No. 20-56156

In the United States Court of Appeals for the Ninth Circuit

JOANNA MAXON, ET AL.,
Plaintiffs-Appellants,

v.

FULLER THEOLOGICAL SEMINARY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Honorable Consuelo B. Marshall
(2:19-cv-09969-CBM-MRW)

APPELLEES' ANSWERING BRIEF

KEVIN S. WATTLES
Soltman Levitt Flaherty
& Wattles LLP
90 E. Thousand Oaks Blvd.
Suite 300
Thousand Oaks, CA 91360
(805) 497-7706

DANIEL H. BLOMBERG
Counsel of Record
ERIC BAXTER
DIANA M. VERM
DANIEL D. BENSON
DANIEL L. CHEN
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
dblomberg@becketlaw.org

Counsel for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Fuller Theological Seminary represents that it does not have any parent entities and does not issue stock.

Dated: June 14, 2021

/s/ Daniel H. Blomberg
DANIEL H. BLOMBERG
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
dblomberg@becketlaw.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

For over seventy years, Fuller Theological Seminary—and particularly its School of Theology—has existed to "prepare men and women for the manifold ministries of Christ and his Church." As a multidenominational Protestant seminary, the Seminary welcomes a wide variety of Christian students who embrace its Statement of Faith, the "unifying pillar" of its ministry. The Seminary is controlled by its Board of Trustees, a group charged with ensuring the Seminary's fidelity to its faith. And as part of the Seminary's religious training, the Board has established religious standards to guide those who choose to join its religious community.

The First Amendment protects the Seminary's right to determine its religious beliefs and standards, including those regarding marriage and sexuality, free from government interference. In enacting Title IX, Congress reinforced that freedom by including a religious exemption that Title IX "shall not apply" where it conflicts with a religious school's religious tenets. With Congress's knowledge and blessing, the Department of Education has enforced the Title IX exemption to both protect how schools manage their internal religious affairs and to avoid discriminating among religious schools based on their religious affiliation or polity. Every administration since Title IX's enactment has recognized that board-controlled schools of divinity like the Seminary are in the heartland of the exemption's protections.

Plaintiffs seek to change all of that. They demand a new interpretation of Title IX's religious exemption that conflicts with its plain language and over forty years of uniform enforcement by the Department. They ignore the First Amendment's ban on church-state entanglement, thrusting civil courts into a religious thicket that would require the judiciary to override religious schools' sincere religious beliefs, reject their internal judgment about religious membership, and interfere in their decisions about whom to prepare as religious leaders. These are things no civil court can do. And Plaintiffs identify no court that has.

Any of these is reason enough to reject Plaintiffs' interpretation, but they admit one more: religious discrimination. In their view, one of the world's largest Protestant seminaries is not protected by Title IX's religious exemption simply because, unlike "numerous Catholic seminaries," it is an "independent institution" and not "owned" by an "external" organization like "the Catholic Church." That kind of discrimination based on a religious group's polity violates the clearest command of the Establishment Clause: religious neutrality.

The district court should accordingly be affirmed, and for four reasons. *First*, Plaintiffs' reading of the Title IX exemption is wrong. It contradicts the plain language of the statute and is barred by the doctrine of constitutional avoidance, the deference due to the Department's longstanding interpretation, and the Religious Freedom Restoration Act.

Second, the district court's ruling can be affirmed on the alternative ground that Plaintiffs' Title IX claim violates the Religion Clauses by forcing courts to adjudicate religious questions, religious membership, and religious ministerial training decisions.

Third, affirmance is also appropriate because Plaintiffs' claim will violate the First Amendment's protections for assembly and association by forcing inclusion of those who reject the Seminary's religious beliefs.

Fourth, Plaintiffs' grab-bag of associated arguments fails. There is no requirement that the Seminary seek preclearance from the Department for the exemption to apply. Their argument that this Court should second-guess the Seminary's religious tenets is constitutionally impermissible and contrary to Plaintiffs' admissions below. And their perfunctory procedural arguments do not even attempt to pass the high abuse-of-discretion standard they face.

This Court should affirm and hold Plaintiffs to the promise they made when they applied for admission: to join the Seminary's religious community and receive the Seminary's religious training, they would abide by the Seminary's religious standards.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367, and this Court possesses jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly applied Title IX's religious exemption to dismiss Plaintiffs' claims because Fuller Theological Seminary is controlled by a religious organization (its Board of Trustees) and applying Title IX would not be consistent with the Board's religious tenets.
2. Whether the district court correctly held that religious institutions do not have to give advance notice to claim Title IX's religious exemption.
3. Whether the district court correctly considered undisputedly authentic documents that were heavily relied on by, but not attached to, the First Amended Complaint.
4. Whether the district court correctly dismissed Plaintiffs' First Amended Complaint with prejudice.

STATEMENT OF THE CASE

A. Title IX's religious exemption and its enforcement history

Enacted in 1972, Title IX prohibits discrimination "on the basis of sex" in "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As dispositive here, Title IX includes a religious exemption: "[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." *Id.* § 1681(a)(3).

The Department of Education has always understood the exemption to apply to all religious seminaries. The first recorded enforcement guidance issued by the Department's Office of Civil Rights (OCR) provides that it would normally consider an educational institution to be "controlled by a religious organization" where "[i]t is a school or department of divinity" or "[i]t requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled." *See* Assurance of Compliance with Title IX of Education Amendments of 1972, 42 Fed. Reg. 15,141, 15,142-43 (Mar. 18, 1977). OCR further explained that a school of divinity is defined by its mission "to prepare [students] to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects." *Id*. at 15,143.

In 1985, OCR reaffirmed that interpretation when it issued policy guidance for its regional offices.[1] Promulgated by Assistant Secretary Harry Singleton, the "Singleton Memo" reiterated OCR's interpretation of the Title IX religious exemption and confirmed that it did not require control by a separate, external religious organization. *Id*. at 25. Relying on this guidance, OCR has now recognized exemptions for numerous

[1] *See* Memorandum: Policy Guidance for Resolving Religious Exemption Requests from Harry M. Singleton, Assistant Sec'y, DOE-OCR, to Reg'l Dirs., Regions I–X, DOE-OCR (Feb. 19, 1985), available at https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf.

religious colleges and yeshivas, including dozens not controlled by separate, external religious organizations. *See infra* Section I.C. The Department still holds out the Singleton Memo as guidance on the application of the Title IX religious exemption.[2] Both the Singleton Memo and later OCR guidance emphasized that the Department's application of the Title IX exemption must avoid entanglement in internal religious matters or resolution of religious questions. Singleton Memo at 2-3 (warning against OCR enforcement actions that could be "obtrusive" into internal religious affairs, and that "[u]nder no circumstances should OCR appear to be interpreting" religious scriptures).[3]

In 1987, Congress considered amending the religious exemption to ensure it covered all religious schools and not just ones "controlled by" hierarchical religious bodies. Congress carefully reviewed OCR's unbroken enforcement history, including by entering the substance of the

---

[2] *See* DOE-OCR, Exemptions from Title IX: Private schools controlled by religious organizations (*any application contrary to religious tenets exempt*), last updated Mar. 8, 2021, available at https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (providing a copy of the Singleton Memo as OCR guidance).

[3] *See also* Memorandum: Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions from William L. Smith, Acting Assistant Sec'y, DOE-OCR, to OCR Senior Staff at 3 (Oct. 11, 1989), available at https://www2.ed.gov/about/offices/list/ocr/docs/smith-memo-19891011.pdf ("Smith Memo") (OCR officials "should avoid any appearance of interpreting religious tenets," which could "create potential conflicts under the First Amendment.").

Singleton Memo in the Senate Report, and determined that the religious exemption was already being implemented in a manner that was sufficiently broad and thus left it unchanged. S. Rep. No. 100-64, 1987 WL 61447, at *21 (1987); 134 Cong. Rec. H565-02, 1988 WL 1083034 (1987).

Most recently, in 2020, after public notice and comment, the Department of Education promulgated a final rule confirming OCR's longstanding interpretation and application of Title IX's religious exemption. 85 Fed. Reg. 59,953, 59,980-81 (Sept. 23, 2020); 34 C.F.R. § 106.12(c). The Department of Education expressly noted that there is "no textual reason that would require limiting [Title IX's religious exemption] exclusively to schools that are controlled by *external* religious organizations," and that OCR would continue recognizing educational institutions controlled by their religious boards or trustees. 85 Fed. Reg. at 59,956 (emphasis added).

B. Fuller Theological Seminary

Founded in 1947, Fuller Theological Seminary is one of the world's preeminent Protestant seminaries. From its founding to current day, its purpose remains unchanged: to "prepare men and women for the manifold ministries of Christ and his Church." ER-60; ER-93; SER-94. A California nonprofit religious corporation, the Seminary is organized exclusively for religious purposes, ER-60, and commits that "[i]n all of its activities, including instruction, nurture, worship, service, research, and

publication, [it] strives for excellence in the service of Jesus Christ." SER-94.

The Seminary is multidenominational and ecumenical, rooted in a Statement of Faith which was included in its original 1951 articles of incorporation and is "the foundation upon which the seminary is based," "the defining principle within the [S]eminary's governing bylaws," and "the unifying pillar supporting faculty governance." SER-95; ER-159 ¶¶46-47. Consistent with this Statement of Faith, the Seminary's faculty, staff, and students are all expected to hold a number of foundational Christian beliefs, such as that "Jesus Christ … is the only ground for a person's reconciliation with God." SER-95. All students seeking admission must identify their particular denominational affiliation and the church that they attend, provide a reference from a pastor or denominational leader, and give their religious autobiography. ER-99-106; ER-110-115.

