SIDLEY AUSTIN LLP
David L. Anderson (SBN 149604)
dlanderson@sidley.com
555 California Street, Suite 2000
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

THE PORRAZZO LAW FIRM
Michael H. Porrazzo (SBN 121260)
mhporrazzo@porrazzolaw.com
30212 Tomas, Suite 365
Rancho Santa Margarita, CA 92688
Telephone: (949) 348-7778
Facsimile: (949) 209-3514

SIDLEY AUSTIN LLP
Gordon D. Todd*
gtodd@sidley.com
Mackenzi J.S. Ehrett*
mehrett@sidley.com
Alaric R. Smith*
alaric.smith@sidley.com
Aaron P. Haviland*
ahaviland@sidley.com
Matthew H. Simpson*
msimpson@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

*Admitted pro hac vice

Attorneys for Plaintiffs Capital Christian Center and Capital Christian School

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO

Capital Christian Center and Capital Christian School,

Plaintiffs,

vs.

California Interscholastic Federation; California Interscholastic Federation, Sac-Joaquin Section Executive Committee; Michael S. Garrison, Commissioner of California Interscholastic Federation, Sac-Joaquin Section; and Kevin Swartwood, President of California Interscholastic Federation, Sac-Joaquin Section Executive Committee,

Defendants.

Case No. 2:22-cv-00721-JAM-KJN

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Assigned to: Judge John A. Mendez

Date: July 12, 2022
Time: 1:30 p.m.
Place: United States District Court, Eastern District of California, 501 I Street, Courtroom 6, 14th floor, Sacramento, California 95814

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This lawsuit does not challenge the legitimacy of state and local COVID-19 public health orders, nor does it challenge Defendants' duly enacted bylaws. Rather, Plaintiffs filed suit and seek injunctive relief because Defendants, in wielding their authority over interscholastic athletic competitions, enforced those orders and bylaws so as to single out and sanction exclusively four Christian high schools for conduct similar to other schools that went unpunished. The Supreme Court has clearly, and repeatedly, emphasized that government action that treats religious activity less favorably than comparable secular activity is impermissible. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). Here, Defendants admit that they were aware that players and coaches from both religious schools and secular schools were participating in a club football league, *see* Defs.' Opp'n Br. [ECF 22] ("Opp.") at 6:6–7:1 (citing Declaration of Michael S. Garrison [ECF 22-1] ("Garrison Decl.") ¶ 13), yet punished only the former. Because Defendants' own admissions confirm that their sanction scheme treated conduct by religious schools less favorably than comparable conduct by secular schools, and because without injunctive relief plaintiffs will suffer irreparable injury, injunctive relief is warranted.

FACTUAL BACKGROUND

The Parties generally agree on the facts underlying this controversy. In early 2020, the novel coronavirus precipitated global shutdowns and stay at home orders, including in the State of California and Sacramento County. Pls.' Mem. in Supp. of Mot. for Prelim. Inj. [ECF 14-1] ("PI Br.") at 4:4–9; Opp. at 4:23–5:24. In California, the COVID-19 stay at home orders gradually gave way to restrictions on various activities, in the interest of promoting public health and safety. PI Br. at 4:4–9; Opp. at 5:21–24. Among other things, applicable COVID-19 restrictions suspended interscholastic athletic competitions, including interscholastic high school football. PI Br. at 4:8–9; Opp. at 5:21–24. By early 2021, high school athletes had lost an entire year of interscholastic competition, and it appeared that they would lose the 2020-2021 athletic season as well. PI Br. at 4:8–9; Opp. at 5:21–24. Club football teams formed throughout California to fill the void. PI Br. at 4:19–5.4 & n.1. One such league, the California Association of Private Sports ("CAPS"), formed in the Sacramento area. PI Br. at 5:8–14; Opp. at 6:9–12.

CAPS began with eleven teams, whose students hailed from numerous public and private high schools. PI Br. at 6:6–9. It included the Cap City Cougars, the Castle Student Athletic Academy, the Knight Outdoor Fitness and Skills Academy, the Misfits, the Modesto Renegades, the Raider Athletic Club, the Reaching High Cav's, the West City Warriors, and the Wild Dawgs. Declaration of Aaron Garcia [ECF 14-5] ("Garcia Decl.") ¶¶19, 21; Declaration of Michael Garrison [ECF 22-1] ("Garrison Decl.") ¶ 14. CAPS entered facility leases with four area private schools: Capital Christian High School ("CCHS"), Ripon Christian High School, Stone Ridge Christian High School, and Vacaville Christian High School. PI Br. at 5:21–27. During February and March 2021, every single CAPS team played club football games against other CAPS teams at the stadium facilities acquired by the leases. *Id.* at 7:4–11.

