**No. 20-56156**

# United States Court of Appeals for the Ninth Circuit

JOANNA MAXON AND NATHAN BRITTSAN,
PLAINTIFFS-APPELLANTS,

*v.*

FULLER THEOLOGICAL SEMINARY, MARIANNE MEYE THOMPSON, MARI L. CLEMENTS, AND NICOLE BOYMOOK,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, NO. 19-CV-09969
HON. CONSUELO B. MARSHALL, PRESIDING

## BRIEF OF ORRIN G. HATCH FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Orrin G. Hatch Foundation, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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## INTEREST OF AMICUS CURIAE[1]

The Orrin G. Hatch Foundation is a nonprofit organization that serves as an incubator for policy scholarship, promotes civic discourse and engagement, and promotes, among many issues, the preservation of religious liberty in the United States. Its Hatch Center serves as one of the most expansive repositories of legislative history for the modern Senate. In keeping with the legacy of its namesake, Senator Orrin G. Hatch, the Hatch Foundation affirms the basic dignity of all persons and seeks to ensure that every American can exercise his or her faith free from unconstitutional interference. Ensuring that the government protects and preserves the religious rights of American citizens and religious organizations is of special concern to the Hatch Foundation.

The Hatch Foundation files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and all parties have consented to the filing of this brief.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person or entity, other than *amici* and their counsel, contributed money intended to fund the preparation or submission of this brief.

## INTRODUCTION

Title IX does not "apply to an educational institution controlled by a religious organization" if application of Title IX would be inconsistent with the organization's "religious tenets." 20 U.S.C. § 1681(a)(3). Since Title IX's enactment in 1972, the Department of Education has time and again confirmed what the plain text says: this exemption applies to all schools controlled by any type of religious organization, regardless of whether that organization is a formally and legally distinct denomination or church. Any other interpretation would arbitrarily deny the protections of the law to religious entities that choose to structure their internal governance in certain ways.

Notwithstanding Title IX's text, the Department's longstanding enforcement history, and the fundamental principle of religious autonomy, Appellants assert that Title IX's religious exemption does not apply to Fuller Theological Seminary's decision to enforce its religious standards regarding personal conduct against Appellants, even though they agreed to abide by those standards upon admission. These religious standards are established by Fuller's controlling Board of Trustees, which governs its academic and religious affairs. To avoid the plain application of Title IX's religious exemption, Appellants claim that the exemption applies only to educational institutions controlled by "separate" churches or denominations, not religious organizations like Fuller's Board of Trustees.

The district court correctly ruled that the religious exemption's text and history do not support Appellants' interpretation. Nothing in Title XI's text imposes any requirement that the relevant religious organization be a separate legal entity from the educational institution. Instead, all it requires is that the institution be "controlled by a religious organization"—and there is no question that Fuller's Board of Trustees controls the institution and is a religious organization.

If there were any doubt about this reading, such doubt would be resolved by the Department's consistent application of the exemption to religious seminaries like Fuller throughout Title IX's enforcement history. From its initial application of the exemption in the 1970s, the Department has applied the exemption to any educational institution controlled by a religious organization, regardless of the organization's formal structure. In a strained effort to muddy the waters, Appellants selectively quote post-enactment legislative history involving proposed amendments to Title IX. Even if that history were relevant, it shows that Congress rejected attempts to amend the religious exemption because it concluded that the exemption was already broad enough to cover seminaries and other educational institutions controlled by religious organizations that are not legally distinct churches or denominations.

Finally, the religious autonomy doctrine, which requires the judiciary to avoid interference with matters of faith, doctrine, and internal governance, coun-

sels against any interpretation that would make the scope of the exemption turn on a judicial assessment of how religious organizations have structured their internal operations.

## ARGUMENT

The district court properly dismissed Appellants' complaint. First, applying the religious exemption here is consistent with Title IX's text and the protections that the exemption was enacted to afford. Second, Title IX's enforcement history and legislative history both support applying the exemption to Fuller. And third, Appellants' contrary interpretation would run headlong into the religious autonomy doctrine, which forbids the federal judiciary from intruding on matters of internal religious structure and governance.

### I. The district court's interpretation of the religious exemption follows the text of Title IX.

In applying the religious exemption to Fuller, the district court followed the plain meaning of Title IX. As noted, Title IX "shall not apply to an educational institution which is controlled by a religious organization" when application of Title IX "would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). Here, applying Title IX to prohibit Fuller from adhering to its religious standards regarding personal conduct would conflict with Fuller's religious tenets. Thus, the applicability of the exemption turns on whether Fuller is "controlled by a religious organization." Fuller readily satisfies this requirement.