Part of the Seminary's religious training of students for "Christian service" includes developing their "moral character." SER-64. The Seminary's Board of Trustees accordingly established ethical and behavioral standards for all enrolled students and employees. SER-64, 68, 81; *accord* ER-117. These "community standards" are "guided by an understanding of Scripture and a commitment to its authority regarding all matters of Christian faith and living" and are part of the Seminary's "core mission, values, and identity." SER-95; SER-64. They also reflect

the Seminary's "respect [for] the moral tradition of the churches who entrust students" to the Seminary. SER-64. The community standards are public, listed on Fuller's website, admissions materials, and academic catalogues. *See, e.g.*, *id*. It is "a continuing condition of enrollment" that all prospective students agree to "continual adherence" to these standards. SER-64, 89-90, 95; ER-103, 115.

As relevant to this case, the community standards identify the Seminary's sincere religious belief that marriage "is the covenant union between one man and one woman," that "sexual union must be reserved for marriage," that "all members of its community—students, faculty, ... and trustees—[must] abstain from what [the Seminary] holds to be un-biblical sexual practices," and that homosexual conduct is among practices which it considers to be "inconsistent with the teaching of Scripture." SER-84; ER-174 ¶191. The standards explain that God "intended marriage to be an unconditional covenant between a woman and a man" and that this "ideal" "must be reflected, however imperfectly, in the lives of its faculty, administration, board, students, and staff." SER-77.

At the same time, while the Seminary affirms and practices this historic orthodox Christian understanding of marriage, it expressly "does not discriminate based on sexual orientation" as such. ER-174 ¶191. Rather, the Seminary welcomes and serves Christian students who come from denominations that celebrate same-sex unions. ER-159 ¶¶47-55. It

also provides numerous accommodations and forms of support for its students who hold different religious views on this issue, so long as they agree not to enter marriages or engage in conduct that violates the Seminary's religious commitments, embodied in its community standards, during their religious training at the Seminary. ER-159 ¶¶48-54, ER-174 ¶191, SER-84.

C. Plaintiffs' dismissal from the School of Theology

Nathan Brittsan. Brittsan applied for admission to the Seminary in August 2017, seeking a Master of Divinity from the School of Theology. ER-108. His application stated that he was an associate pastor and licensed minister of Grace Baptist Church, a member congregation of the American Baptist Church USA. ER-109-11. He was pursuing ordination from his church, which required a Master of Divinity, and sought to study at the Seminary to "complete [his] spiritual training" and "equip [himself] for [his] future ministry endeavors." ER-114.

Brittsan signed the admissions form affirming his understanding that "continual adherence" to the community standards was "a continuing condition of enrollment." ER-115. He also affirmed that no part of his application contained "any misrepresentation" or "material omission," and that he understood that he could be "denied admission, or if already admitted, ... dismissed" if it did. *Id.*

In early September, before he had registered for classes, the Seminary realized that Brittsan might be in a same-sex marriage and emailed him

to arrange a time to talk. ER-126. The Seminary's director of admissions and an assistant dean of the School of Theology spoke with him on September 19, addressing the community standards violation and explaining that proceeding at the Seminary would not be possible. ER-122, 131, 162 ¶87. Brittsan appealed this decision to Defendant Mari Clements, who affirmed the dismissal on September 21. ER-131. Dean Clements stated the community standards reflected "the Seminary's sincerely held religious beliefs," and that Brittsan was dismissed for violating them. *Id.*

Brittsan appealed this decision as well. He acknowledged his doctrinal disagreement with the Seminary and that it was "within the bounds of [Fuller's] internal policies to dismiss [him]," but nonetheless requested that the Seminary change its mind under "legal and moral principle[s]." ER-134-35. His dismissal was upheld, and Brittsan never exercised his right to appeal to the Fuller Board of Trustees. The Seminary reversed any charges associated with class registration and refunded his application fee. ER-131-32.

Joanna Maxon. Almost a year later, Maxon was also dismissed for entering a same-sex marriage. Maxon had been admitted to the School of Theology at the Seminary's campus in Houston, Texas, in 2015. ER-98. Her application said she was a member of a United Methodist Church. ER-99. Maxon explained that she was "called into the mission of ministry" and wanted to obtain training from the Seminary to "do more

both within the small group ministry of my local church, and beyond to possibly some other ministry I am not even aware of at this time." ER-106. She initially enrolled in the Master of Arts in Theology and Ministry program, with an emphasis in Recovery Ministry. ER-98.

Maxon signed the admissions form affirming her understanding that "continual adherence" to the community standards was "a continuing condition of enrollment." ER-103-04. Yet in August 2018, the Seminary became aware that Maxon had entered into a same-sex marriage sometime after her admission. ER-157 ¶26; ER-170 ¶162; SER-61-62. When Defendant Nicole Boymook contacted Maxon for the Seminary, Maxon confirmed that she had spent well over a year in violation of its community standards. SER-61. Maxon's explanation was only that she "forgot about the policy." ER-138. On October 9, 2018, Maxon was dismissed from the Seminary due to her violation of the standards. ER-140-41. The Seminary refunded any tuition paid for courses which she had started but was unable to complete. ER-140. The October 9 letter informed Maxon of her right to appeal, which she did not exercise.

D. Procedural history

On November 21, 2019, Maxon filed suit against the Seminary and Thompson. ER-192. On January 7, 2020, Plaintiffs filed a First Amended Complaint ("FAC"), adding Brittsan as a plaintiff and Clements and Boymook as Defendants. ER-153.

On February 20, 2020, the Seminary filed a motion to dismiss Plaintiffs' FAC and filed ten documents that were incorporated by reference in Plaintiff's FAC. The Seminary also requested that the district court take judicial notice of the Seminary's Articles of Incorporation, SER-53, and Plaintiffs filed a statement of non-opposition to the Seminary's request for judicial notice. SER-51.[4]

Following the filing of Plaintiffs' opposition to the Seminary's motion to dismiss and the Seminary's reply, the parties filed a Joint Rule 26 Report and Discovery Plan on April 22, 2020. SER-10. There, the Plaintiffs agreed that "[t]he core factual issues are not in dispute" and that the "parties mainly dispute the legal significance of the facts." SER-11. Indeed, in later briefing on a motion to stay discovery pending resolution of the dismissal motion, Plaintiffs quoted this language from the Joint Rule 26 Report and confirmed that "this case is not about whether Fuller had a different, non-discriminatory reason for expelling Plaintiffs." SER-7.

On August 4, 2020, the district court held a hearing on the Seminary's motion to dismiss. ER-22. On October 7, 2020, the district court granted the Seminary's motion to dismiss. ER-3. The court concluded that the

[4] After Defendants pointed out that Title IX does not apply "against school officials, teachers, [or] other individuals," *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009), Plaintiffs agreed to dismissal of their Title IX claims against individual defendants. SER-36 n.2.

Seminary qualified for Title IX's religious exemption, dismissed Plaintiffs' Title IX claims with prejudice, and declined to exercise supplemental jurisdiction over Plaintiffs' remaining state-law claims. ER-21.

STANDARD OF REVIEW

This Court reviews "de novo a district court's order granting a motion to dismiss pursuant to Rule 12(b)(6)." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). A district court's decision to incorporate documents by reference is reviewed for an abuse of discretion, *id.* at 1160, as is a district court's decision dismissing a complaint with prejudice and without leave to amend, *Benavidez v. County of San Diego*, 993 F.3d 1134, 1141-42 (9th Cir. 2021). Under an abuse-of-discretion standard, this Court "must affirm unless the district court applied the wrong legal standard or its findings were illogical, implausible[,] or without support in the record." *TrafficSchool.com v. Edriver*, 653 F.3d 820, 832 (9th Cir. 2011) (citing *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). In short, a "party alleging an abuse of discretion faces an 'uphill battle,'" and this Court "give[s] significant deference to a district court's findings." *Id.* at 832 n.7.

SUMMARY OF ARGUMENT

The district court's decision dismissing Plaintiffs' claims should be affirmed.

I. The Seminary qualifies for Title IX's religious exemption under a plain reading of the statute because it is a seminary "controlled by a religious organization"—its Board of Trustees—with "religious tenets" that would "not be consistent" with Plaintiffs' requested application of Title IX. 20 U.S.C. § 1681(a)(3). A ruling that a seminary must be controlled by a separate, external religious organization would be atextual and would violate the canon of constitutional avoidance by forcing the Government to discriminate among religious groups and to interfere in religious groups' internal governance decisions. The Department of Education's longstanding, uniform interpretation spanning four decades reinforces the district court's analysis. That interpretation is reasonable and persuasive, and therefore, this Court must defer to it. The Religious Freedom Restoration Act further cautions that the religious exemption must be interpreted to avoid imposing a substantial burden on the Seminary's religious exercise without sufficient justification.

Further, contrary to Plaintiffs' arguments, Title IX's religious exemption does not require government pre-approval based upon an institution's advance submission of a written statement that it is eligible for the exemption. Rather, the statutory exemption applies automatically

once its written conditions are met. The Department's rulemaking and longstanding practice confirm this, and the First Amendment rejects Plaintiffs' religiously discriminatory alternative that would privilege numerous secular Title IX exemptions over the religious exemption.

II. Plaintiffs' claims are independently barred by the church autonomy doctrine. Under the First Amendment's Religious Clauses, civil courts have no say over matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of [members] to the standard of morals required of them." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976). Therefore, Plaintiffs cannot hold the Seminary liable for its religious judgment as to what its religious standards are, who can be a member of its religious community, and whom it will train for ministry.