Shortly before the start of the CAPS Season, Defendants began to investigate whether participation in CAPS violated applicable State and County public health orders or Defendants own regulations. PI Br. at 7:14–8:21; Opp. at 5:26–6:23. Following that investigation, Defendants, apparently convinced that CAPS violated applicable public health orders and their own rules, and regulations, referred nine schools (both secular and religious) for possible sanctions on the basis that they "participated in private club football" in violation of Defendants' rules and regulations.[1] Tim Wong Decl. Ex. 11 [ECF 14-4] (Sanction Agenda); *see also* PI Br. at 9:11–16. When Defendants' sanction decision was handed down, only four religious schools—including CCHS—received sanctions. PI Br. at 10:15–25; Wong Decl. Ex. 13 [ECF 14-4] (Sanction Press Release); Opp. at 7:9–10. At the time, Defendants justified their sanction scheme on the grounds that the sanctioned schools "participated in the sport of football when interscholastic football competition was prohibited by CIF and CIF-SJS bylaws and State orders, regulations, and guidance." Wong Decl. Ex. 13 [ECF 14-4] (Sanctions Press Release). Similarly, Defendants' sanction letter to CCHS documented that Defendants imposed sanctions on CCHS because its "football program participated in the [CAPS] club football season during . . . February and March 2021 in contravention of the orders, regulations, and/or guidance of the Office of the Governor, the California Department of Public Health ("CDPH"), the California Interscholastic Federation ("CIF"), and the California Interscholastic Federation, Sac-Joaquin Section ("CIF-SJS"). Wong Decl. Ex. 12 at 1 [ECF 14-

[1] CCHS does not assert that Defendants erred in failing to seek sanctions or otherwise penalize schools on the ground that they fell outside of Defendants' geographic jurisdiction. *See* Opp. at 6:12–13.

4]. As a result, the CCHS football team is currently barred from 2022-2023 football post-season. PI Br. at 10:8–14; Wong. Decl. Ex. 12 at 9 [ECF 14-4] (CCHS Sanction Letter).

At this point, the Parties' perspectives diverge. Defendants argue that their sanction scheme was warranted because CCHS and the other Christian schools acted more egregiously than the other schools whose students and athletes played in CAPS. Opp. at 11:15–26. They point to the fact that four sanctioned schools leased facilities to CAPS or provided equipment, and to the presence of "cheerleaders and other trappings associated with that member's high school" at the league games. *Id.* at 1:18–19.

But the evidence demonstrates that Defendants' justifications have little to do with the orders and rules Defendants purport to have been enforcing, and are nothing more than pretextual excuses to cover their discriminatory investigation and enforcement activities. *See infra* at 9–15; PI Br. at 15:21–20:18. By doling out sanctions to Christians schools whose students and coaches participated in CAPS, while ignoring identical conduct from secular schools, Defendants have violated CCHS' constitutional rights to Free Exercise and Equal Protection. A preliminary injunction staying Defendants' bar on CCHS's ability to play post-season football games is necessary to preserve the status quo while CCHS litigates its claims under the First and Fourteenth Amendments, and is therefore warranted. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

ARGUMENT

Defendants' Opposition fundamentally misconstrues Plaintiffs' legal claims for religious discrimination in violation of the First and Fourteenth Amendments, and is rife with irrelevant arguments. Defendants do not dispute that they penalized four Christian schools whose students and coaches participated in CAPS, while taking no action against public schools whose players and coaches also played in the CAPS. Nor could they. Rather, Defendants rest their opposition on the premise that the non-sanctioned secular schools did not "host[] games in their facilities utilizing their equipment with cheerleaders and other trappings associated with that member's high school." Opp. at 11:17–19. This defense elides Defendants' contemporaneous grounds for imposing sanctions, that the four sanctioned schools "participated in the sport of football when interscholastic football competition was prohibited by CIF and CIF-SJS bylaws and State orders, regulations, and guidance." Wong. Decl. Ex. 13 [ECF 14-4] (Sanctions Press Release); *see also* Wong Decl. Ex. 12 [ECF 14-4] (CCHS Sanctions Letter). Had CCHS

leased its stadium, while its students and coaches stayed home, there would have been no sanctions and we would not be here today. Defendants imposed sanctions because CCHS students and coaches "participated in the sport of football" when such competitions were prohibited, Wong Decl. Ex. 13 [14-4] (Sanctions Press Release), as did every other coach and student who participated in CAPS. Because Defendants did *not* treat comparable activity by secular and religious schools equally, CCHS is likely to succeed on the merits of its First Amendment Religious Discrimination and Fourteenth Amendment Equal Protection claims. *Tandon*, 141 S. Ct. at 1296.

