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Civil no. _____

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CHILD EVANGELISM FELLOWSHIP OF HAWAII, INC., Plaintiff, v. HAWAII STATE DEPARTMENT OF EDUCATION, KEITH HAYASHI, in his official capacity as Superintendent of the Hawaii State Department of Education, et al., Defendants.	)	No. _____

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Motion Related to: Doc. 1

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MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and Local Rule 7.3, Plaintiff, CHILD EVANGELISM FELLOWSHIP OF HAWAII, INC. ("CEF"), moves for entry of a preliminary injunction restraining Defendants, Hawaii State Department of Education ("HIDOE"); Keith Hayashi, in his official capacity as Superintendent of the Hawaii State Department of Education; Rochelle Mahoe, in her official capacity as the Farrington-Kaiser-Kalani Complex Superintendent; Linell Dilwith, in her official capacity as Kaimuki-McKinley-Roosevelt Complex Superintendent; Janette Snelling, in her official capacity as Honokaa-Kealakehe-Kohala-Konawaena Complex Superintendent, and Richard Fajardo, in his official capacity as Superintendent of the Pearl City-Waipahu Complex Area (collectively "Defendants") from violating CEF's rights under the Speech Clause of the First Amendment to the United States Constitution, and the Equal Protection Clause of the Fourteenth Amendment, by denying CEF access to HIDOE facilities to host afterschool Good News Clubs on the basis of the CEF's religious viewpoint, content, and identity, while discriminatorily allowing access to facilities for similarly situated, nonreligious afterschool programs.

MEMORANDUM OF LAW IN SUPPORT

INTRODUCTION AND FACTUAL BACKGROUND

For nearly two years, Defendants blocked and pretextually denied CEF from hosting its elementary school Good News Clubs, which are religious in viewpoint, content, and identity, in Defendants' facilities that host similarly situated nonreligious afterschool clubs that teach moral and character development. Since CEF began to reengage in public schools after COVID-19, Defendants and their officials have prolonged review, imposed endless delays, denied CEF explicitly because it is a religious group, and have otherwise denied CEF equal access by refusing to respond to or provide any answer to repeated requests for equal access. The facts supporting the instant Motion are more fully set forth in the Verified Complaint and are realleged and incorporated by reference as if fully set forth herein. (Doc. 1, Verified Complaint, "V. Compl.," ¶¶ 1-82.)

Hawaii has a collection of statutes and administrative rules (collectively the "Use Policies") that govern the availability of Defendants' facilities for after-school programs. (Doc. 1, V. Compl., ¶¶ 20-33). These written policies and procedures, together with the unwritten and undisclosed policies applied by HIDOE personnel to CEF, compose Defendants' Use Policies challenged in this action. (*Id.* ¶ 20.) CEF has a long history of providing after-school programs in HIDOE schools and,

through its Good News Clubs, was very active across the State before the cancellation of all clubs due to COVID-19 in 2020. (*Id.* ¶¶ 35-37.)

Over that time, Defendants have evidenced a pattern of pretextual denials and inconsistent, hostile application of the Use Policies against CEF. (V. Compl. ¶¶ 34-43.) When after-school programs were restarted in HIDOE facilities in late 2021 (*id.* ¶ 44), CEF sought to reengage with the community and provide its important service by submitting use requests to Lincoln Elementary, Waimea Elementary, Kalihi Waena Elementary, Nu'uanu Elementary School, Kohala Elementary, and Pearl City Elementary School to host Good News Club after-school programs (*Id.* ¶ 45). In all these schools, CEF was denied access. (*Id.* ¶¶ 46-75.) Nu'uanu Elementary and Lincoln Elementary rejected CEF's application for blatantly discriminatory reasons, because they—admittedly—did not want CEF's Christian viewpoint on campus. (*Id.* ¶¶ 49-52, 57.) Yet, other similarly situated nonreligious organizations were granted access to these same district facilities. (*See id.* ¶¶51, 55.) Kalihi Waena Elementary and Waimea Elementary denied CEF Hawaii's use requests despite welcoming similarly situated nonreligious programs to operate after-school programs on campus. (*Id.* ¶¶ 62-71.) CEF likewise sought access to otherwise available facilities at Kohala Elementary School and Pearl City Elementary School to host its program, and CEF was similarly denied at each school. (*Id.* ¶¶72-75.)