III. Plaintiffs' claims are further barred by the First Amendment's protections for free association and assembly. As a religious group, the Seminary is the archetype of an expressive association, and application of Plaintiffs' Title IX claim to punish the Seminary's religious expression is unconstitutional. And the government has no compelling justification to control a Seminary's religious training of future ministers of the faith.

IV. Plaintiffs' procedural arguments fail. Plaintiffs do not come close to making the difficult showing that Judge Marshall abused her discretion by incorporating certain exhibits by reference or dismissing their Title IX claim with prejudice. To the contrary, Judge Marshall's

ruling was correct on both counts. First, incorporation by reference was proper because Plaintiffs never objected to the authenticity of the exhibits and substantially relied on those same documents in their FAC. Second, the district court properly dismissed Plaintiffs' complaint with prejudice because they failed to specify what new facts they would have alleged, and no amount of artful pleading could have avoided contradicting the original pleadings or rid the Title IX claim of its constitutional defects.

ARGUMENT

I. The Seminary is at the core of Title IX's religious exemption.

Title IX's exemption protects all religiously-affiliated colleges, with seminaries like Fuller Theological Seminary being at the core. Under Title IX's plain text, the Seminary is exempt because it is "controlled by a religious organization" and applying Title IX would "not be consistent" with its "religious tenets." 20 U.S.C. § 1681(a)(3). That decides this appeal.

Plaintiffs' contrary reading to require control by a separate, external entity fails for three reasons. First, under the doctrine of constitutional avoidance, Plaintiffs' interpretation must be rejected because it would force the Government to discriminate among religious groups based on their religious polity and to entangle itself in the internal religious affairs of schools from non-hierarchical faiths.

Second, the Department of Education's unbroken, decades-long application of Title IX across every administration since its enactment is entitled to deference, and confirms that the religious exemption covers Board-controlled seminaries like Fuller Theological Seminary.

Third, Title IX's religious exemption should be interpreted in light of RFRA, which—where possible—requires avoiding a construction that would substantially burden the Seminary's sincere religious exercise without sufficient justification.

A. The plain text and history of Title IX put the Seminary within the heartland of Title IX's religious exemption.

Title IX states that it "shall not apply to an educational institution which is controlled by a religious organization" if Title IX's application "would not be consistent" with the organization's "religious tenets." 20 U.S.C. § 1681(a)(3). Under a plain reading of the statute, which is supported by the uniform history of its interpretation and enforcement, the Seminary meets both requirements necessary to claim Title IX's religious exemption.

1. Applying Title IX to the Seminary here would violate its religious tenets.

Applying Title IX to forbid the Seminary from dismissing Plaintiffs from its educational programs "would not be consistent" with the Seminary's "religious tenets." 20 U.S.C. § 1681(a)(3). Those religious tenets—as identified in the Complaint—expressly state that the Seminary "believes that sexual union must be reserved for marriage" and

that marriage "is the covenant union between one man and one woman." ER-174 ¶191, SER-84. The Seminary "expects members of its community to abstain from what it holds to be unbiblical sexual practices." ER-174 ¶191.

Plaintiffs were aware of the Seminary's religious tenets and that their conduct violated those tenets. Maxon was admitted to the School of Theology at the Seminary's Houston campus in 2015. ER-98-106. Brittsan applied for admission in August 2017. ER-108-15. During the admission process, each signed a statement promising to abide by these tenets and agreed that failure to keep their promise would be grounds for dismissal. ER-103-04, 115. Further, Plaintiffs acknowledged that entering into same-sex marriages was in violation of the Seminary's tenets and that the Seminary was "within the bounds of [its] internal policies" to expel them. ER-135; *see also* ER-138. Once the Seminary confirmed that Maxon and Brittsan were in violation of the community standards, they were dismissed. ER-117-18, 131-32, 140-41.

Furthermore, there is no dispute the Seminary "expelled Plaintiffs because it determined their same-sex marriage[s] violated the Sexual Standards Policy, which defines marriage as 'the covenant between one man and one woman' and prohibits sexual activity outside the confines of marriage, based on its interpretation of the Bible." ER-19-20. Therefore, applying Title IX here to hold the Seminary liable "would not be consistent" with its "religious tenets."

Plaintiffs argue that "discovery may show" that allowing seminary students to enter "same-sex marriages would not violate Fuller's religious beliefs," and that Plaintiffs' dismissal instead reflected "the personal animus of a couple of administrators, rather than … Fuller's religious beliefs." Br.21.

There are three fatal problems with that argument. First, if it were true, it would foreclose Plaintiffs' Title IX claim. Title IX does not allow for liability against individual administrators, as Plaintiffs conceded below. SER-36 n.2. Nor does it permit claims against an educational institution "based on principles of *respondeat superior* or constructive notice." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). So Title IX liability here could not be predicated on Plaintiffs' unfounded speculation about rogue administrators.

Second, Plaintiffs' repeated representations below flatly contradict this new theory on appeal. Plaintiffs told the district court that "[t]he core factual issues are *not* in dispute," that "the Parties would *not* need to engage in substantial discovery about the who, what, where[,] and why of Plaintiffs' expulsions," and that they "[we]re *not* asking the Court [to] question [the] sincerity of Fuller's religious beliefs regarding marriage, sexuality, or any of their religious beliefs." SER-7, 11; ER-32 (emphasis added). Rather, they admitted their theory of the case was that the Seminary "is entitled to have a sincerely held religious belief that entering into a same-sex marriage is immoral, … but it is not entitled to

do that on the government's dime." ER-34.[5]

Third, even if Plaintiffs' argument did not contradict *both* the scope of Title IX liability *and* their own representations, it would still violate the First Amendment. The Seminary has clearly stated, and Plaintiffs have pled and conceded, that the reason for the dismissals was that Plaintiffs' actions violated the Seminary's beliefs. ER-151 ¶78, ER-170 ¶162; ER-6, 8; ER-32; ER-117-18; ER-131-32; ER-135; ER-140-41; SER-7, 11. As discussed below, *see infra* Part II, no civil court can contradict a seminary's sincere, longstanding determination of what would "violate [its] religious beliefs." Br.21. Thus, the district court rightly found that it cannot second-guess the Seminary's beliefs, ER-20, matters which a religious group may "decide for [itself], free from state interference." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

2. The Seminary is controlled by a religious organization.

The district court also rightly held that the Seminary is (1) "controlled by" (2) a "religious" (3) "organization": its Board of Trustees.

---

[5] Both Plaintiffs recently filed a lawsuit against the Department of Education claiming that the entire Title IX religious exemption is unconstitutional. *Hunter v. Department of Education*, No. 21-cv-474 (D. Or.). There, just last week, Brittsan filed a declaration admitting that he knew the Seminary's "application and student policies … prohibited homosexuality and defined marriage as strictly heterosexual," and yet signed the application anyway because he "felt [he] "complied with the spirit of the policy" and that "Fuller should treat [his] marriage the same way as other marriages." Dkt. 35-7 at ¶¶ 16, 39-40 (June 7, 2021).

First, all parties agree (see Br.11, 14) that the Seminary is "controlled by" its Board of Trustees. As shown in its Articles of Incorporation, the Seminary is "organized under the Nonprofit Religious Corporation Law." ER-60. That law "requires that the activities and affairs of a religious nonprofit corporation … be conducted and its corporate powers exercised under the direction of its board." *Korean United Presbyterian Church v. Presbytery of the Pac.*, 230 Cal. App. 3d 480, 503 (1991), *disapproved of on other grounds by Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994); *see also Thomason v. Grace M.E. Church*, 113 Cal. 558, 560 (1896) (the powers a religious corporation "may exercise are vested in the trustees"); Cal. Corp. Code 9210 (the board of a nonprofit religious corporation must "manage[]" "the activities and affairs of the corporation"). The district court agreed and held that the Board "exerts control over" the Seminary and is particularly "responsible for implementing the policies at issue." ER-18; ER-118; ER-167 ¶133.

Second, it is also undisputed that the Board is "religious." The Board must affirm the Seminary's Statement of Faith, "bear concerted witness" to it, and hold it forth as "essential to [its] ministry." SER-95. The Board must also adhere to the Seminary's community standards, including the ones at issue here. SER-84. "Trustees at the seminary see their role in the education ministry" of the Seminary as "serving Christ," and under the Board of Trustee's direction, the Seminary is "exclusively" organized for "religious purposes." SER-95, ER-60.

Third, the Seminary's Board of Trustees is an "organization." Title IX does not define "organization," and when a term is "not defined in the statute, [courts] must give it 'its ordinary or natural meaning.'" *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1144 (9th Cir. 2012) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). "To determine the ordinary meaning of a word, consulting common dictionary definitions is the usual course." *Animal Legal Def. Fund v. USDA*, 933 F.3d 1088, 1093 (9th Cir. 2019) (quotation omitted). "If the language has a plain meaning or is unambiguous, the statutory interpretation inquiry ends there." *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017) (citation omitted).

Here, the term "organization" has capacious meaning. From the first edition of Black's Law Dictionary to include a definition of "organization" to the most recent one, an organization exists when a group of "two or more persons" act to further "a joint or common interest." *Organization*, Black's Law Dictionary (5th ed. 1979); *see also Organization*, Black's Law Dictionary (11th ed. 2019) ("A group that has formed for a particular purpose"). Other dictionaries provide the same definition. *See, e.g.*, *Organization*, Cambridge Dictionary ("a group of people who work together in an organized way for a shared purpose"); *Organization*, Oxford English Dictionary (3d ed. 2004) ("an organized body of people with a particular purpose") The Seminary's Board of Trustees is plainly a group that works together for a common purpose: controlling the

Seminary to ensure it achieves its religious purpose.