I. Defendants' Sanction Scheme is Subject to—and Fails—Strict Scrutiny.

Defendants' assertion that strict scrutiny does not apply to their sanction scheme betrays a fundamental misunderstanding of Free Exercise law. *See* Opp. at 11:28–12:17. The threshold question in any Free Exercise claim is whether the state action is neutral and generally applicable. *Tandon*, 141 S. Ct. at 1296; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. State action that preferences secular activity over comparable religious activity fails these tests and therefore triggers strict scrutiny. *Tandon*, 141 S. Ct. at 1296; *Fulton*, 141 S. Ct. at 1877. To survive, the state action must be narrowly tailored to serve a compelling state interest. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and government actions that target "religious conduct for distinctive treatment" rarely withstand its withering review, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Measured against this standard, Defendants' sanction scheme must fail.

A. Strict Scrutiny Applies to Defendants' Sanctions.

Defendants contend that strict scrutiny does not apply because CCHS has not identified any "bylaws, ordinances or statute" to which the Court may apply strict scrutiny.[2] Opp. at 12:11–17. But this novel interpretation of strict scrutiny would—bizarrely—allow state actors to circumvent constitutionally secured rights by not writing down their discriminatory rules or regulations, or enforcing existing laws unevenly, but instead simply making up and enforcing new discriminatory standards. That is not the law,

[2] Defendants are correct that CCHS does not ask the Court to apply strict scrutiny to either California and Sacramento County's COVID-19 public health orders or to the CIF's bylaws. *See* Opp. at 12:11–14. Indeed, CCHS made clear in its opening brief that its likelihood of success does not turn on whether Defendants acted within the scope of their authority to enforce State and County COVID-19 public health orders when they decided to issue sanctions. PI Br. at 17:18–18:26.

and Defendants cite no legal authority in support of their novel position. Nor could they, because it is well established that government actions, including "individualized governmental assessments" are subject to strict scrutiny. *Emp. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 884 (1990); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (the government may neither "impose regulations that are hostile to the religious beliefs of affected citizens [nor] *act* in a manner that passes judgement upon or presupposes the illegitimacy of religious beliefs and practices." (emphasis added)); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) ("Cases before and after *Smith* have continued to apply a strict scrutiny test to . . . individualized assessment questions."). And here, in any event, Defendants individually assessed which schools they would sanction and which schools they would not sanction. *See* Wong Decl. Exs. 11 (Sanction Agenda), 13 (Sanctions Press Release) [ECF 14-4]. Defendants offer no legal justification for their position that the court cannot apply strict scrutiny to that assessment.

Defendants' argument is further misguided because the sanctions decision itself *is* a written state action which may be subjected to strict scrutiny. *See* Wong Decl. Exs. 12 (CCHS Sanctions Letter), 13 (Sanctions Press Release) [ECF 14-4]; *see also, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (decision by the Colorado Civil Rights Commission violated the Free Exercise Clause); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (decision to deny a public benefit to a church because of religion triggered strict scrutiny under the Free Exercise Clause); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1019–21 (9th Cir. 2021) (directive issued by school district to football coach restricting his religious conduct triggered strict scrutiny under the Free Exercise Clause); *Manning v. Powers*, 281 F. Supp. 3d 953, 960–62 (C.D. Cal. 2017) (special conditions of parole issued to a felon triggered strict scrutiny under the Free Speech, Free Exercise, and Establishment Clauses). CCHS asks the Court to assess Defendants' sanction scheme, as it is revealed through (1) their published agenda announcing its intent to consider sanctions for schools whose students and coaches who "participated in private club football," Wong Decl. Ex. 11 [ECF 14-4] at 1; (2) their sanctions letter sent to CCHS, citing CCHS for its "football program['s] participat[ion] in the [CAPS] club football season," Wong Decl. Ex. 12 [ECF 14-4] at 1; and (3) their published press release announcing that it had decided to levy sanctions on exclusively religious schools because they had "participated in the sport of football when interscholastic football competition was

prohibited[.]" Wong Decl. Ex. 13 [ECF 14-4]. Taken together, these documents demonstrate that religious schools were treated differently from secular schools, when students and coaches from both types of schools engaged in comparable activity (participation in CAPS football), but Defendants chose to sanction only religious schools, which is, at the very least, "circumstantial evidence of a discriminatory intent," thereby triggering strict scrutiny. *Cottonwood Christian Center*, 218 F. Supp. 2d at 1225 (granting injunctive relief); *see also Lukumi Babalu*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.").

