

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)

BRIEF OF *AMICI CURIAE*
THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES,
AGUDATH ISRAEL OF AMERICA,
THE COALITION FOR JEWISH VALUES, THE
INTERNATIONAL ALLIANCE FOR CHRISTIAN EDUCATION,
AND 32 RELIGIOUS COLLEGES AND UNIVERSITIES
SUPPORTING DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* have no parent corporations. They have no stock, and, therefore, no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTRODUCTION AND INTEREST OF <i>AMICI</i>	1
STATEMENT	5
SUMMARY OF ARGUMENT	6
ARGUMENT.....	9
I. The Religious Exemption Is Constitutionally Required When Title IX’s Application Would Interfere With A Religious School’s Decisions About Adherence To Its Religion-Based Standards.....	10
A. The expressive-association doctrine protects the rights of religious schools to choose who will belong to their communities.	10
B. The Religion Clauses independently allow religious schools to decide what standards of belief and conduct determine community membership.	15
II. The Unique Benefits Of Religious Colleges And Universities Would Be Lost Absent Protections Such As Those Provided By Title IX’s Religious Exemption.....	22
A. Religious colleges and universities bring unique benefits to higher education.	22
B. The district court’s decision helps preserve these unique benefits.....	33
CONCLUSION	36
CERTIFICATE OF COMPLIANCE.....	37
CERTIFICATE OF SERVICE.....	38
APPENDIX A	39

TABLE OF AUTHORITIES

Cases

<i>Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith</i> , 684 F.3d 413 (3d Cir. 2012)	19
<i>Bouldin v. Alexander</i> , 82 U.S. (15 Wall.) 131 (1872)	2, 7, 12, 18
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000)	12, 13, 14
<i>Burgess v. Rock Creek Baptist Church</i> , 734 F. Supp. 30 (D.D.C. 1990)	12
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014)	21
<i>Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos</i> , 483 U.S. 327 (1987)	13, 16
<i>EEOC v. Townley Eng'g & Mfg. Co.</i> , 859 F.2d 610 (9th Cir. 1988)	15
<i>Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla.</i> , 824 F. App'x 680 (11th Cir. 2020)	18
<i>Farnsworth v. Storrs</i> , 59 Mass. (5 Cush.) 412 (1850)	17
<i>Harmon v. Dreher</i> , 17 S.C. Eq. (Speers Eq.) 87 (1843)	17
<i>Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC</i> , 565 U.S. 171 (2012)	12, 19
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.</i> , 515 U.S. 557 (1995)	13
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	18

<i>Korte v. Sebelius</i> , 735 F.3d 654 (7th Cir. 2013).....	16
<i>McCarthy v. Fuller</i> , 714 F.3d 971 (7th Cir. 2013).....	20
<i>N.L.R.B. v. Cath. Bishop of Chicago</i> , 440 U.S. 490 (1979).....	20
<i>NAACP v. State of Ala. ex rel. Patterson</i> , 357 U.S. 449 (1958).....	1, 11
<i>Natal v. Christian Missionary All.</i> , 878 F.2d 1575 (1st Cir. 1989).....	5, 20
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020).....	2, 15
<i>Paul v. Watchtower Bible & Tract Soc. of New York, Inc.</i> , 819 F.2d 875 (9th Cir. 1987).....	16, 19
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	1, 11
<i>Shannon v. Frost</i> , 42 Ky. (3 B. Mon.) 253 (1842).....	17
<i>Thomas v. Review Bd. Of Ind. Emp. Security Div.</i> , 450 U.S. 707 (1981).....	21
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1871).....	7, 18
Statutes	
Higher Education Opportunity Act of 2008, Pub. L. No. 110–15 (2008).....	24
Other Authorities	
154 Cong. Rec. H7661 (2008).....	24
154 Cong. Rec. H7668 (2008).....	24
<i>Abraham Kuyper: A Centennial Reader</i> (James D. Bratt ed., 1998).....	23
Arizona Christian University, <i>Student Handbook</i> (2020).....	13