First, Fuller's Board of Trustees is unquestionably a "religious organization." As the district court explained, "the ordinary meaning of the term 'organization' is sufficiently broad to include the board of directors." Op. 16. And there is no question that Fuller's Board adheres to "religious" beliefs. Second, Fuller's Board "controls" the seminary. As the district court rightly explained, the Board is "responsible for implementing the policies at issue." *Id.* Thus, in accord with the plain text, the district court properly applied the exemption to Fuller and granted the motion to dismiss.

Appellants' interpretation of Title IX would circumvent the statute's plain language and eviscerate the protections afforded by the religious exemption. Appellants assert that the statute does not apply to Fuller because it "is not owned by a church, denomination or other religious organization," and "two separate entities" are required for the exemption to apply. Br. 14–15. But the statute does not contain any sort of separate ownership or legal separation requirement. By its plain language, Title IX's religious exemption applies to any "educational institution which is controlled by a religious *organization*." 20 U.S.C. § 1681(a)(3) (emphasis added). Fuller's Board of Trustees is just that.

Indeed, when the Department began to apply Title IX, "organization" meant "a group of people that has a more or less constant membership, a body of officers, a purpose, and us[ually] a set of regulations . . . [including] *religious organiza-*

*tions*." Webster's New International Dictionary 1590 (3d ed. 1981) (emphasis added). The statutory language is not limited to "religious denomination," "religious congregation," or "religious church." Nor does it require that the controlling religious organization be a legally distinct church or denomination. Appellants' proposed interpretation thus impermissibly narrows the text of Title IX. "[G]eneral words are general words, and they must be given general effect." Antonin Scalia & Bryan Garner, *Reading Law* 101 (2012). Where, as here, the plain meaning of "the statutory language provides a clear answer," the statutory interpretation inquiry "ends there." *United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

Even if the Court were to find that the meaning of the phrase "controlled by a religious organization" is ambiguous, it should defer to the Department's permissible interpretation of Title IX. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Medina Tovar v. Zuchowski*, 982 F.3d 631, 634–35 (9th Cir. 2020); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995) (applying *Chevron* deference even to informal letter correspondence). Under the Department's interpretation, as the district court explained, Fuller "plainly qualifies" for the exemption. Op. 17.

As "the administrative agency charged with administering Title IX," *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999) (citation omit-

ted), the Department has adopted regulations interpreting the statute that are consistent with the plain meaning of the text and that favor applying the religious exemption here. Specifically, in November 2020, the Department promulgated an update to 34 C.F.R. § 106.12 (2021), codifying its longstanding internal guidelines about what educational institutions qualify for the religious exemption. Under the regulation, an educational institution qualifies as an institution controlled by a religious organization when the institution "is a school or department of divinity," "requires its faculty, students, or employees to . . . engage in religious practices of . . . the religion of the organization by which it claims to be controlled," or offers "[o]ther evidence sufficient to establish that an educational institution is controlled by a religious organization." 34 C.F.R. § 106.12(c)(1)–(2), (6). As a seminary controlled by a religious Board of Trustees that requires its educational community to abide by conduct standards, Fuller typifies the kind of religious institution contemplated by the Department's regulations. Accordingly, even if the Court were to conclude that Title IX's text is ambiguous as to whether Fuller qualifies for the religious exemption, it should defer to the Department's reasonable interpretation and conclude that the exemption applies.

## II. Title IX's enforcement and legislative history support the district court's interpretation.

Not only is the decision below consistent with the plain meaning of Title IX's text, but it is also consistent with Title IX's enforcement and legislative histo-

ry. Where a statute is ambiguous, this Court has long relied on enforcement history and legislative history to clarify the statute's meaning. *See, e.g.*, *Eleri v. Sessions*, 852 F.3d 879, 882 (9th Cir. 2017) (discussing the "benefit" of an agency's interpretation and enforcement to resolve ambiguity); *United States v. Vance Crooked Arm*, 788 F.3d 1065, 1073 (9th Cir. 2015) (discussing the use of legislative history to resolve ambiguity).

Here, the Department has consistently enforced the religious exemption across the almost five decades since Title IX's enactment in a manner that supports applying the exemption here. Appellants feebly point to post-enactment legislative history from hearings almost two decades after Title IX's enactment, but that history is both irrelevant and inconsistent with their position.