Following the continuous and systematic denials at Defendants' facilities, CEF initiated appeals of these denials to the District Superintendents, sent demand letters outlining the constitutional deficiency of such denials, and requesting equal access to similarly situated groups. (V. Compl. ¶¶34-75.) Those appeals proved as fruitless as the original applications, as Defendants continued to deny CEF equal access or otherwise simply refused to respond to CEF's request at all. During this same time period and despite continuously and explicitly denying CEF access because of its religious viewpoint, Defendants have granted access to numerous similarly situated nonreligious organizations and groups, including the Girl Scouts, Cub Scouts, Boy Scouts, YMCA, Bricks 4 Kidz, Mokichi Okada Association Art for Kids, Parkour, Advantage Sports Academy soccer, Sports Jam Academy programs, and Ukelele Pa'ani. (*Id.* ¶¶ 51, 64, 69; Ex. 9.) Defendants' discriminatory denials of CEF's requested access is unconstitutional and should be enjoined.

ARGUMENT

I. CEF IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

To prevail on a motion for preliminary injunction, CEF must show (1) that it is likely to succeed on the merits of its claim, (2) that it will suffer irreparable harm absent injunctive relief, (3) that the balance of the equities favors injunctive relief, and (4) that a preliminary injunction is in the public interest. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Baird v. Bunta*, 81 F.4th 1036, 1040

(9th Cir. 2023). "It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury," because a showing of a likelihood of success on that factor "usually demonstrates he is suffering irreparable harm no matter how brief the violation" and that showing necessarily "tips the public interest decidedly in his favor." *Baird*, 81 F.4th at 1040. The reason for that is simple: "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (citations omitted). CEF easily satisfies all four elements, and the preliminary injunction should issue immediately.

A. CEF Is Likely To Succeed On The Merits Of Its Claims Under The First Amendment.

1. Defendants' Policies Represent a Presumptively Unconstitutional Prior Restraint on CEF's Speech.

It is axiomatic that prior restraints are highly suspect and disfavored. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Indeed, "[a]ny system of prior restraints of expression comes to this Court bearing *a heavy presumption against its constitutional validity*." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citing cases) (emphasis added). "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965).

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context

> of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. *[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition*.

Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 165-66 (2002) (emphasis added); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) ("[w]hile this freedom from previous restraint . . . upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the [First Amendment]."); *Carroll v. President & Comm'r Princess Anne, et al.*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect from abridgment.").

"While prior restraints are not unconstitutional *per se*," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), the Supreme Court has "identified two evils that *will not be tolerated* in such schemes." *Id.* The first intolerable evil is "a scheme that places unbridled discretion in the hands of a government official [and] may result in censorship." *Id.* at 225-26. The second is "a prior restraint that fails to place time limits within which a decision maker must issue the license." *Id.* at 226. A prior restraint scheme "avoids constitutional infirmity *only* if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman*, 380 U.S. at 58 (emphasis added). Defendants' policies are doubly

impermissible because they include both intolerable schemes and contain no procedural safeguards. Thus, the Use Policies do not avoid a required finding of constitutional infirmity. The preliminary injunction should issue.

a. Defendants' Use Policies unconstitutionally grant unbridled discretion to school officials.

The danger inherent in the viewpoint discriminatory policies and application here is only increased by the unbridled discretion inherent in Defendants' policies. "When a city allows an official to ban [speech] in his unfettered control, it sanctions a device for suppression of free communication of ideas." *Saia v. People of State of N.Y.*, 334 U.S. 558, 562 (1948). "[E]ven if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, *it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion*." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988) (emphasis added). The danger of viewpoint discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. This is precisely why *"[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official*." *Forsyth Cnty.*, 505 U.S. at 133 (emphasis added).

