n, 8-9; dkt. 33-1, Peña Decl., ¶¶28-30, 32-
17 33.) But, the unrefuted evidence before the Court is that Defendants offered no justification whatsoever
18 for their denial of CEF’s application. (*E.g.*, V. Compl., ¶¶71, 78, 85, 112, 117.) And, given that these
19 OUSD facilities have denied CEF for over two years without explanation, that delay is a denial of First
20 Amendment rights. *See Clark v. City of Lakewood*, 259 F.3d 996, 1009 (9th Cir. 2001) (“To an
21 unsuccessful license applicant, **the unavoidable delay is tantamount to an effective denial of First**
22 **Amendment rights.**” (emphasis added); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990)
23 (holding that the First Amendment prohibits the “risk of delay” because such delay “creates an
24 impermissible risk of suppression of ideas”). Thus, though OUSD has never overtly stated that
25 Defendants’ denials at these schools were based on religion, the years-long delay with no response is
26 sufficient to demonstrate a First Amendment violation. *See Child Evangelism Fellowship of Hawaii*, 2024

1 WL 3233996, at *6 n.6 (noting that when licensors never respond to applications to use facilities, such
2 “allegations tend to suggest that the [post-hoc] rationale was pretext for discrimination”).

3 **C. Defendants’ Self-Serving Affidavit Is A Complete Sham In Any Event, And**
4 **Crosses Dangerously Close To Perjury.**

5 Defendants ask the Court to ignore the evidence presently before the Court showing that that OUSD
6 **does not have new Policy**, and there is no indication of changed practices. As discussed *supra*,
7 Defendants’ sworn testimony presented to the Court says that because the California legislature modified
8 California Education Code §46120 **in 2021**, “OUSD’s practices regarding the use of OUSD facilities”
9 “have changed,” (dkt. 33-1, Peña Decl., ¶18), and that OUSD has a “new policy” governing use of OUSD
10 facilities. (*Id.*, ¶20.)

11 First, Defendants do not have a new policy. As the unrefuted evidence before the Court
12 demonstrates, Board Policy 1330 says nothing about a change to California Education Code §46120 that
13 fundamentally altered OUSD’s policy and practices that existed before COVID, as OUSD’s sworn
14 testimony suggests. (*Compare* dkt. 1-1, V. Compl., Ex. 1, at 1-2, *with* dkt. 33-1, Peña Decl., ¶18.) Board
15 Policy 1330 does not even mention California Education Code §46120, much less articulate that Board
16 Policy 1330 was revised to reflect the OUSD’s “new policy” (dkt. 33-1, Peña Decl., ¶20) that purportedly
17 came about by 2021 amendment to California’s law, or that OUSD has “new practices” (dkt. 33-1, Peña
18 Decl., ¶18) that significantly altered Board Policy 1330’s statement that OUSD facilities are available for
19 community use under California Civic Center Act. In fact, Board Policy 1330’s only citation to California
20 Education Code is to the Civic Center Act. (Dkt. 1-1, V. Compl., Ex. 1 at 1-2.)

21 Second, Defendants’ Administrative Regulation 1330, likewise governing the “Use of District
22 Facilities” (dkt. 1-2, V. Compl., Ex. 2 at 1), says nothing about a change to California Education Code
23 §46120 and does not even mention that section, much less articulate that AR1330 has been revised to
24 reflect the OUSD’s “new policy” (dkt. 33-1, Peña Decl., ¶20), or that OUSD has “new practices” (dkt.
25 33-1, Peña Decl., ¶18) that significantly altered AR1330’s statement that OUSD facilities are available
26 for community use under California Civic Center Act. (Dkt. 1-2, V. Compl., Ex. 2 at 1.)

1 Finally, Defendants' contention that they have new practices regarding community use of OUSD
2 facilities is baseless. OUSD adopted the Facilitron system on November 1, 2018, and it is "the only way
3 to request use of a district facility." Oakland Unified School District, *Facilities Permit Request*,
4 <https://www.ousd.org/facilities-planning-management/contact-us/facilities-permit-request> (last visited
5 February 13, 2025). The Terms of Use (dkt. 1-3), which govern the community organization's use of
6 OUSD facilities, does not say a word about OUSD's new policies or practices that purportedly changed
7 the entire scheme after 2021. The reason is simple: it didn't.