### A. The Department's enforcement history supports the district court's interpretation.

The enforcement of Title IX's religious exemption began when the Department addressed three institutions' requests for preemptive exemptions in 1976. The Department "largely treated the three educational institutions as inherently exempt, focusing on the specificity of religious tenets and regulatory sections" and defer-

ring to "the assertion of control by [the] religious organization[s]." Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. Kan. L. Rev. 327, 349 (2016).[2]

The process followed by the Department in these cases was formalized in 1977 when the Department adopted an "Assurance of Compliance" form, HEW Form 639-A. *See* Assurance of Compliance with Title IX of Education Amendments of 1972, 42 Fed. Reg. 15,141 (Mar. 18, 1977). The Form included an "appropriate box" that allowed an educational institution to preemptively seek confirmation of the religious organization's eligibility under the religious exemption. *Id.* at 15,142. In addition to checking the box, the institution was encouraged to attach "a written statement" from "the highest ranking official of the educational institution," identifying the parts of Title IX that "conflict with a specific tenet of the controlling organization." *Id.* While the Department imposed "no time restrictions" when seeking such confirmation, it encouraged institutions to submit the "written statement" when they submitted the Form. *Id.* The Department follows a similar process today. *See* U.S. Dep't. of Educ., Exemptions from Title IX, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (last up-

[2] Appellants point to this article's critique of the Department's adoption of an internal review process without public comment or involvement in the implementation of the control test to argue that the Department's control test "has never been formalized as a regulation." Br. 15. That argument ignores that the Department formalized the control test when it promulgated the update to 34 C.F.R. § 106.12 in November 2020.

dated Mar. 8, 2021). Its website explains that "an educational institution can inform [the Department's Office for Civil Rights] that it is claiming a religious exemption by submitting a written statement to the Assistant Secretary for assurance that OCR acknowledges the institution's exemption" and that "[a]n institution's exempt status is not dependent upon its submission of a written statement to OCR." *Id.*

With the Form's publication, the Department publicly outlined for the first time its test for assessing whether an institution qualified as "controlled by a religious organization." The Form provided several examples of educational institutions that would qualify as "controlled by a religious organization," including an institution that "is a school or department of divinity." Assurance of Compliance with Title IX of Education Amendments of 1972, 42 Fed. Reg. 15,141, 15,142–43 (Mar. 18, 1977). The Form additionally set forth a definition for "school or department of divinity" that Congress had established in the Higher Education Act of 1965. *Id.* at 15,143 (citing Higher Education Act of 1965, Pub. L. No. 89-329, § 111, 79 Stat. 1219, 1224 (1965)). Under this definition, the terms "school or department of divinity" mean "an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects." *Id.*

Since the Department adopted the Form, the Form's approach for assessing whether an educational institution is "controlled by a religious organization" and the Form's examples of institutions that qualify for the exemption have guided the Department's application of the exemption as "an internal administrative agency policy and practice." Augustine-Adams, *supra*, at 349–50. This approach has remained consistent throughout Title IX's enforcement history, including through the Department's codification of the policy as an official rule in 34 C.F.R. § 106.12(c) late last year, as discussed above. *See* U.S. Dep't. of Educ., Exemptions from Title IX, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (last updated Mar. 8, 2021).

Eight years after the Form's adoption, for example, in 1985, the Department followed the Form's approach when Assistant Secretary of Education Harry M. Singleton led an initiative, the Religious Exemption Project, to resolve the Department's backlog of exemption requests. *See* Augustine-Adams, *supra*, at 361–78. In a memorandum to the Department's Regional Civil Rights Directors, Assistant Secretary Singleton acknowledged that "'control' was defined for institutions" in the Form. *See* Memorandum from Harry M. Singleton, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Reg'l Dirs., Regions I-X, Office for Civil Rights, U.S. Dep't of Educ. (Feb. 19, 1985), http://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf (last visited June 21, 2021).