B. Defendants' sanction scheme fails strict scrutiny.

Defendant Garrison admits he was aware that students and coaches from many public and private schools participated in CAPS. Garrison Decl. [ECF 22-1] ¶¶ 13–14. Indeed, he has no choice but to admit as much, given that Defendants' sanction agenda included both public and private-religious schools for possible sanctions. Wong Decl. Ex. 11 (Sanctions Agenda) [ECF 14-4]. That admission alone confirms that, as a matter of law, Defendants' sanction scheme was not neutral and generally applicable, because it treated activity by religious schools less favorably than comparable activity by secular schools. *Tandon*, 141 S. Ct. at 1296; *Fulton*, 141 S. Ct. at 1877. Defendants have not even tried to offer a compelling governmental interest to justify their decision. Instead, they attempt to distinguish the religious schools and secular schools activity, and cite to erroneous "facts" in support of their decision. Neither are compelling.

1. Defendants cite no compelling state interest justifying their discriminatory actions.

As CCHS anticipated, Defendants invoke their authority to enforce State and County COVID-19 public health orders, and to enforce their own bylaws in justification of their conduct. *See* Opp. at 12:20–13:15. In so doing, they ignore CCHS' arguments for why these are insufficiently "rare" bases allowing Defendants to withstand strict scrutiny. *Lukumi Babalu,* 508 U.S. at 546. Defendants rest their case on the (irrelevant) fact that during early 2021, "football competition, either school based, or club based, was strictly prohibited by law." Opp. at 12:21–22. Well enough, but, as CCHS pointed out in its opening brief, if securing public health and safety in compliance with State and County COVID-19 orders prohibiting football games was *genuinely* the motivating factor behind Defendants' sanction scheme, the logical and reasonable action was to sanction *all* schools whose students and coaches participated in CAPS,

or to take action prior to the games taking place. PI Br. at 17:28–18:10. Yet, as Defendants concede, Commissioner Garrison was aware that other coaches and players from schools within his jurisdiction participated the league without the schools receiving subsequent discipline. Opp. at 6:6–7:1.

Defendants' invocation of various CIF-SJS Bylaws fares no better. Opp. at 13:10–15; *see also* Wong Decl. Ex. 12 [ECF 14-4] at 3 (CCHS Sanctions Letter). CIF-SJS's bylaws comprehensively regulate interscholastic athletics in the Section. For each sport, the Bylaws lay out distinct periods within the year, such as a pre- and post-season dead period, "season of sport," out of season, and summer. *See* CIF-SJS Bylaws at 19; Decl. of Mackenzi Ehrett, attaching Ex. B. CIF-SJS regulates what conduct is permitted in each. During dead periods, a member of a coaching staff cannot have any contact with his or her athletes except for weightlifting and conditioning. CIF-SJS Bylaw 504.8. In contrast, a "school employee-coach and his/her student-athletes" may participate in "out-of-season activities sponsored by an agency not under the authority of the State CIF or of the Section," such as the AAU, without implicating CIF rules. *See* CIF-SJS Bylaw 504.7.

Defendants relies principally on two bylaws, Bylaw 504.L (Maximum Number of Seasons) and Bylaw 504.A (Season of Sport), and contend that CCHS violated Bylaw 504.L by participating in more than two seasons of football during the 2020-21 school year. But Bylaw 504.L plainly imposes no such restriction. Bylaw 504.L provides that "each *student*"—not "each school"—"shall be limited to one season of a particular sport for each school year." CIF-SJS Bylaw 504.L (emphasis added). And this rule makes good sense in the context of CIF's regulatory scheme. The CIF delegates authority to "the highest CIF component level in which championship competition is conducted (*i.e.*, State, Section or league)" to designate a specific "season of sport" for each sport. CIF-SJS Bylaw 504.B. Thus, for sports that do not have State level championship competition, the individual CIF Sections are free to set a divergent "season of a sport." For example, girls water polo is played as a fall sport in Northern California, whereas it is a winter sport in Southern California. *See* CIF-SJS Bylaw 504.H. Bylaw 504.L thus precludes a student-athlete from participating in a sport in one region of the State, transferring to a school in a different region, and participating in that same sport a second time in the same school year.[3]

[3] Undoubtedly, this is but one of a myriad of CIF Bylaw designed to deter athletic-related transfers.