Avi Lazerson,
Holiness and Judaism, Jewish Magazine (Jan. 2001)..... 28

Biola University,
Sexuality & Relationships Policy..... 13

Blue Zones,
Loma Linda, California: A group of Americans living 10 years longer..... 32

Brief for Council for Christian Colleges & Universities et. al. as Amici Curiae Supporting Petitioners at App. B, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. argued June 3, 2020) 34

CCCU,
Additional Resources: Hunter v. Department of Education Lawsuit (May 12, 2021)..... 33

CCCU,
The Case for Christian Higher Education (2018)..... 26

College Simply,
California Religious Colleges..... 22

Concordia University Irvine,
Concordia Serves 2021 26

Conrad Harvey,
A Buddhist perspective on Health and Spirituality, 9 Scottish Journal of Healthcare Chaplaincy 33 (2006) 32

Datalab, *Federal Investment in Higher Education* 34

Econsult Solutions, Inc.,
Building The Common Good: The National Impact Of Council For Christian Colleges & Universities (CCCU) Institutions (2017)..... 26

EDSmart,
College Sexual Assault Statistics of Top Ranked Schools 2015..... 28

Ellen B. Stolzenberg, et al., *Undergraduate Teaching Faculty: The HERI Survey, 2016-2017* (2019) 30

Elliot N. Dorff,
The Jewish Tradition: Religious Beliefs and Healthcare Decisions, Advocate Health (2002) 32

Gayle M. Wells,
The effect of religiosity and campus alcohol culture on collegiate alcohol consumption, 58 J. Am. Coll. Health. 295 (2010) 32

George Fox University,
George Fox University Undergraduate Student Handbook 2020–21.. 13

George Fox University,
Resources for Current Students 26

Kristen Whitney Daniels,
Muslim Students Find Catholic Haven, National Catholic Reporter (Nov. 4, 2016) 28

Mehmet Eskin,
The Effects of Religious Versus Secular Education on Suicide Ideation and suicidal Attitudes in Adolescents in Turkey, 39 Social Psychiatry Psychiatric Epidemiology 536 (2004) 33

Nevada Christian College,
About 27

Northwest University,
Community Handbook: 2019-2020 (2019) 13

Richard Isralowitz and Alexander Reznik,
Impact of Religious Education and Religiosity on Adolescent Alcohol Use and Risk-Taking Behavior, 110 J. of the Religious Ed. Ass’n 306 (2015)..... 33

Richard W. Garnett,
A Hands–Off Approach to Religious Doctrine: What Are We Talking About?, 84 Notre Dame L. Rev. 837 (2009) 16

Salman Assad et al.,
Health and Islam, 4 Journal of Mid-Life Health 65 (2013) 31

State University,
Top 500 Ranked Colleges - Safest Private Colleges and Universities .27

Tad Walch,
Stone-Cold Sober XXIII: BYU repeats (and repeats) atop Princeton Review list, Deseret News (Aug. 18, 2020) 32

Tanya Loudenback, <i>The 25 safest college campuses in America</i> , Business Insider (Jan. 12, 2016).....	27
The Master’s University, <i>Student Handbook</i> (2020)	13
Yale, Slavery & Abolition, <i>The Story of Yale Abolitionists</i>	29
Yeshiva University, <i>Jewish Living and Learning</i>	23
Regulations	
34 C.F.R. §106.12 (2020)	35
Scriptural Authorities	
Deuteronomy 10 (NIV)	24
Exodus 22	25
Galatians 5 (NIV)	1
James 1:27 (NIV).....	26
Luke 12 (NIV).....	25
Matthew 25 (NIV)	24, 26, 28
Mosiah 2	24
Proverbs 27 (NIV).....	2
Quran 16.....	24
Quran 17.....	25
Revelation 14 (NIV).....	29
Sahih al-Bukhari 6416.....	28
Talmud.....	24

INTRODUCTION AND INTEREST OF *AMICI*¹

In upholding and applying to Fuller Theological Seminary the religious exemption that Congress included in Title IX, the district court acted in compliance not only with the statute, but with the best traditions of our Nation—and the requirements of the First Amendment.