Based on this definition and consistent with the Department's approach to interpreting the exemption, Assistant Secretary Singleton instructed the regional directors to "accept as fact that an institution is controlled by a religious organization where the specific organization is named" by the educational institution. *Id.*

The Department's subsequent approach to approving the religious exemption as part of the Religious Exemption Project typifies its approach throughout Title IX's enforcement history. For example, in resolving a request for an exemption from Asbury Theological Seminary, Assistant Secretary Singleton concluded that the Seminary had "adequately establishe[d] that Asbury Theological Seminary is controlled by a religious organization" because the Seminary had demonstrated it was "controlled by the Wesleyan interpretation of the Scriptures."[3]

Likewise, the Department acknowledged Berea College's exempt status in 1985, where the religious organization "controlling" the College was its Board of Trustees, which was not a separate entity from the College. In a letter to the Department, Berea's President noted that Berea's internal religious governance was by design because the "founders of Berea College were . . . anti-sectarian and we

[3] Letter from Harry M. Singleton, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to David L. McKenna, President, Asbury Theological Seminary (May 17, 1985), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/asbury-theological-seminary-response-05171985.pdf (last visited June 21, 2021).

have continued in that tradition" in keeping with the College's "commitment to Christianity."[4] Based on this letter, Assistant Secretary Singleton concluded in a reply to Berea that the "commitment to Christianity by Berea College and the *controlling* Board of Trustees adequately establishes that Berea College is controlled by a religious organization."[5]

The Department continued this approach long after it completed the Religious Exemption Project in the mid-1980s. In 2016, for example, Assistant Secretary Catherine Lhamon accepted Lancaster Bible College's statement of control when Lancaster claimed that its "lifestyle standards" prohibiting sex outside of a marriage "union between one man and woman" were religiously required by its controlling Board of Trustees.[6] And in 2018, Acting Assistant Secretary Candice Jackson accepted Dallas Theological Seminary's statement of control even though no separate organization controlled the seminary because the seminary was "con-

[4] Letter from John B. Stephenson, President, Berea College, to William H. Thomas, Regional Director for Regions IV, Office for Civil Rights, U.S. Dep't of Educ. (July 19, 1985), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/berea-college-request-07191985.pdf (last visited June 21, 2021).

[5] Letter from Harry M. Singleton, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to John B. Stephenson, President, Berea College (Sept. 3, 1985) (emphasis added), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/berea-college-response-09031985.pdf (last visited June 21, 2021).

[6] Letter from Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Peter W. Teague, President, Lancaster Bible College (Aug. 31, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/lancaster-bible-college-response-08312016.pdf (last visited June 21, 2021).

trolled by the Evangelical Christian interpretation of the Scriptures" and required its scholastic community to "adhere to essential doctrinal commitments."[7]

Over the past five decades, nearly 300 educational institutions have received religious exemptions under Title XI. *See* Augustine-Adams, *supra*, at 327. The examples above of the Department's approach for assessing whether an educational institution is "controlled by a religious organization" are representative of the consistent approach that the Department has used throughout Title IX's enforcement history.[8]

As discussed, contrary to Appellants' assertion that the "control test as described in the Singleton Memo has never been formalized as a regulation," Br. 15, the Department recently codified its approach to applying the religious exemption with the promulgation and adoption of an updated version of 34 C.F.R. § 106.12. In that codification, the Department made clear that 34 C.F.R. § 106.12 "is consistent with guidance issued by former Assistant Secretary Singleton" and "con-

[7] Letter from Candice Jackson, Acting Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Mark Bailey, President, Dallas Theological Seminary (Apr. 25, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/dallas-theological-seminary-response-04252018.pdf (last visited June 21, 2021).

[8] For additional examples of the Department's consistent approach to enforcing the exemption, see U.S. Dep't of Ed., Office for Civil Rights, Other Correspondence, https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html (last modified Apr. 15, 2021) (featuring all the Department's exemption request and response letters).

sistent with the Department's past practice." Exemption for Educational Institutions Controlled by Religious Organizations, 85 Fed. Reg. 59,916, 59,945, 59,955 (Sept. 23, 2020) (to be codified at 34 C.F.R. pt. 106.12). The Department rejected the argument that Appellants make here, because "[t]he Title IX statute does not require that an educational institution and a controlling religious organization be separate and distinct entities." *Id.* at 59,956.

Because the religious exemption has consistently been applied to educational institutions like Fuller throughout Title IX's enforcement history, that history supports applying the exemption to Fuller.