More troubling for this justification, CIF-SJS Bylaws explicitly define a "season of sport" as the "period of time which elapses between the first interscholastic contest and the final contest for that particular sport." Bylaw 504.A; *see also, e.g.*, CIF-SJS Bylaw 2101.B ("[E]ach team's season of sport is defined as the first day of practice, as allowed by the Section, until the final contest for the team."). Because the CIF-SJS sets the starting date for interscholastic contests for schools under its jurisdiction, *see* CIF-SJS Bylaw 504.5, the "season" does not start until CIF authorizes, which Plaintiffs concede CIF-SJS had not yet done at the time of CAPS' games. Put simply, the conduct at issue here could not been participation in a second "season" because no interscholastic season was underway. Moreover, assuming the premise of Defendants' argument, the rule again necessarily reaches all students who participated in CAPS—including those at public schools that have gone unpunished. *See* PI Br. at 18:11–26.

This, however, does not render CIF-SJS powerless to regulate out-of-season conduct. As noted, the bylaws regulate what schools, players, and coaches can, and cannot, do throughout the year. S*ee* CIF-SJS Bylaw 504.7–.9. But neither Defendants' decision imposing sanctions, nor their arguments here reference or rely on these rules. Instead, Defendants continue to rely on justifications lacking any support in their bylaws. Such justifications are little more than pretext, which itself evidences a discriminatory motive. *See Cottonwood Christian Center*, 218 F. Supp. 2d at 1225; *cf. Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("[D]iscriminatory animus *may be inferred* from the simple showing of pretext.").

2. Defendants' purported factual distinctions do not save their sanction scheme.

Defendants rely on several "facts" that supposedly set CCHS and the other religious schools who received sanctions apart from the secular schools whose students and coaches joined and played in CAPS. *See* Opp'n at 11:15–20; Garrison Decl. [ECF 22-2] at ¶¶ 19–20. Reliance on these so-called "facts" are either cherry-picked justifications manufactured by Defendants to draw arbitrary lines around Christian schools, or are facts which are, in actuality, demonstrably false. Such pretextual justifications "ring[] hollow" and, taken as a whole, amount to "circumstantial evidence of discriminatory intent" against religious schools. *Cottonwood Christian Center*, 218 F. Supp. 2d at 1225.

a. Facilities Leases

Defendants make much of the fact that the four sanctioned schools leased their equipment and facilities to CAPS. Opp'n at 10:17–21. These leases, of course, were paid for by the league, using dues

paid by all the teams, and the facilities were used by all the teams. As an initial matter, then, Defendants' position that the leases demonstrate that some school's teams but not other schools' teams were illegally playing football is passing strange. Nor have Defendants adduced any evidence to suggest that the amounts paid for the leases, $1500 for CCHS's field (along with insurance and indemnification) was somehow improper.

More fundamentally, Defendants' reliance on the leases is nothing more than pretextual cover.[4] *See Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (in the context of a strict scrutiny analysis, "[t]he government's justification 'must be genuine, not hypothesized or invented post hoc in response to litigation.") (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996))); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (rejecting explanation manufactured for litigation that was not proffered at the time of decision-making). As CCHS has repeatedly pointed out, Defendants have *never* identified any rule making facilities or equipment leases a basis for sanctions, or indeed for a finding that a club team is really a school team. *See* PI Br. at 17:7–10; Wong Decl. Ex. 12 [ECF 14-4] (CCHS Sanction Letter) at 3 (citing CIF Constitution Article 22(B)(2), (B)(5), B(8), (C)(1); CIF Bylaws 105, 504(A), 504(L), and 502 (A), (B)). None of the rules Defendants rely have anything to say about CIF member schools leasing their facilities or equipment to outside groups.

Defendants do not deny that prior to these events, CIF members schools—including CCHS—routinely leased their facilities without any objection from Defendants. PI Br. at 5:17–20 (reciting the Church's prior leases of its athletic facilities, including the football stadium, to outside athletic groups). At the time Defendants imposed their sanctions, they clearly and repeatedly explained that the sanctions were due to the sanctioned schools' participation in CAPS. Wong Decl. Ex. 11 [ECF 14-4] (Sanction Agenda); Wong Decl. Ex. 13 [ECF 14-4] (Sanctions Press Release); *see also supra* at 2–3. Defendants' excuses betray their real—and discriminatory—purpose in imposing sanctions in the manner that they did. *See Cottonwood Christian Center*, 218 F. Supp. 2d at 1225 (explanations for discriminatory actions that "ring[] hollow" are "circumstantial evidence of a discriminatory intent."). Defendants' reliance on the

[4] In his declaration, Garrison acknowledges his awareness of leases between the Misfits and "local city agencies" for field space. Garrison Decl. ¶ 14(f). Yet, ignoring the possibility of some nexus between a local high school and city agency, Garrison deemed his thorough investigation complete without additional inquiry.