Other courts have repeatedly recognized this ordinary meaning of "organization" for purposes of federal law. For instance, in a series of ERISA cases, the plaintiffs argued that certain defined-benefit plans were not exempt from the requirements of ERISA because those plans were not maintained by an "organization." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017); *Sanzone v. Mercy Health*, 954 F.3d 1031 (8th Cir. 2020); *Boden v. St. Elizabeth Med. Ctr.*, 404 F. Supp. 3d 1076 (E.D. Ky. 2019). Specifically, the plaintiffs argued that, based on the plain meaning of "organization," employers had to create and separately incorporate a wholly independent body to maintain the plan in order for the ERISA exemption to apply.

Courts rejected this interpretation of "organization" and held that no such separate entity was necessary. Rather, based on dictionary definitions, the plain meaning of "organization" merely requires "a body of persons (such as a union or a corporation) formed for a common purpose." *Medina*, 877 F.3d at 1226 (cleaned up); *Sanzone*, 954 F.3d at 1044 (defining "organization" as "a group of people who work together in an organized way for a shared purpose"); *accord Boden*, 404 F. Supp. 3d at 1085 (definition of "organization" simply requires "(1) a group of people with (2) a specific purpose; nothing further is necessary for a group to be considered an 'organization' under an ordinary understanding"). Thus, in *Medina*, a subcommittee of a larger entity was itself an "organization" for

purposes of ERISA since it met the relevant dictionary definition. 877 F.3d at 1226.

So too here. As the district court held, "the ordinary meaning of the term 'organization' is sufficiently broad to include" the Seminary's Board of Trustees. ER-18. That ends the interpretational inquiry. *Vividus*, 878 F.3d at 706. The Seminary comes within the religious exemption.

3. Title IX does not require control by a separate, external entity.

Plaintiffs' arguments to the contrary fail. Their primary error, like the plaintiffs in the ERISA cases, is to read a whole new concept into the statute: the exempt entity must be controlled by a *wholly separate and external* religious organization. But courts are prohibited from rewriting statutes in such a fashion. "'It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts.'" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (quoting *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019)) (cleaned up). This is why courts have rejected an interpretation that requires an organization to constitute a "wholly independent bod[y]." *Medina*, 877 F.3d at 1226-27; *Boden*, 404 F. Supp. 3d at 1085 (rejecting the interpretation "that an 'organization' must be a completely separate entity"). And here, "it is not clear what the advantage of such a structure would be, or why Congress would have required it," *Medina*, 877 F.3d at 1227, especially as requiring separate, external control raises a whole

host of constitutional issues. Rather, because there is no reason "to depart from the plain meaning of *organization*," this Court should "decline to do so." *Sanzone*, 954 F.3d at 1044-45.

Plaintiffs' comparison between the religious exemption in Title IX and the religious exemption for educational institutions in Title VII is also confused. Br.18-19. In the first place, construing two statutes on similar subjects *in pari materia* "makes the most sense when the statutes were enacted by the same legislative body at the same time." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). That is not the situation here. But more importantly, the point of the doctrine is to "harmonize" related provisions, "unless legislative history or purpose suggests material differences." *In re Joye*, 578 F.3d 1070, 1076 n.1 (9th Cir. 2009). Plaintiffs have identified no reason—let alone a legitimate, constitutional reason—why Congress would have departed from its Title VII approach to discriminate under Title IX among religious denominations.

Finally, Plaintiffs' resort to legislative history fails as well. And the failure is particularly obvious here, as Plaintiffs do not even cite to Title IX's legislative history. Rather, they point to "*subsequent* legislative history" in the form of two failed attempts by Congress, fifteen years after passing Title IX, to amend Title IX's religious exemption to read "closely identified with" in lieu of "controlled by." Br.19.

The Supreme Court and this Court, however, have expressly rejected this kind of argument repeatedly, emphasizing that "subsequent

legislative history is a hazardous basis for inferring the intent of an earlier Congress," *Jones v. United States*, 526 U.S. 227, 238 (1999), and "should not be taken seriously," *Multnomah Legal Servs. Workers Union v. Legal Servs. Corp.*, 936 F.2d 1547, 1555 (9th Cir. 1991) (quotation marks omitted) (collecting cases). Following these precedents, the district court did the same. ER-19.

Even on its merits, Plaintiffs' resort to legislative history falters. Plaintiffs claim that Congress rejected proposals to broaden Title IX's religious exemption, but the amendment failed because Congress agreed that Title IX's "record of implementation" already protected self- and board-controlled seminaries like Fuller Theological Seminary. S. Rep. No. 100-64, 1987 WL 61447, at *21.

Just two years earlier, the Department of Education's OCR had issued the Singleton Memo, which confirmed that Title IX's "controlled by" requirement is normally met if any "one" of several conditions applies, including if the institution is a "divinity school" focused on preparing students "to become ministers," to enter "some other religious vocation," or "to teach theological subjects." Singleton Memo at 25. The Singleton Memo confirmed that OCR had been using this definition of "controlled by" for almost a decade, and refused to make control by a separate, external religious organization a requirement for the religious exemption. *Id.* As a result, by the late 1980's—the time of the amendment's consideration—the Department of Education had

confirmed the exempt status of dozens of self- or board-controlled religious institutions like Fuller Theological Seminary.[6]

The Senate committee recited in full the Singleton Memo's definition of "controlled by" and concluded that "the religious tenet exemption in Title IX" should be left "intact." S. Rep. No. 100-64, 1987 WL 61447, at *21, *20. The House Report similarly suggests that Congress agreed that an amendment was "unnecessary" because the "track record ... is clear and unequivocal" that exemptions are "never denied." 134 Cong. Rec. H565-02, 1988 WL 1083034. House testimony also stated that Congress particularly expected that the "vast bulk" of exemptions would go "to seminaries." *Id*. The legislative history indicates that Congress thus concluded there was not "any need to broaden the religious tenet provision." S. Rep. No. 100-64, 1987 WL 61447 at *21.

Accordingly, even if this Court were to consider Plaintiffs' subsequent legislative history, it only supports the plain reading of the statute: the Seminary clearly qualifies for Title IX's religious exemption because it is an educational institution controlled by its Board of Trustees, a religious organization. That alone forecloses Plaintiffs' appeal.

---

[6] *See* Religious Exemptions Index, DOE-OCR (May 3, 2016), available at https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html (listing confirmed institutions); *see also infra* Part I.C.

B. The constitutional avoidance doctrine prohibits Plaintiffs' interpretation of Title IX.

Plaintiffs' interpretation of Title IX's religious exemption should also be rejected because it would unnecessarily create unprecedented and serious First Amendment problems.

Under the canon of constitutional avoidance, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[7] "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* In this way, constitutional avoidance functions as "a tool for choosing between competing plausible interpretations of a statutory text," and "when deciding which of two plausible statutory constructions to adopt," the less constitutionally

[7] In the administrative law context, the canon of constitutional avoidance is a traditional tool of statutory interpretation and is therefore "highly relevant at *Chevron* step one." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 816 (9th Cir. 2016). The Seminary therefore addresses constitutional avoidance before demonstrating that, even if the statute's plain text is ambiguous (which it isn't), the Seminary should prevail because OCR's interpretation of Title IX's religious exemption is entitled to deference. *See infra* Part I.C.

problematic option "should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

Courts have distilled the constitutional avoidance analysis into two parts. First, courts must discern whether an interpretation "would give rise to serious constitutional questions" or "present[] a significant risk that the First Amendment will be infringed." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-02 (1979). The inquiry "is not whether [a proffered] interpretation of Title IX is unconstitutional, but whether it 'raises serious constitutional questions.'" *Neal v. Bd. of Trustees*, 198 F.3d 763, 772 (9th Cir. 1999).

Second, if an interpretation does raise serious constitutional questions, a court must determine whether "a less constitutionally troubling construction [is] readily available." *Valenzuela Gallardo*, 818 F.3d at 818. This step requires a court to "construe the statute to avoid such [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

NLRB v. Catholic Bishop of Chicago shows how the analysis works. There, the Supreme Court considered whether the National Labor Relations Act gave the NLRB jurisdiction over lay faculty members at Catholic schools. 440 U.S. at 491. Noting that the Religion Clauses could be violated by "the very process of inquiry" necessary to resolve labor charges against religious schools, the Court concluded that "serious First Amendment questions" would follow from finding jurisdiction. *Id.* at 502,

504. Thus, the Court held that the statute should be interpreted narrowly to avoid that result unless there was "clear expression of an affirmative intention of Congress" to require it. *Id.* at 504. Finding no such express intent, the Court construed the statute not to grant the NLRB jurisdiction over lay faculty at Catholic schools. *Id.* at 504-07.

Here, in addition to the as-applied violations detailed in Sections II and III below, Plaintiffs' interpretation of Title IX alone raises *two* serious constitutional questions, neither of which Congress plainly intended, and both of which can be avoided by following OCR's obviously plausible (and longstanding) interpretation of Title IX. Plaintiffs' interpretation must accordingly be rejected.

1. Plaintiffs' interpretation raises serious constitutional questions regarding religious discrimination.

Under Plaintiffs' interpretation of Title IX, the Seminary is only exempt if it is controlled by a wholly separate and external religious organization. They acknowledge that their interpretation would discriminate among religions, admitting that non-denominational seminaries and colleges would generally not qualify for Title IX's religious exemption because they are not a part a hierarchical church, while "numerous Catholic seminaries ... owned by the Catholic Church and run by various dioceses.... would satisfy the control test of Title IX as the seminaries (the educational institutions) are controlled by a religious organization (the Catholic Church)." Br.14. That interpretation clearly

raises "serious constitutional questions" *and* "presents a significant risk that the First Amendment will be infringed." *See Catholic Bishop*, 440 U.S. at 501-02.