### B. Post-enactment legislative history is irrelevant and, if anything, supports the district court's interpretation.

The district court correctly rejected Appellants' argument, made here again, that legislative history decades after Title IX's enactment somehow undermines the applicability of the religious exemption to Fuller. *See* Op. 16–17. Limited legislative history exists from the initial adoption of Title IX's religious exemption. *See* Elise S. Faust, Comment, *Who Decides? The Title IX Religious Exemption and Administrative Authority*, 2017 BYU L. Rev. 1197, 1202 (2017). What little initial legislative history does exist indicates that the exemption was added as a part of a series of compromises between the House and Senate in the conference committee. *Id.* at 1203–04. Of note, Congress was legislating against the backdrop of a series of then-recent Supreme Court decisions forbidding government entanglement with

religious schools, which likely influenced consideration of the exemption. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (issued the year before Title IX's adoption); *Tilton v. Richardson*, 403 U.S. 672 (1971) (same).

This limited record leaves Appellants grasping at a few cherry-picked quotations from legislative history almost two decades after Title IX's adoption to argue that the religious exemption for educational institutions does not apply to seminaries like Fuller. *See* Br. 19. This argument is meritless. First, as the Supreme Court has long held and as the district court properly noted, any use of subsequent legislative history faces the "difficulties inherent in relying on subsequent legislative history." *Sullivan v. Finklestein*, 496 U.S. 617, 628 n.8 (1990) (citing *United States v. United Mine Workers*, 330 U.S. 258, 281–82 (1947)); Op. 17. Failed attempts to pass a new statute are "particularly dangerous" sources of legislative history because a statute can be proposed or fail "for any number of reasons." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 (2001) (citations omitted). Because of its inherently speculative nature, subsequent legislative history is useful only to the extent that it reveals what a later Congress thought an earlier Congress intended. *See Sullivan*, 496 U.S. at 631–32 (Scalia, J., concurring). It provides no "authoritative evidence" of a statute's *original* public meaning. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020). Indeed, the Supreme Court recently rejected again "[a]rguments based on subsequent legisla-

tive history" as arguments that "should not be taken seriously, not even in a footnote." *Id.* (quoting *Finklestein*, 496 U.S. at 632 (Scalia, J., concurring)).

Even if subsequent legislative history were somehow relevant here, it would support the district court's interpretation. Appellants rely on a failed effort in the late 1980s to amend the text of Title IX's religious exemption to apply whenever the educational institution is "closely identified with the tenets of a religious organization." Br. 19. The legislative record, however, does not support Appellants' contention that the failed amendments show that the current text excludes seminaries like Fuller from the religious exemption. Rather, the record shows that Congress *approved* of the Department's definition of "controlled by" as applied in the Form's control test and throughout the Department's consistent history of enforcing Title IX, because Congress concluded that the "record of implementation" for the exemption "[did] not indicate any need to broaden" it. S. Rep. No. 100-64 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 1987 WL 61447, at *20–21. In the House, for example, one representative explained that the "vast bulk" of exemptions had been given to, and would continue to be given, "to seminaries." 134 Cong. Rec. H565-02 (daily ed. Mar. 2, 1988) (statement of Rep. Fish), 1988 WL 1083034. The Senate report likewise stated that the proposed amendments would not depart from the Department's consistent application of the religious exemption, which as explained, did not require separate ownership or control by a legally dis-

tinct church or denomination. *See* S. Rep. No. 100-64 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 1987 WL 61447, at *21–22.

For their part, the amendment's opponents were not focused on creating (or preserving) any sort of requirement that an institution be controlled by a separate religious organization. They were simply concerned that a "loose[r] definition" of the exemption would "invite[] mischief" by allowing institutions to claim the exemption "no matter how tenuous the religious connection." 134 Cong. Rec. H565-02 (daily ed. Mar. 2, 1988) (statements of Reps. Fish, Durbin, & Snowe), 1988 WL 1083034. The amendment's opponents believed, moreover, that the Department's consistent enforcement standard for the exemption could continue to "be applied in a sufficiently flexible manner to avoid significant problems." *Id*. (statement of Rep. Jeffords). And as explained above, the amendments ultimately failed because Congress believed that the religious exemption was already sufficiently broad.

In sum, even the subsequent legislative history cited by Appellants does not support their contention that Congress intended to deny the exemption to religious institutions like Fuller. Instead, the Department's longstanding, uniform enforcement of the exemption is consistent with the subsequent legislative history, as well as the plain text of Title IX.

## III. The religious autonomy doctrine further supports the district court's interpretation.

Finally, if there were any remaining questions about the statute's meaning, Appellants' interpretation of the religious exemption would contradict the federal judiciary's constitutionally required deference to religious institutions on matters of internal religious governance. The Supreme Court has long recognized that the government must avoid interfering with "matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). This well-settled principle prevents the government from dictating to a religious institution what "rules and regulations for internal discipline and govern[ance]" the institution must or should adopt in accord with its faith and doctrine. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976).

