No. 20-56156

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNA MAXON, *et al*.,
Appellants,
V.

FULLER THEOLOGICAL SEMINARY, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Central District of California,
No. 2:19-cv-09969 (Marshall, J.)

BRIEF *AMICI CURIAE* OF THE NATIONAL LEGAL FOUNDATION AND THE PACIFIC JUSTICE INSTITUTE
in Support of the Appellees and Urging Affirmance

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Amici Curiae, The National Legal Foundation and the Pacific Justice Institute, have not issued shares to the public, and they have no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock of either *amicus*.

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INTERESTS OF THE *AMICI CURIAE*

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from California, are vitally concerned with the outcome of this case because of its effect on religious freedom.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. To this end, PJI has engaged in extensive litigation involving the free exercise of religion by religious individuals and organizations.

This brief is filed with the consent of all Parties.

STATEMENT OF COMPLIANCE WITH FRAP 29(a)(4)(E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Amici write to emphasize that the ruling Appellants request—i.e., that independent religious organizations are not covered by the Religious Organization Exemption of Title IX, 20 U.S.C. § 1681(a)(3)—would have wide-ranging consequences, as many religious educational organizations are independent. The district court properly held that both the text and intent of section 1681 extend the exemption to independent organizations. Indeed, any other construction would raise serious constitutional concerns. Nor does the Constitution permit a court to delve into the religious tenets of a school when there is no evidence of falsification of them for purposes of the suit. Thus, the district court properly dismissed the action.

ARGUMENT

I. Many Independent Religious Schools, Supervised by Their Own Boards, Populate This Country

The implications of this case are great. In the United States, many religious schools (both post-secondary and elementary-secondary) are independent of a denominational or other umbrella oversight organization. The U.S. Department of Education's National Center for Education Statistics (NCES) reporting data through 2018 shows that there were 879 private, independent, nonprofit post-secondary institutions that were religiously affiliated. Of those, 98 (11%) were not

affiliated with a specific denomination.[1] These 98 schools had a collective enrollment of over 107,000 full- and part-time students for the fall 2018 semester. This nondenominational status is even more characteristic of religiously affiliated elementary and secondary schools. For the fall 2015 term, NCES reported 23,270 religiously affiliated private elementary and secondary schools. Of those, 5,710 (over 24%) are identified as "Christian, no specific denomination" or "Other."[2]

While statistics by NCES for 1972, the year Title IX was enacted, are not currently available, it is certainly likely that the numbers for independent schools were also substantial at that time, as most such schools currently operating were also operating then. Thus, it is clear that Congress, when enacting Title IX and the Religious Organization Exemption, was well aware that religious schools run by independent boards existed and that excluding them from the exemption would be highly anomalous, not to mention unconstitutional (as discussed further below).

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[1] https://nces.ed.gov/programs/digest/d19/tables/dt19_303.90.asp (last visited June 13, 2021). These 98 institutions included those identified as "interdenominational," "multiple Protestant denominations," "non-denominational," "Protestant-other," "undenominational," and "'other religious affiliated."

[2] https://nces.ed.gov/programs/digest/d19/tables/dt19_205.45.asp (last visited June 13, 2021).

II. The Text of the Religious Organization Exemption Covers Independently Organized Schools Such as Fuller Seminary

Independent religious educational institutions qualify under the Religious Organization Exemption of Title IX. This is the reasonable reading of the text of the statute.

The prohibition of sex discrimination in section 1681 of Title IX does 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[.]" 20 U.S.C. § 1681(a)(3).[3] Restating this, for a school to be "controlled by a religious organization," the controlling organization must be religious with "religious tenets" with which it requires the associated school to conform. An independent board that controls a religious school meets this simple requirement.