Here, Defendants' Use Policies unconstitutionally vest unbridled discretion in the hands of those who make decisions concerning access to school facilities. Hawaii statute §302A-1148 provides that Defendants "may issue licenses" "as deemed appropriate by the department," and requires Defendants to adopt rules "as deemed necessary." H.R.S. §302A-1148(a). There are no standards or guideposts to cabin the discretion of what is either appropriate or necessary. What is appropriate is left to officials to determine for themselves. After outlining the general requirement that an application be submitted, the administrative rules state only that the application "shall be approved or disapproved by the school's principal or a designee." Haw. Code R. §8-39-4(a). Again, no standards or guideposts are outlined as to how the principal or a designee make the approval decision. Finally, any organization receiving a determination of disapproval is required to submit any appeal to the district superintendent, and the rule states only that "[t]he district superintendent's decision shall be final." Haw. Code R. §8-39-14. It states nothing other than that the superintendent's decision is final, but provides no guidance as to how the superintendent is to adjudicate or determine any appeal.

In all of Defendants' Use Policies, there is nothing to limit the discretion of school officials to determine whether to grant CEF or any other applicant constitutionally required equal access to school facilities. "Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or

illegitimate criteria are far too easy." *City of Lakewood*, 486 U.S. at 758. Failing to provide explicit guideposts to determine the availability of access and the cost of access for community organizations wishing to use Defendants' facilities grants Defendants officials unbridled discretion. *See Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1070 (4th Cir. 2006) ("speech is not to be selectively permitted or proscribed according to official preference"); *id.* (failing to provide adequate limitations on an official's decision provides "a virtual prescription for unconstitutional decision making").

b. Defendants' Use Policies fail to set adequate time limitations for decisions on applications.

"A licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *FW/PBS*, 493 U.S. at 226. As such, permitting schemes, such as the Defendants' Use Policies, must have express time constraints on the official tasked with enforcing it. *Id.* ("*a prior restraint that fails to place limits on the time in which the decisionmaker must issue the license is impermissible*" (emphasis added)). "Time limits upon a prior restraint allay 'the risk of indefinitely suppressing permissible speech.'" *American Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1253 (10th Cir. 2000) (quoting *FW/PBS*, 493 U.S. at 227). Defendants' Use Policies fail to provide adequate time limitations on Defendants' officials. Defendants' Use Policies thus fail to satisfy the Supreme Court's

demanding standards for prior restraint policies. Where, as here, Defendants' Use Policies do "not include a deadline for [government] officials to grant or deny" an application, they are unconstitutional prior restraints. *Real v. City of Long Beach*, 852 F.3d 929, 935 (9th Cir. 2017). The failure to include strict time limits for decisionmakers is a "facial flaw" that "fails to meet the requirements of the First and Fourteenth Amendments." *Baby Tam & Co., Inc. v. City of Las Vegas*, 199 F.3d 1111, 1115 (9th Cir. 2999).

Defendants' application of their Use Policies demonstrates the constitutional invalidity of the failure to impose strict time limits. After being initially denied equal access to facilities at Nu'uanu Elementary School, CEF submitted a letter from counsel on February 27, 2023, outlining the unequal and unconstitutional treatment. (V. Compl. ¶52.) Nearly one year has passed, and *Defendants still have not responded to that letter*. (*Id.* ¶53.) At Lincoln Elementary School, CEF again submitted multiple requests for equal access in December 2022 and *never received a response concerning its last application*. (*Id.* ¶59.) Counsel for CEF again sent a letter to Defendants concerning the denial in February 2023. (*Id.* ¶60.) *Defendants have still not responded to CEF's application or counsel's letter*. (*Id.* ¶61.) At Waimea Elementary, CEF again submitted an application and sent letters from counsel, beginning in August 2022. (*Id.* ¶¶62-65.) *Defendants have still not responded to CEF's letter.* (*Id.* ¶ 66.) At Kalihi Waena Elementary, beginning in

December 2022, the same thing—CEF submitted an application and letter from counsel. (*Id.* ¶¶67-70.) *Defendants have still not responded to CEF's letter or application*. (*Id.* ¶71.)

As is evident from the litany of examples above, Defendants' unconstitutional Use Policies require no timely decision, and Defendants hide behind the cloak of that censorship scheme to repeatedly refuse to issue any timely decisions. For that reason alone, it fails the demanding First Amendment test. "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *FW/PBS*, 493 U.S. at 226. The Use Policies must be enjoined.