Among other things, that Amendment protects the “freedom to engage in association for the advancement of beliefs and ideas.” *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). That right of association, moreover, extends to “educational, religious and cultural” points of view. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). And the right to associate necessarily includes the right *not* to associate. Indeed, the members of a religious community, no less than its ministers, can have a powerful impact on the development of the community and the furtherance of its doctrine and missions. *See, e.g.*, Galatians 5:9 (NIV) (“A little yeast works through the whole batch of dough.”); Proverbs 27:17

¹ All parties consent to this *amicus* brief’s filing. No party’s counsel authored any part of this brief. No party or party’s counsel, or person other than *amici*, contributed money to the brief’s preparation or submission.

(NIV) (“As iron sharpens iron, so one person sharpens another.”). For that reason, what has come to be called the First Amendment’s “religious-autonomy” doctrine, see *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), shields religious institutions from judicial scrutiny of their decisions, not just regarding their leaders and teachers, but also their membership. See, e.g., *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139–40 (1872).

While Fuller is not technically a “church,” it is a community built around educating the next generation in Christian values (as well as in secular learning) that functions much like a church: As to membership and enrollment of students, it shares the same expressive interests as a church in maintaining cohesiveness and unity of message and practice on beliefs fundamental to its biblical, Christian identity.

Yet despite these clear First Amendment protections, Appellants now ask this Court to ignore Fuller’s constitutionally protected autonomy. They have done so by suing Fuller under Title IX and a bevy of state statutes for expelling two of its students for violating some of the important religious beliefs by which the Fuller community defines itself, and which lie at the heart of the community’s theology.

These freedoms are especially important to religious higher education. In a typical religious college, all members of the community are expected to live according to a set of guidelines inspired by the community's faith. That expectation is part of the distinctive promise made to students and their families—that the community will be shaped by adherence to the school's particular theological understandings.

For these reasons, a school's religious practices are not a mere additive to the educational experience; they are the oxygen that gives it life. In turn, graduates of these religious schools provide the next generation of religious leaders. Accordingly, interfering with these schools' ability to live out their beliefs necessarily affects the spiritual life of churches, mosques, temples, and synagogues. Christian colleges like Fuller deliver on their duty to the larger church body by maintaining a community where students and teachers agree to live according to their biblical beliefs. For many religious colleges, as for Fuller, faithful living according to these standards is thus a continuing condition of admission and employment in the community. *See* ER 93–94.

That is why this case—which threatens to deprive religious schools of their ability to shape their communities according to their beliefs if

they wish to have their students accept federal funding—is of great concern to *Amici*, who represent a wide swath of American religious higher education. Specifically, *Amici* include the Council for Christian Colleges & Universities (“CCCU”), which represents some 140 faith-based institutions in the United States, Agudath Israel of America, the Coalition for Jewish Values, the International Alliance for Christian Education, and 32 religious colleges listed in the Appendix.

Like Fuller, the *amici* schools (and those represented by the associational *amici*) cannot achieve their sacred goals unless they can choose their students and the religious standards governing campus life. They thus have a powerful interest in protecting their right to create—free from government interference—a community of students, staff and faculty who are aligned with the institution’s religious missions. Because, “[b]y its very nature, the inquiry” that Appellants invite this Court to undertake into the circumstances of their expulsion would plunge the Court “into a maelstrom of Church policy, administration, and governance,” the First Amendment forbids civil courts from undertaking it. *Natal v. Christian and Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989). The decision below should therefore be affirmed.