First, a board of trustees or similar supervising authority of an independent school is not the school itself. The board does not enroll students or teach classes. Its purpose is to authorize and exercise control of the school, not to be the school itself or operate as an academic faculty. Here, that supervisory function is

[3] The seminary has not cross-appealed the district court's ruling that the actions for which the appellants were dismissed from the school were discrimination on the basis of sex for purposes of section 1681. Thus, that issue is not presented by this appeal or addressed by *Amici*.

performed by Fuller Seminary's Board of Trustees, as the district court correctly observed. *Maxon v. Seminary*, 2020 WL 6305460 at *6 (C.D. Cal. Oct. 7, 2020).

Second, in exercising that supervisory function, a board of an independent religious school defines the religious principles under which the school is to operate. For independent schools, this will often involve the promulgation of "Articles of Faith" or some such document that specifies the necessary beliefs of the school. Boards will also decide by whom those beliefs (or "tenets," as section 1681 has it) must be held—the administration, certainly, and many boards also require faculty of the school to adhere to them. And many, including Fuller Seminary, go a step further and require all students to adhere to those core beliefs. *See id.* at *1-2. The Religious Organization Exemption provides that, when the supervisory organization has done so, those tenets exempt conformance with Title IX.

Nothing more need be shown for a school to avail itself of the exemption. It must be assumed that Congress, when it enacted the exemption, knew full well that the country was dotted with independent religious schools, i.e., those unaffiliated with any specific denomination and denominational structure. Yet, the statute does not say that the controlling organization must be separately incorporated from the school; nor does it add any other, artificial, legal requirement. Thus, as the district

court held, a board of trustees such as that of Fuller Seminary qualifies the school for the exemption.

Finally, "religious tenets" encompass both propositions of theology and how its adherents must act consistently with that theology in order to be a part of the community in good standing. Fuller Seminary is a Christian school, and Christianity's founder, Jesus Christ, repeatedly admonished that, to be his follower, it was not enough to know his teachings and theological principles; one also had to obey, conforming one's conduct to his teachings. *See, e.g.*, Jn. 14:23-24 ("If anyone loves me, he will obey my teaching. . . . He who does not love me will not obey my teaching.") (NIV). Thus, the district court correctly held that the Religious Organization Exemption shielded Fuller Seminary's insistence that its students conform their conduct to the school's understanding of biblical teaching on sexual conduct, as that was part of the religious tenets of the school. *See* 2020 WL 6305460 at *8.

III. No Contemporary Legislative History Supports the Appellants' Position That Would Disqualify Independent Religious Schools from the Religious Organization Exemption, and Any Such Interpretation Would Be Unconstitutional and, Thus, Should Be Rejected

Appellants posit that Congress intended to give *denominational* religious schools an exemption from Title IX for acting in conformity with their religious beliefs but to deny *independent* religious schools the same protection. Just stating

the proposition defeats it. The appellants have cited no contemporaneous legislative history in support of any such intent of Congress.

This dooms the former students' case under the canon of interpretation that requires statutes to be interpreted so as to avoid constitutional infirmity, often called the *Catholic Bishop* rule, after *NLRB* v. *Catholic Bishop of Chicago,* 440 U. S. 490 (1979). The Court in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), explained the operation of the rule as follows:

> 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. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray* v. *The Charming Betsy,* 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate. As was stated in *Hooper* v. *California,* 155 U. S. 648, 657 (1895), "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." 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. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Id. at 575 (citing *Catholic Bishop*, 440 U.S. at 499-501, 504; some citations omitted).

This rule of construction dooms the former students' argument because, if the Religious Organization Exemption were to advantage hierarchical religious denominations over independent ones, it would set up a religious preference forbidden by the First Amendment. In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court considered a statute that exempted well-established religious groups, but not others. It struck down the statute with these words: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244; *see also Epperson v. Ark*., 393 U. S. 97, 104 (1968) (holding that the "First Amendment mandates governmental neutrality between religion and religion"); *Abington Sch. Dist. v. Schempp*, 374 U. S. 203, 225 (1963); *id.* at 305 (Goldberg, J., concurring) ("[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects"); *Zorach v. Clauson*, 343 U. S. 306, 314 (1952) (holding that "[t]he government must be neutral when it comes to competition between sects"); *Everson v. Bd. of Educ.*, 330 U. S. 1, 15 (1947) (holding that the Establishment Clause does not permit the State to "pass laws which . . . prefer one religion over another").