leases to justify their scheme simply demonstrates the gerrymandered standards Defendants applied to ensure that only religious schools were subject to their sanction scheme. Thus, the fact that CCHS and other religious high schools leased facilities and/or equipment to CAPS and CAPS' teams is not a ground for sanctions that withstands strict scrutiny and should be rejected. *Lukumi Babalu*, 508 U.S. at 540; *Agudath Israel*, 983 F.3d at 633.

b. Cheerleaders and an Inflatable Tunnel

Defendants' reliance on the presence of cheerleaders and an inflatable tunnel is pure grasping at straws. As to the cheerleaders, Defendant Garrison asserts that he observed "Plaintiffs' cheerleaders" at the February 12, 2021 CAPS game between Cap City and Bakersfield, and at the February 19, 2021 game between Cap City and an unidentified team. Garrison Decl. [ECF 22-1] at ¶¶ 19–20. The record laid before the Executive Committee and again before this Court, however, lacks any evidence as to the school affiliation, if any, of the Cap City cheerleaders. *See* Garrison Decl. [ECF 22-1] ¶ 19 (asserting that he saw "Plaintiffs' cheerleaders" without explaining how he determined who they were). Contrary to Mr. Garrison's claims, whoever they were, the cheerleaders were not wearing CCHS cheerleading uniforms, Garcia Decl. [ECF 14-6] ¶ 26, as confirmed the photographs Garrison himself took while lurking in the elementary school parking lot on February 12, 2021. *See* Decl. of Mackenzi Ehrett, attaching Ex. A. In any event, and even assuming that at least some of the Cap City cheerleaders attended CCHS, Defendants have *never* identified any CIF-SJS bylaw establishing that if a school's cheerleaders cheer for a club team, that club team becomes the school's team.

Defendants' tale regarding the inflatable tunnel borders on the absurd. For one thing, Defendant Garrison isn't even certain what type of an inflatable tunnel he saw, alternatively describing it as an "inflatable Capital Christian helmet" for the February 12 game, and the "inflatable cougar head for the Plaintiffs' high school football program" for the February 19 game. Garrison Decl. [ECF 22-1] ¶¶ 19–20. Defendants also ignore the fact that, while Plaintiffs acknowledge the Cap City team leased CCHS's inflatable cougar head, all CCHS-specific lettering and content was ***covered up*** prior to its use by Cap City. Garcia Decl. ¶ 26. This, if anything, underscores the lengths CAPS went to in order to avoid having its teams confused with interscholastic teams. Ultimately, as with the cheerleaders, Defendants'

handwaving at Cap City's use of an inflatable tunnel prior to games is irrelevant, because they have never cited any rule or Bylaw that justifies imposing sanctions on this basis.

c. High School Affiliated "Trappings"

Next, and least convincingly, Defendants accuse CCHS of fixating on the fact that students and coaches from secular schools participated in CAPS, when there was no evidence that the secular schools checked all the same "offense" boxes as did CCHS. *See* Opp. at 11:15–20. But even here, Defendants' own evidence underscores the perfunctory nature of Defendants' investigation into anyone other than the Christian schools. For example, Garrison admits that until reading the Complaint, he was unaware that students and coaches from Elk Grove High School joined with Grant High School to form the Misfits team despite demanding names and rosters from CCHS. Garrison Decl. at ¶ 14.c. Defendant Garrison has nothing to say at all about his investigation into Pleasant Grove High School, the third public school team whose students joined the Misfits. *Compare* Garrison Decl. at 14.c *with* Garcia Decl. at ¶ 20. Similarly, Defendant Garrison has nothing to say about his investigation (or, non-investigation) into the team the Wild Dawgs, and its nexus with Hughson High School. *Compare* Garcia Decl. at ¶ 21 with Garrison Decl. at ¶ 14 (saying nothing about the CAPS team the Wild Dawgs, or its players and coaches school-affiliation). The very evidence Defendants submit here confirm what CCHS has said all along: that Defendants were fixated on investigating and punishing religious schools with a nexus to CAPS, while turning a blind eye to comparable conduct by secular schools. *See, e.g.*, PI Br. at 12:2–8. What is more, Defendants have *never* cited any rule or regulation that renders the "trappings" of a high school football team a relevant consideration. Defendants have always stated that the purpose of their sanction scheme was to punish schools for their participation in CAPS. If that was, indeed, Defendants' purpose, *every* school whose students or coaches played or coached in CAPS should have been punished.