STATEMENT

Fuller is a California religious corporation organized to “establish, conduct, and maintain a seminary of religious learning to prepare men and women for the manifold ministries of Christ and his Church.” ER 60. To further that mission, Fuller maintains community standards that govern the conduct of students and employees alike. One provides that sexual activity is appropriate only in a “covenant union between one man and one woman.” ER 83. Under this standard, any sexual conduct outside of a man-woman marriage is strictly prohibited. *Ibid.*

Moreover, all Fuller students, including Appellants Joanna Maxon and Nathan Brittsan, agree to follow the community standards as a “continuing condition of enrollment.” ER 103, 115. Indeed, both Appellants signed forms before admission saying they understood that their enrollment at Fuller was contingent on their continued adherence to the community standards. *Ibid.* Neither, however, fully followed those standards: Joanna, a woman, married a woman, and Nathan, a man, married a man. ER 154–55, 157–58. Their membership in the Fuller religious community was terminated because of their failure to comply fully with its faith-based standards.

SUMMARY OF ARGUMENT

In addition to the reasons addressed in the Appellees' Brief, two reasons strongly counsel affirmance.

I. A long line of decisions recognizes that groups with expressive missions, such as religious colleges, have an independent First Amendment right to expressive association. That right includes the right either to not associate with, or to disassociate from, members who no longer are willing to uphold the expressive purposes and beliefs of the community. That right would be lost if this Court were to reverse the decision below, as religious colleges throughout the Ninth Circuit would be forced to include students who are openly hostile to the schools' religious messages. The Free Speech and Association Clauses protect religious colleges from that result.

Fuller's rights of expressive association are enhanced by the First Amendment's religion clauses. Those clauses forbid civil courts from exercising jurisdiction over ecclesiastical matters, including decisions about standards for members or leaders of churches and other religious communities. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

Fuller (at 52–53) correctly urges that the so-called “ministerial

exception” bars this Court from second-guessing its decisions about whom to train for the ministry and that Fuller properly exercised that right here. But the religious autonomy doctrine—of which the ministerial exception is just one part—does not apply *only* to would-be ministers. That doctrine applies to all disciplinary decisions regarding religious standards affecting members and attendees of churches and other religious institutions, including religious colleges.

Indeed, long before the Supreme Court formally recognized the ministerial exception, it recognized that courts cannot “decide who ought to be members of the church” or whether those excluded “have been regularly or irregularly cut off.” *Bouldin*, 82 U.S. at 139–40. Because religious colleges, like churches, exist to further religious missions, that same principle applies to religious colleges. The Religion Clauses thus foreclose courts from asking the very questions Appellants ask this Court to resolve—that is, inquiring into Fuller’s ecclesiastical decisions regarding membership in its religious community. And principles of constitutional avoidance caution against interpreting Title IX to allow such entanglement with Fuller’s religious decisions.

II. An affirmance will also serve society's powerful interest in preserving a robust religious higher-education community. Religious colleges and universities offer students distinctive opportunities to integrate community service into their educations, to enjoy the physical and emotional safety that generally prevail in communities united by a common religious ethic, and to learn in an atmosphere of greater philosophical and political diversity than is offered in most non-religious institutions. Accordingly, the mere existence of religious colleges and universities provides significant benefits to higher education generally. And, without the ability to ensure mission alignment by removing from the community those who oppose fundamental aspects of that mission, religious higher-education institutions would lose the ability to provide those unique benefits.

If the Court agreed with Appellants that Title IX's religious exemption does not apply to colleges like Fuller, religious schools would face a Hobson's choice: abandon core religious beliefs or foreclose their students' ability to seek federal funding on a par with students at other institutions. An affirmance, by contrast, will ensure that religious colleges can continue providing their many societal benefits.

ARGUMENT

Amici agree with Appellees that the district court properly held that Title IX's religious exemption bars Appellant's claims and that the religious autonomy doctrine forbids courts from second-guessing a seminary's decision on who will be trained for the ministry. *Amici* write separately to emphasize two key points. *First*, the First Amendment's expressive-association and religious-autonomy doctrines apply with full force to religious colleges and universities (regardless of whether they are seminaries like Fuller) and bar Appellants' claims. *Second*, religious colleges and universities benefit society in numerous ways that would be lost if the government could condition their students' receipt of federal funds on those schools' abandoning their religious beliefs and practices.

I. The Religious Exemption Is Constitutionally Required When Title IX’s Application Would Interfere With A Religious School’s Decisions About Adherence To Its Religion-Based Standards.