Both Religion Clauses forbid Plaintiffs' religious discrimination. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And using religious affiliation to deny a religious group access to public benefits unequivocally violates the Free Exercise Clause. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) (invalidating state law that conditioned "eligibl[ility] for government aid" on a school's decision to "divorce itself from any religious control or affiliation." (cleaned up)); *see also Larson*, 456 U.S. at 245 ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."). And the Supreme Court has recently re-emphasized this point, warning that "non-denominational Christian schools" must be treated equally under the Religion Clauses to avoid "privileging religious traditions with formal organizational structures over those that are less formal." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064-65 (2020).

Courts have repeatedly condemned this kind of religious discrimination. In *Larson*, Minnesota imposed reporting requirements on religious organizations, but exempted those religious organizations that

received, among other things, a certain portion of their contributions from outside affiliated organizations. 456 U.S. at 231-32. The Supreme Court found that the statute was unconstitutional because it "clearly grant[ed] denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id*. at 246. Specifically, the statute made "explicit and deliberate distinctions between different religious organizations" and unconstitutionally distinguished between "well-established churches" and "churches which are new and lacking in a constituency." *Id*. at 246 n.23. Importantly, the Supreme Court reached this conclusion even though the law at issue in *Larson* differentiated among religious entities by objective funding criteria, not religious doctrine. *Id*. at 230.

In *Spencer v. World Vision*, the panel majority noted that interpreting a "statute such that it requires an organization to be a 'church' to qualify for [a religious] exemption would discriminate against religious institutions which are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." 633 F.3d 723, 728 (9th Cir. 2011) (O'Scannlain, J., joined by Kleinfeld, J., concurring) (quotation marks omitted). That was a sufficient reason to reject such a "constitutionally questionable interpretation." *Id*. at 729.

The Tenth Circuit likewise held that a Colorado statute "necessarily and explicitly discriminate[d] among religious institutions" by "extending scholarships to students at some religious institutions, but not those

deemed too thoroughly 'sectarian' by government officials." *Col. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008). The challenged law "exclude[d] some but not all religious institutions" such that "students at Regis University, a Roman Catholic institution run by the Society of Jesus, and the University of Denver, a Methodist institution, [could] receive state scholarships, but not students at [Colorado Christian University] or Naropa University, a Buddhist institution." *Id*. This was unconstitutional "discrimination on the basis of religious views or religious status." *Id*. (quotation marks omitted). *Accord Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (agreeing that "discriminating between kinds of religious schools" would "raise First Amendment concerns," and citing *Larson*).

Thus, because Plaintiffs' interpretation discriminates among religious schools and institutions, it clearly raises a serious constitutional question.

2. Plaintiffs' interpretation raises serious constitutional concerns regarding religious autonomy.

Plaintiffs' interpretation also raises a serious constitutional question because it would intrude on church autonomy. "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady,*140 S. Ct. at 2055 (quoting *Kedroff*, 344 U.S. 94). "[I]nternal management decisions that are essential to [an]

institution's central mission" are part of a religious institution's "sphere" of "autonomy." *Id.* at 2060. Thus, a religious body's choice of its "internal church government" lies at "core of ecclesiastical affairs" protected from state interference. *Milivojevich*, 426 U.S. at 721.

But Plaintiffs' preferred reading of Title IX would necessarily interfere in church polity by demanding religious institutions formally affiliate with a separate, external religious organization to be exempt. That would be a severe burden on numerous religious schools. Religious institutions like the Seminary are *theologically compelled* to have governance structures that are not controlled by an outside denomination, often precisely because they believe in training leaders and pastors from *many* denominations.[8]

---

[8] For example, in its Title IX exemption letter, Berea College explained that its governance structure was theologically informed: "The founders of Berea College were not only strongly anti-slavery and anti-caste but were anti-sectarian and we have continued this tradition." Letter from John B. Stephenson, President, Berea Coll., to William H. Thomas, Reg'l Dir., Region IV, DOE-OCR 1 (July 19, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/berea-college-request-07191985.pdf. Other religious traditions also have similar beliefs. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (Jewish school made "decision to cater toward Conservative, Reform, and Reconstructionist Jewish families," rather than become an Orthodox school); Beeson Divinity School, *Why Beeson?*, https://perma.cc/XMB6-UTQ6 ("Our school was founded to represent the entirety of the orthodox Christian church. Our faculty and student body are Protestant Christian, evangelical and interdenominational.").

At a minimum, then, Plaintiffs' interpretation raises a very serious constitutional question about how religious groups subject to Title IX would remain free "to decide for themselves, free from state interference, matters of church government." *Our Lady*, 140 S. Ct. at 2055.

3. This Court can construe Title IX's religious exemption to avoid these serious constitutional problems.

Because Plaintiffs' interpretation raises serious constitutional concerns, the question is whether it can "construe the statute to avoid such [constitutional] problems" so long as "such [a] construction is [not] plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. Here, "a less constitutionally troubling construction is readily available": the interpretation available by applying the ordinary meaning of "organization" as long enforced by OCR. *See Valenzuela Gallardo*, 818 F.3d at 824.

Thus, as a matter of constitutional avoidance, Plaintiffs' novel reading of Title IX must be rejected. Instead, this Court should affirm the district court's straightforward holding that the Seminary is exempt.

C. The Department of Education's uniform, longstanding interpretation of Title IX deserves deference.

Even were this Court to conclude that—despite its plain text and history, and the canon of constitutional avoidance—Title IX's religious exemption remains ambiguous, the ambiguity must be resolved in favor of the Department of Education's decades-long uniform interpretation.

That interpretation confirms that the Seminary qualifies for Title IX's religious exemption.

1. The Department's interpretation is entitled to *Chevron* deference.

Where a statute speaks clearly to the precise question at issue, courts "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If, however, after exhausting traditional tools of statutory interpretation, the statute is "ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If it is permissible, courts must defer to the agency's interpretation. *Id.*

Chevron deference "may be extended to an agency's perspective" both when that perspective is established through the agency's "rulemaking authority" and "when an agency authorized to administer a statute interprets ... the statute by other means." *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F.3d 1162, 1173 (9th Cir. 2014). For instance, in *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995), this Court held that the Department of Education's position stated in a "letter to all chief state school officers" was "entitled to deference in its interpretation of the statute, because the interpretation is based on a permissible construction of the existing statutory language." *Id.* at 894.

Here, OCR's interpretation of the Title IX religious exemption enjoys the support of both formal rulemaking and other less formal ways the agency has administered the statute.

First, after going through notice and comment in 2020, the Department of Education promulgated a final rule in the Federal Register adopting OCR's longstanding interpretation and application of Title IX's religious exemption. 85 Fed. Reg. at 59,980-81; 34 C.F.R. § 106.12(c). The Department expressly noted that there is "no textual reason that would require limiting [Title IX's religious exemption] exclusively to schools that are controlled by *external* religious organizations," and that OCR would continue recognizing educational institutions controlled by their religious boards or trustees. 85 Fed. Reg. at 59,956.

Second, even "[i]n the absence of formal [rulemaking]," courts also consider other factors which may counsel deference such as, "[f]or example," "the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1247 (9th Cir. 2013) (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)). Here, "the balance tips to the side of deference." *Id.*

To begin, the Department of Education's OCR has expertise administering Title IX. Indeed, as it is "the administrative agency

charged with administering Title IX," courts must "defer properly to [its] interpretation of Title IX." *Neal*, 198 F.3d at 770; *accord Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 962 n.3 (9th Cir. 2010) (same). And OCR's interpretation is important to the administration of the statute, as Title IX's religious exemption serves important First Amendment interests by "lifting a regulation that [would otherwise] burden[] the exercise of religion." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987).

Most importantly, courts "accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart*, 535 U.S. at 220; *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (recognizing to importance of "the consistency of an agency's position" in "assessing the weight that position is due"). The Department's interpretation easily meets that standard.

For more than forty years, the Department's OCR has uniformly maintained that seminaries and board- or trustee-controlled religious institutions can claim Title IX's religious exemption, regardless of whether they are controlled by a separate, external religious entity. In numerous enforcement actions and adjudications from 1985 to the present, OCR has confirmed that Title IX's religious exemption applies to seminaries and board- or trustee-controlled religious institutions and not only religious institutions controlled by a separate, external religious organization. At no time has OCR limited Title IX's religious exemption

solely to schools or departments of divinity controlled by an external, independent religious organization.

For example, in 1985, OCR confirmed that Berea College qualified for Title IX's religious exemption because its controlling Board of Trustees had a serious commitment to Christianity, which "adequately establishe[d] that Berea College is controlled by a religious organization."[9] OCR reached that same conclusion in 1985 for many other nonhierarchical religious colleges and universities, including Colorado Christian University,[10] Biola University,[11] and numerous Jewish seminaries and yeshivas that were not controlled by formally

---

[9] Letter from Harry M. Singleton, Assistant Sec'y, DOE-OCR, to John B. Stephenson, President, Berea Coll. 1 (Sept. 3, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/berea-college-response-09031985.pdf.

[10] Letter from Joe L. Wall, President, Colo. Christian Coll., to Gilbert D. Roman, Reg'l Dir., DOE-OCR 1 (Sept. 18, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/colorado-christian-college-request-09181985.pdf; Letter from Harry M. Singleton, Assistant Sec'y, DOE-OCR, to Joe L. Wall, President, Colo. Christian Coll. 1 (Oct. 25, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/colorado-christian-college-response-10251985.pdf.