2. Defendants' Policies Unconstitutionally Discriminate against CEF's Viewpoint.

A viewpoint-based restriction on private speech has never been upheld by the Supreme Court or any court *in any type of open forum*. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health*, 564 U.S. 552, 571 (2011). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 106 (2001) ("The restriction must not discriminate against speech on the basis of viewpoint."). "When the government targets not subject matter, but

particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. In fact, viewpoint-based regulations are always unconstitutional. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'" (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) ("any restriction based on the content of the speech must satisfy strict scrutiny . . . and restrictions based on viewpoint are prohibited.").

a. Defendants' Use Policies discriminate against CEF's religious viewpoint.

Where, as here, Defendants have opened up a limited public forum for community organizations to use District facilities (V. Compl. ¶¶20-33), groups cannot be excluded from the forum based upon a religious viewpoint. *Good News Club*, 533 U.S. at 106-07. In *Good News Club*, the school district excluded CEF from its after-school activities forum based upon CEF's religious viewpoint. *Id.* at 107. The district specifically found CEF's activities to be "religious in nature—the equivalent of religious instruction itself," and thus excluded CEF based upon that determination. *Id.* at 108. Nevertheless, as Defendants' here, the district in *Good News Club* permitted community organizations such as the Scouts to use district facilities. *Id.*

The Supreme Court held that it was "quite clear that [the district] engaged in viewpoint discrimination when it excluded [CEF] from the afterschool forum." *Id.* at 109. "We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id.* at 111. If a school district permits the Scouts to use its facilities, it must permit CEF to use its facilities on an equal basis. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.* Indeed, "*speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the grounds that the subject is discussed from a religious perspective*." *Id.* at 112 (emphasis added). Thus, the exclusion of CEF from Defendants' facilities for its religious viewpoint is unconstitutional.

Precedent affirming these entrenched principles, including binding precedent from the Ninth Circuit, is also legion. *See, e.g., Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (8th Cir. 2012) (excluding CEF from the district's facilities use program was unconstitutional viewpoint discrimination); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006) (failing to give CEF access to district

facilities on an equal basis with other nonreligious groups amounts to viewpoint discrimination); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004) (excluding CEF from otherwise available forum because of its religious perspective was unconstitutional viewpoint discrimination); *Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002) (excluding religious groups from otherwise available forum represents viewpoint discrimination); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279-80 (10th Cir. 1996) (discriminating against a religious group's speech in a government-opened forum is impermissible viewpoint discrimination); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994) ("we conclude that the Amended Use Policy results in viewpoint discrimination because it denies the club access based on the club's religious perspective on an otherwise includible subject matter").

Here, Defendants have made it abundantly clear that CEF's religious viewpoint stands as the basis for Defendants' exclusion of CEF from the otherwise available forum. (*See, e.g.*, V. Compl. ¶¶49-50, 57.) In fact, in some instances—namely at Nu'uanu Elementary and Lincoln Elementary—Defendants have explicitly stated that it was CEF's religious viewpoint that prevented it from gaining access. (*Id.* ¶49 ("CEF received a letter from Principal Uemae denying CEF's application for a Good News Club immediately after school, and informed CEF that it was not permitted to host its after-school program *because it was religious*").) But,

even if Defendants had not made the religious discrimination evident by their own words, Defendants' actions speak loud enough. For multiple years and at multiple facilities, Defendants have permitted a host of similarly situated nonreligious organizations to host after-school programs at Defendants' facilities while prohibiting CEF from gaining equal access. (*See, e.g, id.* ¶¶ 51, 64, 69.) Indeed, Defendants have granted access to the Girl Scouts, Cub Scouts, Boy Scouts, YMCA, Bricks 4 Kidz, Mokichi Okada Association Art for Kids, Parkour, Advantage Sports Academy soccer, Sports Jam Academy programs, and Ukelele Pa'ani to use district facilities (*id.* ¶¶ 51, 64, 69 & Ex. 9), while simultaneously denying CEF access to those same facilities. The sole difference between these groups is CEF's religious viewpoint, and thus the disparate treatment alone demonstrates the viewpoint discrimination. Defendants' "exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

b. The unequal financial burdens imposed by Defendants' Use Policies on CEF discriminates against viewpoint.