Appellants’ proposed reading of Title IX’s religious exemption would create a conflict between Title IX and two of the First Amendment’s key protections. *First*, it would punish religious colleges, each of which is an expressive association, for removing from their communities would-be members whose actions interfere with the institution’s ability to further its expressive, religious goals. *Second*, Appellants’ position would allow the civil courts to second-guess a religious organization’s decision to dismiss members for violating its religious teachings—a decision fully protected by the Religion Clauses.

A. The expressive-association doctrine protects the rights of religious schools to choose who will belong to their communities.

The simplest path to affirmance is to recognize that the First Amendment protects the rights of every religious college, including Fuller, to form a religious community designed to further its expressive, religious goals.

1. The Supreme Court has long recognized that the First Amendment protects the “freedom to engage in association for the

advancement of beliefs and ideas,” and that such association “is an inseparable aspect of the ‘liberty’ assured” by the First and Fourteenth Amendments. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). This freedom of expressive association is especially important for the right of “effective advocacy” of “public and private points of view, particularly controversial ones,” and has caused the Court to see the “close nexus between freedoms of speech and assembly.” *Ibid.* And that right of association extends to “educational, religious *and* cultural” points of view. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added).

Critically, the right to associate protected by the First Amendment necessarily includes the right *not* to associate:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Id. at 623. The doctrine of expressive association thus forbids the government from forcing or pressuring expressive groups, such as religious schools, to include an “unwanted person in a group” if doing so

affects “the group’s ability to advocate public or private viewpoints.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (public accommodations law that required the Boy Scouts to admit a gay rights advocate violates the Boy Scouts' First Amendment right of expressive association).

This right of association is at its strongest when it comes to religious institutions, given the additional protections of the First Amendment’s religion clauses. Those clauses especially protect the right of all religious organizations, including religious colleges and universities, to decide for themselves what beliefs and practices will define those who “ought to be members,” teachers, and leaders of their communities. *Bouldin*, 82 U.S. at 139–40; *see also Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 33 (D.D.C. 1990) (government may not interfere with the “fundamental ecclesiastical concern of determining who is and who is not” a church member); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 189 (2012) (courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions). This right to freely associate for expressive ends is so fundamental that it violates the First Amendment to apply public-accommodation laws in a

way that interferes with an expressive association’s ability to control its own message. *Dale*, 530 U.S. at 644; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995) (holding states may not “require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey”).

2. Religious schools, such as Fuller, are expressive associations. They exist, to borrow from Justice Brennan, to foster an “ongoing tradition of shared beliefs.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). Many such schools have beliefs on human sexuality and gender that depart, often substantially, from secular or contemporary understandings.² Yet the First Amendment

² *E.g.*, George Fox University, *George Fox University Undergraduate Student Handbook* 2020–21, at 13 (2020), <https://tinyurl.com/GeorgeFoxHandbook> (“In regard to sexual morality, we believe that only marriage between a man and a woman is God’s intention for the joyful fulfillment of sexual intimacy.”); Biola University, *Sexuality & Relationships Policy*, <https://tinyurl.com/BiolaPolicy> (“Biola University’s position on marriage affirms the goodness of sexual relationships as designed by God

protects those beliefs, even if they are unpopular. *Dale*, 530 U.S. at 660. And because any “requirement that [those schools] retain” students who live or advocate contrary to those beliefs “would significantly burden [their] right to oppose or disfavor” conduct that violates their organizational views, the First Amendment forbids the government from imposing such a requirement. *Id.* at 659.