[11] Letter from Clyde Cook, President, Biola Univ., to John E. Palomino, Acting Reg'l Dir., Region IX, DOE-OCR 1 (July 30, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/biola-university-request-07301985.pdf; Letter from Harry M. Singleton, Assistant Sec'y, DOE-OCR, to Clyde Cook, President, Biola Univ. 1 (Sept. 3, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/biola-university-response-09031985.pdf.

separate, external religious organizations.[12]

Since then, the Department of Education's OCR has continued to uniformly interpret Title IX's religious exemption to apply to seminaries and board- or trustee-controlled religious institutions. In 1990, OCR acknowledged a religious exemption from Title IX for God's Bible School because "the College [was] controlled by a Board of Trustees, a non-profit religious corporation."[13] In 1994, OCR confirmed that Palm Beach Atlantic College was entitled to a religious exemption from Title IX, because it was an institution "controll[ed] by a board of trustees who are committed to a religious faith statement."[14] And in 2014, OCR again acknowledged that Biola University was exempt from relevant portions

---

[12] *See, e.g.*, Letter from Harry M. Singleton, Assistant Sec'y, DOE-OCR, to Resach Ringel, President, Rabbinical Seminary of Belz 1-2 (Sept. 24, 1985), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/belzer-yeshiva-machzikei-torah-seminary-response-09241985.pdf; *see also* Religious Exemptions Index, *supra* n.6.

[13] Letter from William L. Smith, Acting Assistant Sec'y, DOE-OCR, to Dr. Bence C. Miller, President, God's Bible School 1 (Jan. 16, 1990), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/gods-bible-school-college-and-missionary-training-home-response-01161990.pdf.

[14] Letter from Paul R. Corts, President, Palm Beach Atlantic Coll., to Norma Cantu, Assistant Sec'y, DOE-OCR 1 (Aug. 18, 1994) https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/palm-beach-atlantic-college-request-08181994.pdf; Letter from Norma Cantu, Assistant Sec'y, DOE-OCR, to Paul R. Corts, President, Palm Beach Atlantic Coll. 1 (Sept. 14, 1994) https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/palm-beach-atlantic-college-response-09141994.pdf.

of Title IX because the institution was "a private Christian evangelical institution" and was "governed and controlled by its Board of Trustees pursuant to the statement of mission and purpose and Articles of Faith contained in its Articles of Incorporation."[15] That same conclusion followed for Westminster Seminary California, as it was both a "school of divinity" and "governed by a [religious] Board of Trustees."[16]

This uniform forty-year enforcement history is similar to the duration and consistency of other agency interpretations recognized as deserving *Chevron* deference. *Barnhart*, 535 U.S. at 220 (forty-five years); *Fournier v. Sebelius*, 718 F.3d 1110, 1121 (9th Cir. 2013) (forty-six years).

In light of these factors, "*Chevron* provides the appropriate legal lens through which to view the legality" of OCR's interpretation. *Fournier*, 718 F.3d at 1121-22 (quotation marks omitted). Under *Chevron*, courts must uphold agency interpretations if they are reasonable. As shown

---

[15] Letter from Catherine E. Lhamon, Assistant Sec'y, DOE-OCR, to Barry H. Corey, President, Biola Univ. 1 (Aug. 29, 2016) https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/biola-university-response-08292016.pdf; *see also* Letter from Catherine E. Lhamon, Assistant Sec'y, DOE-OCR, to Barry H. Corey, President, Biola Univ. 1-2 (Dec. 22, 2014) https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/biola-university-response-12222014.pdf (reiterating the three-part analysis from HEW Form 639A and the Singleton Memo).

[16] Letter from Catherine E. Lhamon, Assistant Sec'y, DOE-OCR, to W. Robert Godfrey, President, Westminster Seminary California 1 (Oct. 5, 2016) https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/westminster-seminary-california-response-10052016.pdf.

above, OCR's interpretation easily clears that low threshold.

2. At a minimum, the Department's interpretation is entitled to *Skidmore* deference.

"[E]ven when an agency's decision does not qualify for *Chevron* deference, 'an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *E.M.*, 758 F.3d at 1174 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)). In those circumstances, under *Skidmore v. Swift*, courts look to "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. 134, 140 (1944).

Here, the reasons given for the *Chevron* analysis show that OCR's interpretation is at least entitled to *Skidmore* deference. Indeed, as this Court has previously held, it need not determine whether an agency's interpretation is entitled to *Chevron* deference, where, as here, even under *Skidmore*, OCR's persuasive interpretation of Title IX deserves deference. *E.M.*, 758 F.3d at 1174; *see also Mead Corp.*, 533 U.S. at 235.

* * * *

Accordingly, this Court should defer to OCR's longstanding and consistent interpretation of Title IX's religious exemption. No matter the

route—*Chevron* or *Skidmore*—the end conclusion is identical: Fuller Theological Seminary qualifies for Title IX's religious exemption.

D. RFRA requires interpreting Title IX's religious exemption to protect the Seminary.

The Religious Freedom Restoration Act ("RFRA") guides statutory interpretation of other federal laws. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("RFRA operates as a kind of super statute, displacing the normal operation of other federal laws"); *Little Sisters of the Poor*, 140 S. Ct. 2384 at (2020) (agency "would certainly be susceptible" to claims of arbitrary and capricious rulemaking if it did not consider RFRA). It provides "very broad protection for religious liberty" by exempting religious objectors from federal laws that substantially burden the exercise of their religious beliefs. *Holt v. Hobbs*, 574 U.S. 352, 356 (2015). Under RFRA, such substantial burdens are permissible only if they are the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

RFRA "applies to all federal law, and the implementation of that law," including Title IX. 42 U.S.C. § 2000bb-3(a). As such, any interpretation of Title IX must take into account RFRA's requirements and thus must avoid using the power of the government to substantially burden the Seminary's exercise of religion.

A "substantial burden" is established either when religious groups are "coerced to act contrary to their religious beliefs by the threat of

civil ... sanctions" or "forced to choose between following the tenets of their religion and receiving a governmental benefit." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc). Here, Plaintiffs' theory of Title IX would make enforcing the Seminary's community standards an "unlawful act" subject to open-ended civil sanctions, including millions of dollars in claimed damages, all of which "would directly restrict the free exercise of the [Seminary's] religious faith." *Paul v. Watchtower Bible & Tract Soc'y of N.Y.*, 819 F.2d 875, 881 (9th Cir. 1987). And it would force the Seminary to either give up access to students relying on federal aid—thus imposing the burden of cutting them off from co-religionists seeking theological training—or give up their religious practices. If this Court grants Plaintiffs' claim, "the pressure to forgo th[ose] practice[s] would be unmistakable" and would thus constitute "a substantial burden." *Id.* at 881-82 & n.6 (cleaned up).

Nor can Plaintiffs justify that burden. There is no compelling government interest in controlling how a seminary trains its students for ministry. Thus, to avoid conflict with RFRA, the Title IX religious exemption must be interpreted to include the Seminary's practice of its religion here.

E. Title IX does not require the Seminary to apply for an exemption.

Plaintiffs argue (at Br.19-21) that the Seminary cannot assert the religious exemption because it did not apply to the Department for the exemption in advance. Not so.

The plain language of the statue refutes Plaintiffs' proposed administrative-preclearance requirement. If a religious school meets the statutory requirements for Title IX's religious exemption, the statutory language says that Title IX "shall not apply." 20 U.S.C. § 1681(a). As the district court explained, this language "automatically exempts … any educational institution that meets the statutory criteria." ER-15. It "does not condition an educational institution's liability under [Title IX] on its submission of a written claim for exemption." *Id.*

The Department's current regulations, which Plaintiffs conspicuously fail to address, confirm this common-sense reading. While "[a]n educational institution that seeks assurance of the exemption … *may* do so" by submitting a statement to the Department, "[a]n institution is *not required* to seek assurance from [the Department] in order to assert such an exemption." 85 Fed. Reg. 30,026, 30,475 (May 19, 2020); 34 C.F.R. § 106.12(b) (emphasis added).

Ignoring both the statute and controlling regulation, Plaintiffs instead quote former regulatory language stating that "[a]n educational institution which wishes to claim the exemption … shall do so by submitting in writing to the Assistant Secretary a

statement … identifying the provisions of this part which conflict with a specific tenet of the religious organization." Br.19-20 (quoting 34 C.F.R. § 106.12(b), *amended by* 85 Fed. Reg. at 30,475). But even this former regulation did "not require that a religious institution submit a written claim of exemption." Smith Memo at 1. Rather, OCR has long explained that this written statement is simply an optional "request for assurance" that the government will recognize a school's exemption. *Id.* That is precisely what the new regulation reaffirmed.

Finally, if Plaintiff's reading of the former regulation were correct, the regulation would be invalid, for two reasons. First, an implementing regulation cannot conflict with its unambiguous authorizing statute. *See Vividus*, 878 F.3d at 706; ER-15. Where the statute says that Title IX "shall not apply," 20 U.S.C. § 1681(a), a regulation can't say differently.

Second, imposing a discriminatory requirement for religious schools to seek preclearance of their religious beliefs would violate the Free Exercise Clause. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). As relevant here, Title IX provides a number of broad secular exemptions for, among other things, all private undergraduate admissions decisions; longtime single-sex public educational institutions; social fraternities and sororities; and voluntary youth service

organizations. *See* 20 U.S.C. § 1681(a). None of these require preclearance. Thus, there can be no requirement that religious schools must alone play "Mother, may I?" before practicing their faith.