Unless the Religious Organization Exemption of Title IX is interpreted to include independent religious schools supervised by a board of directors or similar body, it would have the same failing the Supreme Court highlighted in *Larson*.

Because the statute does not require such an interpretation and because an interpretation of the exemption including independent religious schools like Fuller Seminary is not "plainly contrary to the intent of Congress," *DeBartolo*, 485 U.S. at 575, the *Catholic Bishop* rule requires this Court to interpret the Religious Organization Exemption to include independent religious schools supervised by a board that is itself not an educational institution. *See Colo. Christian Univ. v. Weaver*, 534 F. 3d 1245, 1257-58 (10th Cir. 2008) (noting that analysis of discrimination among religious groups proceeds along parallel paths under the Establishment, Free Exercise, and Equal Protection Clauses).

IV. The District Court Also Correctly Held That Discovery Was Unavailable to Test the Substance of the School's Religious Tenets

The district court also correctly held that it had no authority to go "trolling" through Fuller Seminary's religious beliefs and that, consequently, discovery requested by appellants as to those beliefs with an intent to pierce the declarations of its officials was improper. *See* 2020 WL 6305460 at *8 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). A contrary ruling would have intruded on ground outside the Court's competence and would have unduly interfered in the affairs of the religious organization, implicating the church autonomy doctrine.

The church autonomy doctrine recognizes, quite simply, that the judiciary has no business meddling in a religious organization's internal affairs, as they are

inextricably linked with the organization's and its members' free exercise of religion. It is moored in the fact that judges are constitutionally incapacitated from adjudicating religious doctrine and belief. This was all explained by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), in which the Court concluded that the church autonomy doctrine is so strong that it safeguards a church's decision to fire a minister even when it is made for a non-religious reason. 565 U.S. at 194; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

Moreover, the Supreme Court has frequently noted that requiring a religious organization to put on evidence of its religious motivation and beliefs has a chilling effect on the free exercise of religion, with the natural result of affecting how personnel decisions will be made. For example, when the Court approved the religious organization exemption of Title VII in *Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), it explained that, if a religious organization were required,

> on pain of substantial liability, to predict which of its activities a secular court will consider religious . . ., an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carrie[s] out what it underst[ands] to be its religious mission.

Id. at 336. Justice Alito in *Hosanna-Tabor* reiterated these concerns: "[T]he mere adjudication of . . . questions [regarding the 'real reason' for the dismissal of a

religious employee] would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of [a] religious doctrine . . . , with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." 565 U.S. at 205–06 (Alito, J., concurring) (internal quote marks adjusted).

These same considerations apply here when Fuller Seminary dismissed its students for not conforming with the way the seminary interpreted its religious tenets, which included its related standards of conduct. This is not a case in which there is a colorable claim that a religious reason is being used as a pretext or is being falsified. As a result, the discovery appellants requested was inappropriate, and the district court properly denied it and entered judgment in the seminary's favor.

CONCLUSION

Should this Court adopt the interpretation of the Educational Organization Exemption of Title IX that the appellants advocate, it would reverberate all across the nation, disqualifying the many religious schools who are supervised by independent boards. But that is not the better reading of the text of the statute, and it is an interpretation forbidden by the *Catholic Bishop* rule. The First Amendment also prohibits a court from delving into the why's and

wherefore's of the religious tenets of a religious organization, and the district court appropriately stopped appellants from invading that area through discovery. The decision below applying the Religious Organization Exemption to Fuller Seminary in this instance should be affirmed.

Respectfully submitted,
this 21st day of June, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(5)(A) and 32(a)(7)(B)(i) and the corresponding local rules, the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced and contains 2,525 words, excluding those portions not required to be counted, as calculated by Microsoft Word 365.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 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.

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