In short, Appellants ask this Court to interpret Title IX in a way that would hinder religious colleges from being able to further their messages and missions. Because the First Amendment does not allow that result, the decision below should be affirmed.

to be expressed within the covenant of marriage between a man and a woman.”); Arizona Christian University, *Student Handbook* 52 (2020), <https://tinyurl.com/AZChristianUHandbook> (defining “marriage as the permanent, exclusive, comprehensive, and conjugal ‘one flesh’ union of one man and one woman” and prohibiting “sexual acts outside marriage”); Northwest University, *Community Handbook: 2019-2020*, at 9 (2019), <https://tinyurl.com/NUHandbook> (“We do not condone sexual relations before marriage, outside of marriage, or homosexual practices.”); The Master’s University, *Student Handbook* 18 (2020), <https://tinyurl.com/MastersUHandbook> (“Any form of sexual immorality,” including “adultery, homosexuality, or bisexual conduct,” is “sinful and outside of God’s design for sexual intimacy[.]”).

B. The Religion Clauses independently allow religious schools to decide what standards of belief and conduct determine community membership.

Aside from expressive association, and aside from the fact that the Appellants were training for the ministry, *see* Appellee’s Br. 53, under the First Amendment the mere fact that Appellants were members of a religious community and were ousted for failure to abide by the community’s norms is sufficient to bar their claims.

1. Just last year, the Supreme Court (re)affirmed that 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 of Guadalupe Sch.*, 140 S. Ct. at 2055 (cleaned up). This doctrine, known as the church- or religious-autonomy doctrine, is grounded in the First Amendment.³ And it demands respect for the authority of each religious organization to set religious conduct standards within its community and discipline violators: “Courts generally do not scrutinize closely the relationship

³ The First Amendment “clearly [protects] organizations less pervasively religious than churches.” *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988).

among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.” *Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987). This recognition of the need to defer to religious organizations, moreover, stems from the practical understanding that “secular tribunals ‘lack the power to answer some questions—religious questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions.’” *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) (quoting Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 Notre Dame L. Rev. 837, 861 (2009)).

No matter is more ecclesiastical than the question of what standards of religious conduct and belief define who can, and who cannot, be members of a religious community. As Justice Brennan recognized, for many, “religious activity derives meaning in large measure from participation in a larger religious community” that “represents an ongoing tradition of shared beliefs.” *Amos*, 483 U.S. at 342 (Brennan, J., concurring in the judgment). The question of who can help form or shape

those beliefs, either as a leader, a teacher, or an ordinary member, is solely for the organization to decide.

For this reason, by as early as 1850, the Massachusetts Supreme Court recognized that the “powers and privileges” of religious organizations had been “established by long and immemorial usage.” *Farnsworth v. Storrs*, 59 Mass. (5 Cush.) 412, 415 (1850). Included in those long-established powers were the “authority to deal with *** members” who violate the community’s norms, and “to administer proper punishment by way of rebuke, censure, suspension and excommunication.” *Ibid.* Many other courts have also recognized the authority of religious organizations to decide such questions without judicial interference. *See Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 258 (1842) (“This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision.”); *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843) (“It belongs not to the civil power to enter into or review the proceedings of a Spiritual Court” of a religious group of which the person was a “voluntary member”).

The U.S. Supreme Court recognized the complete autonomy of religious organizations over membership decisions more than 140 years

before it formally recognized, in *Hosanna-Tabor*, that the “ministerial exception” protects the rights of religious organizations to choose their ministers. In *Watson v. Jones*, the Supreme Court held that courts could “exercise no jurisdiction” over a “matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” 80 U.S. (13 Wall.) 679, 733 (1871). Mere months later, the Court stated expressly what it implied in *Watson*—that courts “cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.” *Bouldin*, 82 U.S. (15 Wall.) at 139–40.

Thus, as the Eleventh Circuit held just last year, “matters of church governance, administration, and membership” are “part and parcel of ecclesiastical concerns.” *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla.*, 824 F. App’x 680, 683 (11th Cir. 2020) (unpublished). And even though courts *can* address some issues involving religious organizations—such as property disputes, *e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602 (1979)—by applying neutral principles of law, there is “no neutral principle of law that could assist in evaluating whether a

member lives his or her life in a manner consistent with church doctrine.” *Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith*, 684 F.3d 413, 419 (3d Cir. 2012).