8 Simply put, Defendants' litigation-driven affidavit is a sham. It is designed (but fails) to contradict
9 the unrefuted documentary evidence before the Court that OUSD officials discriminated against CEF on
10 the basis of its religious viewpoint, excluded CEF from every forum on the basis of its religious beliefs,
11 or otherwise completely ignored CEF's requests for access. Virtually every assertion made in
12 Defendants' self-serving declaration is either directly contradicted by the unrefuted evidence before the
13 Court, or wholly lacks any evidentiary support in the record. In essence, it is a post-hoc rationalization
14 for blatantly unconstitutional religious discrimination, and is not especially probative of anything except
15 that OUSD policies impermissibly vest unbridled discretion in OUSD officials and allow this type
16 unsupported whitewashing. *See Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996)
17 ("we generally consider self-serving opinions without objective corroboration not significantly
18 probative").

19 **D. Defendants do not contest, and therefore concede, that OUSD policies**
20 **unconstitutionally treat CEF differently than other similarly situated**
21 **organizations in violation of the Free Exercise Clause and the Equal Protection**
22 **Clause.**

23 Defendants do not mention, let alone address, the constitutional flaws in the OUSD Use Policies
24 that treat CEF differently than other similarly situated organizations in violation of the Free Exercise
25 Clause and the Equal Protection Clause. (*See* dkt. 2, Mot. Preliminary Injunction, 19-23.) That silence
26 mandates that CEF prevail on its facial challenge. (*See supra* Section I.A.1). *See Avilez*, 596 F. App'x at
27 579; *Walsh*, 471 F.3d at 1037; *Jenkins*, 398 F.3d at 1095 n.4; *Qureshi*, 2010 WL 841669, at * 9 n.2; *Cal.*

1 *Grocers Ass’n*, 2021 WL 4439092, at *2 (a party concedes the argument when it “did not address this
2 point in its opposition to the motion”). The preliminary injunction should issue on these bases.

3 **II. CEF EASILY SATISFIES THE OTHER ELEMENTS OF INJUNCTIVE RELIEF.**

4 Defendants, again, do not contest, and therefore concede, that Plaintiffs are likely to suffer
5 irreparable harm in the absence of injunctive relief. (*See supra* Section I.A.1 (citing *Avilez*, 596 F. App’x
6 at 579; *Walsh*, 471 F.3d at 1037; *Jenkins*, 398 F.3d at 1095 n.4; *Qureshi*, 2010 WL 841669, at * 9 n.2).)
7 And, just as in *Child Evangelism Fellowship of Hawaii v. Hawaii State Department of Education*, “CEF
8 argues, without meaningful contradiction, that its facility use requests will continue to be
9 unconstitutionally denied and delayed at certain schools . . . unless interim equitable relief is granted.”
10 2024 WL 3233996, at *4. And, “it cites, without meaningful contradiction, authorities holding that a
11 colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief.” *Id.* And,
12 there can be no dispute that CEF’s Verified Complaint here establishes irreparable injury. As a matter of
13 black letter law, “[t]he loss of First Amendment freedoms, *for even minimal periods of time*,
14 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis
15 added); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“the deprivation of constitutional rights
16 unquestionably constitutes irreparable injury.” (cleaned up).)

17 Finally, in cases involving the government, “the last two *Winter* factors merge” because “it is
18 always in the public interest to prevent the violation of a party’s constitutional rights.” *Baird v. Bonta*,
19 772 F.3d 563, 583 (9th Cir. 2014). The same is true here. (*See also* dkt. 2, Mot. For Preliminary
20 Injunction, at 23-24.) CEF easily satisfies all three of the additional requirements of a preliminary
21 injunction, and it should be issued.

22 **CONCLUSION**

23 Because the unrefuted documentary evidence before the Court demonstrates that CEF was denied
24 access to OUSD facilities on the basis of its religious viewpoint, because OUSD fail to set specific
25 guidelines on OUSD officials to prevent unbridled discretion, fail to set limits on the amount of time an
26 OUSD official has to answer a facilities use application, and otherwise fail to prevent the viewpoint
27

1 discrimination demonstrated by CEF’s Verified Complaint, CEF is likely to prevail on the merits of its
2 First Amendment claim. The preliminary injunction should issue.

3
4 Respectfully submitted,

5 /s/ Nicolai Cocis
6 Nicolai Cocis (204703)
7 LAW OFFICES OF NICOLAI COCIS
8 25026 Los Brisas Rd.
9 Murrieta, CA 92563
10 (951) 695-1400
11 nic@cocislaw.com

5 /s/ Daniel J. Schmid
6 Mathew D. Staver*
7 Horatio G. Mihet*
8 Daniel J. Schmid*
9 Mariah Gondeiro (323683)
10 LIBERTY COUNSEL
11 P.O. Box 540774
12 Orlando, FL 32854
13 (407) 875-1776
14 court@lc.org
15 hmihet@lc.org
16 dschmid@lc.org
17 mgondiero@lc.org
18 Attorneys for Plaintiff
19 *Admitted *pro hac vice*