The Supreme Court's decision in *Good News Club* is equally applicable to situations involving economic barriers to access. *Rosenberger* made clear that the First Amendment's requirement of equal access applies with equal force to discrimination in the application of facilities use fees and fee waivers. *Rosenberger*,

515 U.S. at 828-29. There, a religious student organization was denied access to a student activity fee forum that was available to organizations for publications. 515 U.S. at 823-25. Religious activity, defined as, "that which primarily promotes or manifests a particular belief in or about a deity or ultimate reality," was banned from receiving funds. *Id.* at 825. Wide Awake Productions, a qualified student organization, produced a publication offering a Christian perspective on both personal and community issues, especially those issues that impact college students. *Id.* at 826. Like CEF here, Wide Awake was the only group denied access to the forum, and the Supreme Court held that "*the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression*." *Id.* at 828 (emphasis added).

The Fourth Circuit's decision in *Child Evangelism Fellowship of S.C.* is also instructive. *See Child Evangelism Fellowship of S.C.*, 470 F.3d at 1062. There, the school district created a forum for community organizations to use district facilities for programs of interest to students. *Id.* at 1064-65. The district created a fee schedule for the use of school facilities but reserved the right to waive such fees for certain organizations. *Id.* Under the fee waiver provision, the district waived fees for such organizations as the Boy Scouts, Girl Scouts, and other similar organizations. *Id.* at 1065. In fact, as Defendants do here, the district created a policy that was specifically designed to permit only those organizations for which it wished to waive fees to

meet the definition of those groups permitted to obtain a fee waiver. *Id.* at 1066. CEF requested numerous times to obtain a fee waiver and equal treatment under the policy, but was denied such a waiver and forced to pay facilities use fees. *Id.* The Fourth Circuit found that the district's application of the fee waiver system "cannot be squared" with the prohibition on viewpoint discrimination. *Id.* at 1069.

Here, on their face, Defendants' Use Policies explicitly discriminate against religious organizations in the application of fees. (V. Compl. ¶¶29-31.) Defendants' Use Policies state that fees are "determined by the type of user." Haw. Code R. §8-39-5(c). (V. Compl. ¶28.) *Some* non-profit community organizations are permitted to use Defendants' facilities with no rental fee. (*Id.* ¶30 (quoting Haw. Code R. §8-39-5(c)(1)(B)).) But, "churches" or any organization that might collect an offering for the ministry are charged a fee. (*Id.* ¶31 (quoting Haw. Code R. §8-39-5(c)(1)(C)).) The imposition of discriminatory user fees is expressly written into the policy, and makes it explicitly viewpoint discriminatory.

Whether the discrimination against viewpoint is based upon a complete denial of access, a partial denial of access, or – as here – an unequal economic barrier to access, the constitutional prohibition is constant. Equal access means equal treatment. If the First Amendment prohibits CEF from being denied equal access to Defendants' facilities on the account of its religious viewpoint, it likewise prohibits the imposition of a discriminatory fee on account of its viewpoint. *See Simon &*

Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers" based solely on the message that speaker communicates.).

3. Defendants' Policies Unconstitutionally Discriminate against Content.

Content-based restrictions on speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (same); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content based regulations are presumptively invalid."). As such, Defendants' repeated denials of CEF's requested access can only be upheld if Defendants "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). And, it is Defendants' burden to demonstrate that its Use Policies survive constitutional scrutiny, *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (noting that the government bears the burden on whether its policies survive First Amendment scrutiny), and "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

"It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000) (emphasis added). Indeed, the notion that a content-based restriction on speech is presumptively unconstitutional is "so engrained in our First Amendment jurisprudence that last Term we found it so 'obvious' as to not require explanation." *Simon & Schuster*, 502 U.S. at 115-16. "*Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under First Amendment*." *Id.* at 116 (quoting *Reagan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)) (emphasis added). Here, Defendants' Use Policies are abhorrent to the First Amendment because they serve no compelling government interest and are not narrowly tailored.

a. There is no compelling interest in discriminating against CEF's speech.