II. Plaintiffs' claims violate the Religion Clauses.

The Religion Clauses of the First Amendment forbid civil courts from becoming "entangled in essentially religious controversies" over matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of [members] to the standard of morals required of them." *Milivojevich*, 426 U.S. at 709, 713-14. This "principle of church autonomy" thus guarantees religious groups "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061. The Religion Clauses speak with one voice here, since "[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.* at 2060.

Here, Plaintiffs' claims are barred in three ways by the church autonomy doctrine: they ask civil courts to decide religious questions; to override a religious community's judgment of who can be members; and to entangle themselves in the strictly ecclesiastical decision of whom the Seminary will train for religious ministry.

A. Church autonomy prohibits courts from deciding religious questions.

At the core of Plaintiffs' Title IX claim is their request that this Court decide whether entering a same-sex marriage violates the Seminary's religious community standards. That's a religious question this Court cannot resolve.

In its community standards, the Seminary has explained that it sincerely believes that "the teaching of Scripture" show that God "intended marriage to be an unconditional covenant between a woman and a man," that "sexual union must be reserved for marriage," and that "all members of its community—students, faculty, … and trustees—[must] abstain from what [Fuller] holds to be unbiblical sexual practices." SER-76, SER-84; ER-174 ¶191; *see also* ER-131 (relying on the standards for dismissal, and explaining they reflect "the Seminary's sincerely held religious beliefs"). The Plaintiffs disagree with these beliefs, but impermissibly want this Court to replace the Seminary's views with their own to find that "their civil same-sex marriages [do] not violate Fuller's religious beliefs." Br.21; *id.* at 12 (arguing their actions are not "inconsistent with Fuller's religious tenets"). That this Court cannot do.

Nor can Plaintiffs evade black-letter law by complaining that the Seminary is *too* accommodating to LGBT students to sincerely hold its beliefs. Br.4-5. Courts have repeatedly rejected that kind of argument, refusing to use a "school's promotion of inclusion as a weapon to challenge the sincerity of its religious beliefs." *Grussgott*, 882 F.3d at 658 (collecting

cases). Any other rule would create a perverse incentive for religious schools to be *less* inclusive, and would counter the missions of many schools to serve a variety of communities.

Under the Religion Clauses, courts cannot "deprive [the Seminary] of the right of construing [its] own church laws," *Milivojevich*, 426 U.S. at 714, nor are they "arbiters of Scriptural interpretation" who can determine that the Seminary's interpretation of its own beliefs is "unreasonable," *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981). *See also Paul*, 819 F.2d at 878 n.1 ("civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity"). Allowing Plaintiffs to contest the "religious meaning" of the Seminary's beliefs would "touch[] the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). Indeed, "the mere adjudication of such questions would pose grave problems for religious autonomy," as civil courts would have to "sit[] in ultimate judgment of what the accused church really believes." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 205-06 (2012) (Alito, J., joined by Kagan, J., concurring); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when ... litigation is made to turn on the resolution by civil courts of

controversies over religious doctrine and practice."). Plaintiffs' Title IX claim must be dismissed on this basis alone.

B. Church autonomy prohibits courts from deciding who ought to be members of religious organizations.

Plaintiffs' Title IX claim is also barred because the church autonomy doctrine protects religious organizations' membership decisions. Courts have long ruled that they "cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Bouldin v. Alexander*, 82 U.S. 131, 139-40 (1872). This reflects our nation's "broad and sound view of the relations of church and state under our system of laws," and prevents the "total subversion of … religious bodies" that would arise if former members "could appeal to the secular courts" to reverse their dismissal. *Watson v. Jones*, 80 U.S. 679, 727, 729 (1871). Religious groups thus have autonomy to decide whether a member failed to meet "the standard of morals required of them." *Milivojevich*, 426 U.S. at 714. As this Court has recognized, religious bodies must be "afforded great latitude" in making those determinations, and cannot entertain claims of former members "for having been 'wrongfully' disfellowshipped." *Paul*, 819 F.2d at 883 & 878 n.1; *see also Ammons v. N. Pac. Union Conf. of Seventh-Day Adventists*, 139 F.3d 903 (9th Cir. 1998) (unpublished) ("Disputes regarding matters of church discipline are not the proper subject of a civil court inquiry.").

Where the issue has arisen, courts have repeatedly recognized that this rule applies to a "decision to expel a student" from a religious school, since it "is akin to a church's decision to remove or discipline one of its members" and "necessarily involves doctrinal criteria, and attempting to disentangle the doctrinal from the secular in this context is precisely what [Supreme Court precedent] prohibits." *Askew v. Trustees of Gen. Assembly*, 644 F. Supp. 2d 584, 594 n.8 (E.D. Pa. 2009), *aff'd* 684 F.3d 413 (3d Cir. 2012).[17] So too here.

C. Church autonomy ensures that the selection and training of ministers remains a wholly ecclesiastical decision.

Finally, the "principle of church autonomy" also establishes the "constitutional foundation" of the ministerial exception doctrine. *Our Lady*, 140 S.Ct. at 2061. This doctrine protects religious groups' right to "select and control who will minister to the faithful," ensuring that authority over "choosing who will preach their beliefs, teach their faith, and carry out their mission" remains "strictly ecclesiastical." *Hosanna-Tabor*, 565 U.S. at 194-96.

---

[17] *See also Calvary Christian Sch., Inc. v. Huffstuttler*, 238 S.W.3d 58, 66-67 (Ark. 2006) (dismissing claims over religious school's dismissal of student); *Flynn v. Estevez*, 221 So.3d 1241, 1251 (Fla. Dist. Ct. App. 2017) (dismissing admissions claim against school because the "Church's governance of its parochial schools is inherently religious"); *In re Episcopal Sch. of Dallas*, 556 S.W.3d 347, 357 (Tex. App. 2017) (Religion Clauses bar claims "regarding whether [a student] should be a member of the school community"); *In re St. Thomas High Sch.*, 495 S.W.3d 500, 512 & n.1 (Tex. App. 2016) (same; collecting cases).

As relevant here, the ministerial exception covers seminary students training for the ministry. "First Amendment considerations relevant to an ordained minister apply equally to a person who, though not yet ordained, has entered into a church-recognized seminary program to become a minister." *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc) (affirming grant of judgment on the pleadings). "The principle of allowing the church to choose its representatives using whatever criteria it deems relevant necessarily applies not only to those persons who already are ordained ministers, but also to those persons who are actively in the process of becoming ordained ministers." *Id.* (cleaned up); *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) ("[T]he autonomy of a religious body in the selection and training of its own clergy [is] of critical importance."). Indeed, preventing government from exercising control over religious training was one of the aims of the Religion Clauses. *Our Lady*, 140 S. Ct. at 2061 (noting "the founding generation sought to prevent a repetition of" abusive English practices, including governmental "restrictions on education" that controlled who could "attend … universities").

That rule applies here. The Seminary's mission is to "prepare men and women for the manifold ministries of Christ and his Church." ER-60. That's particularly true of the School of Theology, where both Plaintiffs enrolled. And religious ministerial training was the express purpose that

both Plaintiffs came to the Seminary. Brittsan sought a Master of Divinity to obtain ordination in his church, "complete [his] spiritual training," and "equip [him] for [his] future ministry endeavors." ER-114; ER-154 ¶3. Maxon likewise enrolled in the School of Theology with the purpose of preparing for ministry. ER-105-06; ER-157 ¶29. On those facts, the Seminary has the constitutional right to choose who to train for ministry "using whatever criteria it deems relevant," including continued adherence to its community standards. *Alcazar*, 627 F.3d at 1292.

* * * *

If "independence in matters of faith and doctrine" means anything at all, *Our Lady*, 140 S. Ct. at 2061, it must mean courts cannot entangle themselves in resolving claims over whether the Seminary wrongly applied its own religious doctrine, determined its own membership, and selected future ministers of the faith.

III. Plaintiffs' claims violate the freedoms of assembly and association.

Plaintiffs' claims are also barred by the First Amendment rights to freedom of assembly and expressive association. The freedom of assembly is "a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). It protects the right of individuals to gather for "abstract discussion, unrelated to action," as well as to "persuade to action." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). Even before individuals "are capable of articulating their

reasons for ... their way of life," the freedom of assembly protects their right to "demonstrat[e] (intentionally or not) its merits"; it protects the right to "practi[ce] in order to preach." John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 159 (2012) (internal quotation marks and citation omitted).

Indeed, "[a]n individual's freedom to speak [and] to worship ... could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). This freedom of assembly or association "plainly presupposes a freedom not to associate," and thus protects against laws that "force[a] group to accept members it does not desire." *Id.* at 623. Protecting this "right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *United States v. Mongol Nation*, 370 F. Supp. 3d 1090, 1101 (C.D. Cal. 2019) (quoting *Boy Scouts v. Dale*, 530 U.S. 640, 647-48 (2000)). Thus, the "exercise of these constitutional rights is not deprived of protection if the exercise is not politically correct and even if it is discriminatory against others." *AHDC v. City of Fresno*, 433 F.3d 1182, 1198 (9th Cir. 2006).

This freedom to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," *Roberts*, 468 U.S. at 622, is thus alone sufficient to defeat Plaintiffs' challenge to the Seminary's decisions in assembling a community of

believers whom it seeks to form in its faith perspective. *See Our Lady*, 140 S. Ct. at 2055 ("The religious education and formation of students is the very reason for the existence of most private religious schools[.]").