* * * * *

Ultimately, none of the factual bases Defendants identify to support their decision to sanction religious schools and not secular schools carries the water Defendants pour into it. Far from exercising their authority equitably by sanctioning all schools whose students and coaches had a nexus to CAPS, Defendants gerrymandered their sanction scheme so as to target only religious schools. This is no mere inference; Defendants all but admit as much by asserting that there is "no evidence that other member

schools hosted games in their facilities utilizing their equipment with cheerleaders and other trappings associated with that member's high school." Opp. at 11:17–19. Such a statement is almost farcical, given both its hyper-specificity, and that if such evidence existed, Defendant Garrison was responsible for collecting it, which he could not have done without knowing which schools to investigate. *See supra* at 11 (Defendant Garrison learned about additional secular schools participating in CAPS from the Complaint filed in this matter). Far from satisfying strict scrutiny, the lines Defendants attempt to draw to distinguish the sanctioned-religious schools from the non-sanctioned secular schools boil down to pretextual justifications for its discriminatory and unlawful sanction scheme. *See Randle,* 69 F.3d at 451 (discriminatory animus may be inferred from the simple showing of pretext. Thus, a showing of pretext is evidence which allows a jury to infer discriminatory intent." (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993))); *Tandon*, 141 S. Ct. at 1296 (Free Exercise is violated when state action preferences secular activity over comparable religious activity). Accordingly, Defendants sanction scheme cannot survive strict scrutiny.

3. Defendants' other arguments are equally meritless.

Defendants oppose CCHS' Free Exercise claim on the grounds that the sanction at issue—participation in high school football playoff games—is not a religious activity. Opp. at 10:2–8 ("The conduct at issue has always been playing football."). But Defendants again misapprehend the law. The conduct at issue is not merely playing football. The conduct at issue is whether a school is deserving of Defendants' sanctions by virtue of the fact that its students and coaches played in CAPS while COVID-19 public health orders were in effect—as Defendants repeatedly stated they did. Wong Decl. Ex. 11 [ECF 14-4] (Sanction Agenda); Wong Decl. Ex. 13 [ECF 14-4] (Sanction Press Release). If the answer to that question is yes, Defendants may not draw their enforcement lines in such a way that only religious schools are punished, when other schools engaged in comparable activity. Here, CCHS (a religious school) and other religious schools with a nexus to CAPS, have been treated more harshly than secular schools whose students and coaches also participated in CAPS games while COVID-19 public health orders were in effect. It is the disparate treatment of conduct by religious and secular actors that violates the First Amendment. *Tandon*, 141 S. Ct. at 1296.

Similarly, Defendants' claim that "Plaintiffs do not demonstrate any form of interference . . . with any religious activities or expression" is wrong and misplaced. Opp. at 10:3–4. As CCHS explained in its opening brief, the Church operates the School as an extension of its religious purpose, and the School views its athletic programs as an "extension of the youth ministries provided on [the School's] campus." PI Br. at 14:28–15:10. Furthermore, CCHS' ability to operate its athletic program and field its football team ***is*** part of its religious ministry, and Defendants' sanctions interfere with its ability to so by barring CCHS from post season play. *Id.* at 2:25–3:3 (citing Wong Decl. at ¶¶ 5–7). Recognizing the unique nature of a religious education, the Supreme Court has repeatedly recognized the impossibility of separating a religious school's mission to provide primary education to its students from its religious mission to provide religious education. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020); *Hosannah-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 192 (2012). In any event, and as a Free Exercise matter, it is irrelevant that the conduct subject to unequal treatment or special disability does not involve a specific religious practice. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1731–32 (holding that the government violated the Free Exercise Clause by punishing a baker who refused to sell a custom-designed wedding cake because of his religious beliefs); *Trinity* Lutheran, 137 S. Ct. at 2024–25 (holding that the government violated the Free Exercise Clause by withholding funds from a church for a child's playground). The Constitution shields religious schools from "'unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Yet that is what Defendants' sanction scheme has wrought. By drawing the sanction lines in such a way that *only* religious schools whose students and coaches played in CAPS are subject to sanction, Defendants have unlawfully subjected CCHS and other religious schools to unequal treatment in violation of the First and Fourteenth Amendments.

II. CCHS Has Suffered and Continues to Suffer Irreparable Harm.

A violation of First Amendment rights, "for even minimal periods of time," is *per se* an irreparable injury. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Right to Life of Cent. Cal. v. Bonta*, 562 F. Supp. 3d 947, 964–65 (E.D. Cal. 2021). Defendants cannot dispute this point as a matter of law. Thus, if CCHS prevails on its Free Exercise claim for the reasons detailed in its opening brief and above, it follows that CCHS has satisfied the irreparable-harm

requirement of a preliminary injunction. And, Plaintiffs are suffering ongoing reputational injury. Compl. ¶¶ 102-104.