Defendants have no interest whatsoever, much less a compelling one, to exclude civic and educational speech from a religious perspective when Defendants permit such speech from a nonreligious perspective. Defendants may attempt to feign an interest in avoiding Establishment Clause concerns, but that argument is foreclosed by entrenched Supreme Court precedent. "It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, *including groups that use meeting rooms for sectarian activities, accompanied by some devotional*

exercises." *Rosenberger*, 515 U.S. at 842 (emphasis added); *see also Good News Club*, 533 U.S. at 114-15. The same is true of Defendants' facilities that have been opened to a wide spectrum of non-profit organizations for the benefit of students. There is simply no compelling interest—or even a rationale one—for permitting similarly situated organizations such as the Scouts while prohibiting CEF.

Moreover, "a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their neutrality towards religion." *Id.* at 839. Such a "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, *including religious ones*, are broad and diverse." *Id.* (emphasis added). The Establishment Clause simply provides no justification for suppressing CEF's religious viewpoint in a forum that is available to similarly situated organizations providing similar programs to students from non-religious perspectives. *See id.* (noting that the Supreme Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching governmental programs neutral in design"). In fact, Defendants' Use Policies and actions violate the Establishment Clause.[1] Defendants' Use Policies and actions are

[1] The Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citing *Zorach v. Clauson*, 343 U.S. 206 (1952)); *Hobbie v.*

not and cannot be justified by any government interest, let alone a requisite compelling interest.

b. Defendants' Use Policies and application are not narrowly tailored or the least restrictive means.

Even if Defendants could articulate a compelling interest for excluding religious speech, which they cannot, Defendants' Use Policies would still fail strict scrutiny because they are not narrowly tailored to achieve any compelling government interest. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Defendants' unconstitutional and discriminatory treatment of CEF and its concomitant burdens on CEF's constitutionally protected speech are substantially broader than any conceivable government interest could justify. A narrowly tailored regulation of speech is one that achieves the government's interest "without

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Unemployment Appeals Com., 480 U.S. 136, 144-45 (1987) ("[T]he government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). "Indeed, the message is one of neutrality rather than endorsement; *if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility towards religion*." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990) (emphasis added). Defendants' Use Policies, both facially and as applied, demonstrate explicit hostility to religion in violation of the Establishment Clause.

unnecessarily interfering with First Amendment freedoms." *Sable Commc'ns*, 492 U.S. at 126. Here, despite permitting a host of nonreligious organizations access to Defendants' facilities, including the Girl Scouts, Cub Scouts, Boy Scouts, YMCA, Bricks 4 Kidz, Mokichi Okada Association Art for Kids, Parkour, Advantage Sports Academy soccer, Sports Jam Academy programs, and Ukelele Pa'ani (V. Compl. ¶¶ 51, 64, 69 & Ex. 9), Defendants have excluded CEF from that same forum for no other reason than its religious viewpoint. That unnecessarily interferes with CEF's protected speech and therefore requires a finding that Defendants' Use Policies are not narrowly tailored.

B. Defendants' Policies Violate CEF's Right To Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment makes it unconstitutional for any state to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the government action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Indeed, the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

"Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech,

such restrictions differentiate between types of speech." *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992). Indeed,

> Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. *And it may not select which issues are worth discussing or debating in public facilities*. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. *Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on this basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone*.

Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (emphasis added); *see also Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (quoting *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring) (noting that differentiating between groups who may use a forum available for expression based entirely on what the groups say is "censorship in its most odious form" and "*invidious discrimination forbidden by the Equal Protection Clause* of the Fourteenth Amendment" (emphasis added)).

In *Mosley*, a local ordinance prohibited picketing or demonstrating within a specified distance of a school unless it was a peaceful picket concerning a labor dispute with the school. *Mosley*, 408 U.S. at 93. A local resident had been picketing outside of the local high school for a long time prior to the enactment of the ordinance because of what he perceived as racial discrimination taking place in the

school. *Id.* He contacted the police department after the ordinance was passed and was told that he would be arrested if he continued his picketing activities. *Id.* He brought suit challenging the distinction between peaceful picketing involving labor disputes and otherwise peaceful picketing as a violation of equal protection. *Id.* at 94. The Court required distinctions involving First Amendment activities to be "carefully scrutinized" and narrowly "tailored to serve a substantial government interest." *Id.* at 99. Because the discrimination was based solely on the content of the message being expressed, it could not withstand strict scrutiny and was a violation of equal protection. *Id.* at 102.