The freedom of assembly takes on additional strength when undertaken for expressive purposes. As relevant here, the First Amendment protects the rights of groups to exclude individuals who undermine the groups' message on sexuality or marriage. *Dale*, 530 U.S. at 659; *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 581 (1995). Thus, for instance, courts have found that a gay softball league can exclude straight players, *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1161-62 (W.D. Wash. 2011), and that religious groups can exclude individuals who reject their beliefs on same-sex marriage, *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021). These rights also protect a seminary's decisions regarding its religious training. *Hosanna-Tabor*, 565 U.S. at 189 (noting EEOC concession that it would violate "the constitutional right to freedom of association" to use federal nondiscrimination law "to compel the ordination of women ... by an Orthodox Jewish seminary"). To decide if the right of expressive association is implicated, courts must determine whether the group "engage[s] in some form of expression, whether it be public or private," and if the law at issue "affects in a significant way the [organization's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648-50.

First, the Seminary engages in "some form of expression." It exists solely to provide "religious learning to prepare men and women for the manifold ministries of Christ and his Church." ER-60; *accord* SER-58. Moreover, its community standards were specifically delineated "to speak clearly" and avoid "confusion" about its moral commitments and to expressively "model" its faith for society. SER-64, 76.

These associational interests are near their peak here because this case concerns both religious *and* academic associational interests. The First Amendment "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor*, 565 U.S. at 189, in part because their "very existence is dedicated to the collective expression and propagation of shared religious ideals," making them "the archetype of associations formed for expressive purposes," *id.* at 200-01 (Alito, J., joined by Kagan, J., concurring). The First Amendment also accords institutions of higher education significant "educational autonomy," *Doe v. Kamehameha Schs.*, 470 F.3d 827, 841 (9th Cir. 2006) (en banc), including in its "selection of its student body," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (the "essential freedoms of a university" include "determin[ing] for itself ... who may be admitted to study" (cleaned up)).

Second, punishing the Seminary for holding certain religious beliefs about marriage and sexuality would "significantly affect the [Seminary's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 650. Courts must "give deference to an association's view of what would

impair its expression." *Id.* at 653. In *Dale*, the Supreme Court explained that the "deference" owed by courts meant that it "need not inquire further" than the Boy Scout's "assert[ion]" regarding the nature of its expression, and that impairment was a logical result of being forced to accept a leader who was open and public about his disagreement. *Id.* at 651, 659; *see also id.* at 651-52 (confirming the assertion via public statements the defendant had made). And here, the harm is plain: punishing the Seminary undermines its ability to maintain its long-established, well-known religious standards for ministry training. That is precisely the kind of "interfere[nce] with the internal organization or affairs of the group" forbidden by the right of expressive association. *See Roberts*, 468 U.S. at 623.

Application of this analysis is straightforward here, not least because Plaintiffs conceded both elements of the Seminary's freedom of association defense below, admitting the Seminary "is an expressive association with associational rights," and its expression would be harmed if Plaintiffs' claims are enforced. SER-40 And while Plaintiffs didn't dispute their ensuing strict scrutiny burden, they provided no argument that their claims could provide a more compelling basis for restricting First Amendment rights than the state public accommodations laws found wanting in *Dale* and *Hurley*.

IV. Plaintiffs' procedural arguments fail.

Unable to prevail on the merits, Plaintiffs retreat to a series of procedural arguments. None is persuasive.

A. The district court properly considered exhibits incorporated by reference into the complaint.

Plaintiffs challenge the Seminary's submission of Exhibits 2 through 10 with its motion to dismiss.[18] They are wrong. The district court was well within its discretion in accepting and considering these exhibits.

The court properly considered the exhibits because they were effectively incorporated into the complaint. In ruling on a 12(b)(6) motion, the district court may "look beyond the pleadings" "to consider documents that were referenced extensively in the complaint and were accepted by all parties as authentic." *Van Buskirk v. Cable News Network,* 284 F.3d 977, 980 (9th Cir. 2002). As the Seminary demonstrated below, and the district court found, Plaintiffs' complaint "heavily relies on Exhibits 2 through 10." ER-10; ER-55-56 (detailing the 120 paragraphs in the FAC that quote or otherwise rely on the exhibits). Plaintiffs do not contest this. Neither do they contest the documents' authenticity. Thus, they have "waived this objection on appeal." *Davis*, 691 F.3d at 1161.

Apparently recognizing these fatal flaws, Plaintiffs are forced to concede that "the district court may have properly incorporated Fuller's proposed documents by reference." Br.23. So Plaintiffs pivot and instead

[18] Plaintiffs admit that Exhibit 1 was admitted properly. SER-51-52; Br.6 n.1.

argue that the court was nonetheless barred from *using* the properly incorporated documents "to decide questions of fact in favor of Fuller." *Id.* This version of the argument fares no better.

First, Plaintiffs told the district court at least three times that the Seminary's religious beliefs and the reason Plaintiffs were dismissed were *not* in dispute. SER-11 ("The core factual issues are not in dispute at this stage of the litigation: The parties agree that Fuller dismissed Plaintiffs because of their same-sex marriages. The parties mainly dispute the legal significance of the facts."); SER-7 (similar); ER-32 ("[W]e are not asking the Court the question of sincerity of Fuller's religious beliefs regarding marriage, sexuality, or any of their religious beliefs.").

Second, courts do not accept as true a plaintiff's "allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 998 (9th Cir.), *opinion amended on denial of reh'g,* 275 F.3d 1187 (9th Cir. 2001); *accord Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Indeed, the incorporation-by-reference rule exists precisely for this purpose: to prevent plaintiffs from dodging proper dismissal "by deliberately omitting references to documents upon which their claims are based." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681-82 (9th Cir. 2006).

And third, as explained above, second-guessing the Seminary's understanding and application of its own religious beliefs would violate the First Amendment and unconstitutionally entangle this Court in a "religious thicket." *Milivojevich*, 426 U.S. at 719.

B. Dismissal with prejudice was proper.

Plaintiffs assert in passing that the district court abused its discretion by dismissing their Title IX claims with prejudice without giving them leave to amend the complaint. Br.21-22. But to obtain leave to amend, a plaintiff must show that the "deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and that do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (quoting *Reddy v. Litton Indus.,* 912 F.2d 291, 296-97 (9th Cir. 1990)). Here, the district court correctly dismissed Plaintiffs' Title IX claims with prejudice because any amendment to those claims would have been futile.

As an initial matter, Plaintiffs never asked the district court for leave to amend. Nor have they explained to this Court what additional facts they could allege to overcome the clear application of Title IX's religious exemption. That failure to "alert [either] court as to what new facts [they] would have alleged" is itself a sufficient reason to reject Plaintiffs' conclusory assertion of error. *Johnson v. Lucent Techs.*, 653 F.3d 1000, 1012 (9th Cir. 2011), *as amended* (Aug. 19, 2011).

In any event, amendment to take the Seminary outside the protections of Title IX's religious exemption would contradict the existing complaint and Plaintiffs' admissions. Plaintiffs would have to disavow their repeated admissions that the Seminary is "controlled by" its Board of Trustees, Br.11, 14, their admissions quoting the Seminary's Community Standards, ER-174 ¶191, and their admissions regarding the reason for their dismissal. ER-135; ER-138; SER-7. And given these admissions, no amount of "artful[] pleading," *Rodriguez v. Sony Comput. Ent. Am., LLC*, 801 F.3d 1045, 1054 (9th Cir. 2015), can change the fact that the Seminary is protected by Title IX's religious exemption. Nor would (another) amended complaint do anything to avoid the myriad First Amendment problems inherent in asking a secular court to order a seminary to train someone for the ministry contrary to its religious beliefs. Amendment would thus have been futile, and the district court was well within its discretion to dismiss the claim with prejudice.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ *Daniel H. Blomberg*

DANIEL H. BLOMBERG
Counsel of Record
ERIC BAXTER
DIANA M. VERM
DANIEL D. BENSON
DANIEL L. CHEN
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
dblomberg@becketlaw.org

KEVIN S. WATTLES
Soltman Levitt Flaherty
& Wattles LLP
90 E. Thousand Oaks Blvd.
Suite 300
Thousand Oaks, CA 91360
(805) 497-7706

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,907 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Daniel H. Blomberg
Daniel H. Blomberg
Counsel for Defendants-Appellees

Dated: June 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2021, the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Daniel H. Blomberg
Daniel H. Blomberg
Counsel for Defendants-Appellees

ADDENDUM

Pertinent Constitutional Provisions and Statutes

TABLE OF CONTENTS

Page

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title IX of the Education Amendments of 1972,
20 U.S.C. § 1681 *et seq.*

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits

students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which

may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

34 C.F.R. § 106.12

§ 106.12 Educational institutions controlled by religious organizations.

(a) Application. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) Assurance of exemption. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

(c) Eligibility. Any of the following in paragraphs (c)(1) through (6) of this section shall be sufficient to establish that an educational institution is

controlled by a religious organization, as contemplated under paragraph (a) of this section, and is therefore eligible to assert a religious exemption to the extent application of this part would not be consistent with its religious tenets:

(1) That the educational institution is a school or department of divinity.

(2) That the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(3) That the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(4) That the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(5) That the educational institution has a published institutional mission that is approved by the governing body of an educational

institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(6) Other evidence sufficient to establish that an educational institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

(d) Severability. If any provision of this section or its application to any person, act, or practice is held invalid, the remainder of this section or the application of its provisions to any person, act, or practice shall not be affected thereby.

Cal. Corp. Code § 9210

§ 9210. Exercise of powers; delegation of management

Subject to the provisions of this part and any provision in the articles or bylaws:

(a) Each corporation shall have a board of directors. The activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.

(b) The board may delegate the management of the activities of the corporation to any person or persons provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.