Separately, CCHS has raised the irreparable harm it will suffer if Defendants sanctions are allowed to stand and CCHS loses its opportunity to compete in the 2022-2023 high school football post season. PI Br. at 20:21–21:18. Defendants reply—without citation to *any* legal authority—that such harm is "speculative" because "there are no guarantees" that CCHS will qualify for the playoffs. Opp. at 14:3–4. But, as CCHS pointed out—and to which Defendants offer no counterargument— courts throughout the country regularly recognize that the loss of competitive opportunities constitutes an irreparable injury meriting injunctive relief. *See, e.g.*, *D.M. v. Minn. State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019); *Lazor v. Univ. of Conn.*, 560 F. Supp. 3d 674, 684–85 (D. Conn. 2021); *T.W. v. S. Columbia Area Sch. Dist.*, No. 4:20-CV-01688, 2020 WL 5751219, slip op. at *8 (M.D. Pa. Sept. 25, 2020); *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020), *appeal docketed*, No. 20-35813 (9th Cir. Sept. 17, 2020); *Inskip v. Astoria Sch. Dist. 1J*, No. CIV. 99-515-KI, 1999 WL 373792, at *2 (D. Or. Apr. 26, 1999).

III. The Remaining Factors Favor Injunctive Relief.

Defendants ignore CCHS's contentions that the public interest strongly favors redressing First Amendment violations, and that it would inequitable to permit a state actor to violate the Constitution when no adequate remedy exists. PI Br. at 21:21–22:18; *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) *abrogated on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). By failing to respond to these assertions in their answering brief, Defendants have forfeited any arguments against them. *See United States v. Orozco*, 858 F.3d 1204, 1210 (9th Cir. 2017) (holding that an argument not addressed in an answering brief is waived); *United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (holding that the government conceded the first two prongs of the plain-error standard by failing to contest them in its answering brief); *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011) (holding that the government waived an argument that it failed to make in its answering brief); *United States v. Defoor*, 625 F. App'x 784, 790 (9th Cir. 2015) (same).

Instead, Defendants fall back to arguing that the "primary harm" of granting the injunction "would be borne by the schools that actually adhered to the Governor's orders, the [California Department of Public Health] guidance[,] and the CIF-SJS rules." Opp. at 14:7–9. *First*, it is not clear (and Defendants

do not explain) how secular schools who are not currently subject to sanctions, will suffer any harm, much less "primary harm" if Defendants are barred from enforcing their unlawful sanctions against CCHS. *Second*, it ignores the bizarre consequences of Defendants' unlawful sanction scheme. *See* PI Br. at 19:20–20:4. Under Defendants' scheme, students and coaches hailing from the schools Defendants chose to sanction are punished for participating in CAPS, while the secular school student and coaches they played against in the purportedly illegal second football season are subject to no penalty whatsoever. Likewise, Defendants overbroad sanctions penalize *all* of CCHS' football athletes and coaches, regardless of whether they participated in CAPS. *Third*, in the event that CCHS does not ultimately prevail on the merits of its claims, the Court is free to revisit issuance of an injunction and allow Defendants to enforce its sanction scheme. But, as CCHS pointed out in its opening brief, once Defendant's sanctions take effect and the CCHS football team loses its opportunity to compete in post-season play, no amount of money damages can restore that lost opportunity. *See* PI Br. at 22:8–18. Thus, issuance of an injunction preserves the status quo while CCHS litigates the merits of its First and Fourteenth Amendment claims.

CONCLUSION

For the foregoing reasons, as well as those in Capital Christian's opening brief, this Court should issue a preliminary injunction removing all sanctions imposed on CCHS by the Plaintiffs, including sanctions barring CCHS from participating in post-season play for the 2022-2023 football season.

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Respectfully submitted,

SIDLEY AUSTIN LLP

By: *David L. Anderson*

David L. Anderson (SBN 149604)
dlanderson@sidley.com
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Gordon D. Todd*
gtodd@sidley.com
Mackenzi J.S. Ehrett*
mehrett@sidley.com

Alaric R. Smith*
alaric.smith@sidley.com
Aaron P. Haviland*
ahaviland@sidley.com
Matthew H. Simpson*
msimpson@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

*Admitted *pro hac vice*

Michael H. Porrazzo (SBN 121260)
mhporrazzo@porrazzolaw.com
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
Rancho Santa Margarita, CA 92688
Telephone: (949) 348-7778
Facsimile: (949) 209-3514

Attorneys for Plaintiffs Capital Christian Center and Capital Christian School