In *Carey*, the Court again faced a regulation of speech, which discriminated on the basis of the category of speech, in a forum otherwise open for expressive activities. *Carey*, 447 U.S. at 457. As in *Mosley*, the regulation was problematic because the ability to engage in First Amendment activities was "dependent solely on the message being conveyed." *Id.* at 461. Because equal protection "mandates that legislation be finely tailored to serve substantial government interests," any classifications or distinctions that the government creates must be "carefully scrutinized." *Id.* at 461-62. The Court described the critical inquiry as whether regulations aimed at speech advance the government objective in a manner consistent with the demands of equal protection and held that it violated equal

protection "because the statute discriminates among pickets based on the subject matter of their expression." *Id.* at 471.

Here, as in *Mosley* and *Carey*, Defendants' policies create two distinct classes concerning who is permitted to speak. Defendants explicitly stated that CEF's religious viewpoint stands as the basis for Defendants' exclusion of CEF from the otherwise available forum. (*See, e.g.*, V. Compl. ¶¶ 49-50, 57.) In fact, in some instances—namely at Nu'uanu Elementary and Lincoln Elementary—Defendants have explicitly stated that it was CEF's religious viewpoint that prevented it from gaining access. (*Id.* ¶ 49 ("CEF received a letter from Principal Uemae denying CEF's application for a Good News Club immediately after school, and informed CEF that it was not permitted to host its after-school program *because it was religious*").) Defendants' discriminatory treatment of CEF as compared to similarly situated nonreligious organizations likewise proves the constitutional infirmity. Defendants have permitted a host of similarly situated nonreligious organizations to host after-school programs at Defendants' facilities while prohibiting CEF from gaining equal access. (*See, e.g*, *id.* ¶¶ 51, 64, 69.) Indeed, Defendants have permitted the Girl Scouts, Cub Scouts, Boy Scouts, YMCA, Bricks 4 Kidz, Mokichi Okada Association Art for Kids, Parkour, Advantage Sports Academy soccer, Sports Jam Academy programs, and Ukelele Pa'ani to use district facilities (*id.* ¶¶ 51, 64, 69 & Ex. 9), while simultaneously denying CEF access to those same facilities. That

action alone demonstrates the equal protection violation. Defendants' Use Policies and their unconstitutional application of those policies must be enjoined.

II. CEF HAS SUFFERED, IS SUFFERING, AND WILL CONTINUE TO SUFFER IMMEDIATE AND IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

In considering a preliminary injunction request in the Ninth Circuit, "[a] 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief."' *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) (cleaned up)). This is because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *A.P. v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (same). Moreover, "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (quoting *Kikumara v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). The reason for that is simple: "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up). Here, CEF has attempted for several years to obtain constitutionally dictated equal access to Defendants' otherwise available facilities. (V. Compl. ¶¶ 34-75.) The deprivation of equal access, to which CEF is unquestionably entitled under the First Amendment, constitutes per se irreparable harm.

III. CEF SATISFTIES THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

"When, like here, the nonmovant is the government, the last two *Winter* factors merge." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023). The reason for that is simple: "We have consistently recognized the 'significant public interest' in upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Sammartano v. First Jud. Dist. Ct., in & for Cnty. of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002)). *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("[T]he public interest favors the exercise of First Amendment rights"). Simply put: "it is always in the public interest to prevent the violation of a party's constitutional rights." *Baird*, 81 F.4th at 1040 (quoting *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022)). Because CEF has shown its likelihood of success on the merits and irreparable harm from Defendants' First Amendment violations, "the balance of the equities and the public interest thus tip sharply in favor of enjoining" Defendants' policies. *Klein*, 584 F.3d at 1208.

CONCLUSION

Because Defendants' Use Policies unconstitutionally discriminate against CEF's viewpoint, represent unconstitutional prior restraints that impermissibly vest Defendants and their officials with unbridled discretion, and impermissibly violate CEF's right to free speech, the preliminary injunction should issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.4(e), I hereby certify that the foregoing document was prepared in accordance with the requirements of Local Rule 7.4(b) and, not counting the items excluded by Local Rule 7.4(d), contains 6,249 words.

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