Just as courts defer to a religious institution's understandings of its own tenets, so too should they defer to a religious institution's chosen structure for governance and control. "Judicial review of the way in which religious schools discharge [matters of doctrine and governance] would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Appellants' interpretation of Title IX would require courts to pass judgment on how religious institutions are structured and whether they have a sufficiently "separate" control-

ling entity to qualify for legal protection. This determination would intrude upon protected religious decisions and exert pressure on religious institutions to be structured in particular ways to receive the full protection of the law. *Cf. Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) (prohibiting conditioning "eligib[ility] for government aid" on a school's decision to "divorce itself from any religious control or affiliation"). Regulating schools with "substantial religious character" based on the fact that they are organized in one particular way could "giv[e] rise to entangling church-state relationships of the kind the Religious Clauses sought to avoid." *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 507 (1979) (internal quotation marks omitted). It could also result in discrimination against religious organizations with less formal structures and divisions, thereby favoring certain denominations and religions over others. This kind of religious discrimination would contradict the "constitutional prohibition of denominational preferences [that] is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson v. Valente*, 456 U.S. 228, 245 (1982); *see also Our Lady*, 140 S. Ct. at 2064 (warning against "privileging religious traditions with formal organizational structures over those that are less formal").

Notably, many courts, including this one, have applied the religious autonomy doctrine to avoid interpreting matters of religion in the Title VII context under

the "ministerial exception."[9] The doctrine protects the autonomy of religious institutions "with respect to internal management decisions," and "[t]he 'ministerial exception' was based on this insight." *Our Lady*, 140 S. Ct. at 2060. The ministerial exception "saves Title VII from unconstitutionality under the First Amendment by requiring that Title VII suits be dismissed when they would impermissibly encroach upon the free exercise rights" of religious organizations. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953 (9th Cir. 2004).

The Supreme Court has recognized that the rationale underlying Title VII cases can inform the analysis of Title IX cases. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing a Title VII case, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), in deciding whether conduct was actionable under Title IX); *accord Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) ("Title VII [precedent] . . . guides our evaluation of claims under Title IX."). This Court, too, has relied on Title VII precedents to decide Title IX cases. *E.g.*, *Oona R.S. ex rel. Kate S. v. McCaffrey*, 143 F.3d 473, 476–77 (9th Cir. 1998). In the hostile environment context, for example, this Court has held that "Title VII

[9] *See, e.g.*, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955–56 (9th Cir. 2004); *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006) (joining "seven of our sister circuits in adopting the [ministerial] exception"); *see also Our Lady*, 140 S. Ct. at 2055, 2058–59 (applying the ministerial exception beyond the Title VII context in the ADEA and ADA contexts).

standards apply to hostile environment claims under Title IX." *Id.* at 477. Another court has applied the ministerial exception rationale from the Title VII context to interpret the very provision of Title IX at issue in this case. *See Petruska v. Gannon Univ.*, 2008 WL 2789260, at *2 (W.D. Pa. Mar. 31, 2008). In that case, the court rejected the "erroneous assumption" that the ministerial exception did not apply to Title IX because "distinctions between Title VII and Title IX are not material to . . . application of the ministerial exception." *Id.* at *4.

Appellants wrongly claim that supposed distinctions between Title IX and Title VII favor their narrow reinterpretation of the religious exemption. Br. 18–19. But the supposed differences Appellants identify miss the relevant point: the ministerial exception exists not as a statutory protection, but as a *constitutional* one. *See Our Lady*, 140 S. Ct. at 2061 (explaining "[t]he constitutional foundation" for the ministerial exception).

Thus, the ministerial exception that courts have recognized in the Title VII context (and beyond) further supports applying Title XI's religious exemption to Fuller. It would make little sense for courts to respect religious autonomy when it comes to the ministerial exception and Title VII claims but disregard a religious organization's choice of structure when it comes to Title IX, particularly since both the First Amendment *and* Title IX's express religious exemption protect the religious organization. Given this double protection, religious organizations like Fuller

certainly merit protection under Title IX. The religious autonomy doctrine thus provides additional support for the district court's interpretation of Title IX.

## CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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JUNE 21, 2021

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**9th Cir. Case Number(s)** 20-56156

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I, Christopher Mills, do hereby certify that I filed the foregoing Brief of Amicus Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 21, 2021. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Christopher Mills*
Christopher Mills
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