2. Appellants’ attempt to apply Title IX against a religious college for its decision to expel them from its religious community conflicts with these principles. Fuller exercised a right afforded all religious organizations—it disciplined two of its members for violating its religious standards. The religious-autonomy doctrine ensures that the authority to make such membership decisions is the religious institution’s alone: “Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.” *Paul*, 819 F.2d at 883 (citation omitted); *see also Hosanna-Tabor*, 565 U.S. at 194–95 (similar). For this reason, Title IX’s religious exemption is constitutionally *required* whenever a student at a religious college or university challenges that institution’s decision to discipline the student for violating its standards on sexuality or gender.

3. Applying the religious-autonomy doctrine would also prevent the excessive entanglement that the First Amendment forbids. The point is well illustrated by the facts here.

This case began after Appellants claimed that Fuller violated Title IX when it expelled them for entering same-sex marriages. Fuller responded by pointing out that its decision was based on its long-standing and well-known commitments to biblical teaching. Appellants now argue that they should be allowed to show, through discovery, that “civil same-sex marriages would not violate Fuller’s religious beliefs.” Appellants’ Br. 21. But because the resolution of Appellants’ charges “will necessarily involve inquiry into the good faith of the position asserted by the [school] and its relationship to the school’s religious mission,” the First Amendment forbids the inquiry. *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see, e.g., McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013) (If the “authorized religious body has resolved the religious [membership] issue, the court may not question the resolution.”).

Courts are not just forbidden to answer such ecclesiastical questions; they are forbidden from even *asking* them. *Natal v. Christian Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989) (explaining that “[b]y its very nature, the inquiry” into religious practices would thrust civil courts “into a maelstrom of Church policy, administration, and governance”). To be sure, courts may inquire into the sincerity of religious

beliefs to discover (for example) whether an alleged belief is merely a pretext or convenient creation to cover an otherwise discriminatory or unlawful act. But once sincerity is established, or absent any serious question of sincerity, courts cannot inquire into the reasonableness, validity, or legitimacy of that belief. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (providing that courts may look at sincerity of belief, but they have “no business” deciding “whether the religious belief *** is reasonable”). For reasons stated previously, this necessarily includes a religious community’s decisions about who can and cannot be part of the community.

In short, the question of who can be part of a religious community, such as a religious college or university, is ecclesiastical. Because the First Amendment forbids secular courts from answering ecclesiastical questions, such as standards of belief and conduct, Title IX cannot constitutionally apply against religious colleges and universities for exercising their rights to make these decisions.⁴

⁴ See also *Thomas v. Review Bd. Of Ind. Emp. Security Div.*, 450 U.S. 707, 717–18 (1981) (holding that religion is substantially burdened

II. The Unique Benefits Of Religious Colleges And Universities Would Be Lost Absent Protections Such As Those Provided By Title IX's Religious Exemption.

Affirming the decision below is also important because it will help preserve the rights of many students at religious colleges throughout the Ninth Circuit to receive federal funding without their schools' having to abandon core religious beliefs.⁵ Largely because of their religious character, these institutions serve important societal purposes and provide important societal benefits, both in the Ninth Circuit and nationwide. A refusal to apply the Title IX exemption to these institutions would severely limit their ability to provide those benefits by depriving their students of necessary funding.

A. Religious colleges and universities bring unique benefits to higher education.

In addition to being academically competitive with non-religious schools, religious colleges and universities offer advantages that are often not as readily available in non-religious institutions. These include the

when the government "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or *** denies such a benefit because of conduct mandated by religious belief").

⁵ See e.g., College Simply, *California Religious Colleges*, <https://www.collegesimply.com/colleges/california/religious-colleges/>.

opportunity to study academic disciplines guided by faith and to naturally integrate community service into higher education. Religious colleges also often provide greater physical safety to their students and a broader diversity of philosophical and political perspectives among professors and students. And they foster physical and mental health of all students generally, including LGBTQ+ students.

1. Part of the appeal of religious colleges to students and their families is the promise of studying academic disciplines in a way that integrates faith. For Christian colleges, for example, faith, learning, life, and work all come under “the Lordship of Jesus Christ,” as famously emphasized by theologian Abraham Kuyper.⁶ Religious colleges from other faith traditions strive for a similar integration of faith and learning.⁷ To students and their families, this integration is extremely valuable and important. And it is well-illustrated in Fuller’s own educational approach.

⁶ *Abraham Kuyper: A Centennial Reader* 488 (James D. Bratt ed., 1998).

⁷ *E.g.*, Yeshiva University, *Jewish Living and Learning*, <https://www.yu.edu/jll>.

2. Congress recognized an additional benefit of religious institutions in the Higher Education Opportunity Act of 2008—i.e., that they help students integrate community service into their educations. Pub. L. No. 110–15 (2008). That is one reason why the Act requires accrediting bodies to “respect[] the *** religious missions” of such institutions. 154 Cong. Rec. H7668 (2008). Noting that “[t]he time to recognize and encourage an increased commitment to public service is now,” the House Report on this legislation emphasized, as a reason for congressional protection, the growing number of students at religious colleges who serve religious missions or perform other kinds of service. 154 Cong. Rec. H7661 (2008). These observations reflect that community service is one important way religious colleges contribute to society.

It is no accident that religious colleges foster community service. Students and professors are typically encouraged by their foundational religious texts, traditions, and teachings to take care of the foreigner, the poor, and the needy.⁸ They are consequently more likely to embrace the

⁸ See, e.g., Talmud (“It is a bounden duty to visit the sick.”); Deuteronomy 10:18–9 (NIV) (“He defends the cause of the fatherless and

principle that the value of one's life is measured not predominantly by what one achieves, but by how well one serves others.⁹

Thus, for instance, the Book of Exodus might inspire a sociology major at a Jewish college to address the plight of refugees from war-torn lands,¹⁰ the Quran might lead a student in a Muslim school to look for opportunities to serve local immigrants,¹¹ or the New Testament might move a student at a Catholic law school to give *pro bono* assistance to

the widow, and loves the foreigner residing among you, giving them food and clothing. And you are to love those who are foreigners, for you yourselves were foreigners in Egypt.”); Matthew 25:40 (NIV) (“The King will reply, ‘Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.’”); Quran 16:90 (Sahih International) (“Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression.”); Mosiah 2:17 (Book of Mormon) (“[W]hen ye are in the service of your fellow beings ye are only in the service of your God.”).

⁹ See, e.g., Luke 12:15 (NIV) (“Then he said to them, ‘Watch out! Be on your guard against all kinds of greed; life does not consist in an abundance of possessions.’”).

¹⁰ See, e.g., Exodus 22:20, <https://tinyurl.com/ChabadExodus> (“And you shall not mistreat a stranger, nor shall you oppress him, for you were strangers in the land of Egypt.”).

¹¹ See, e.g., Quran 17:26 (“[G]ive *** to the needy and the wayfarer.”).

unwed mothers or foster children.¹² Studies show that this is not merely hypothetical: On average, students at religious colleges spend significantly more time in community service than students at non-religious colleges, public or private.¹³ Their service brings immense benefits to their communities.

Students at religious colleges in the Ninth Circuit serve communities both locally¹⁴ and globally.¹⁵ Overseas service trips

¹² See, e.g., Matthew 25:35 (NIV) (“For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in[.]”); James 1:27 (NIV) (“Religion that God our Father accepts as pure *** is this: to look after orphans and widows in their distress.”).

¹³ See CCCU, *The Case for Christian Higher Education* 8-10 (2018), <https://tinyurl.com/ChristianHigherEd> (citing Econsult Solutions, Inc., *Building The Common Good: The National Impact Of Council For Christian Colleges & Universities (CCCU) Institutions* (2017), <https://tinyurl.com/EconsultReport>).

¹⁴ See e.g., Concordia University Irvine, *Concordia Serves 2021*, <https://tinyurl.com/ConcordiaServes> (“Last year, over 1,000 members of our CUI family stepped into the community on one day, called to give to others from the abundance they have been given.”).

¹⁵ See e.g., Arizona Christian University, *Spiritual Life: Service*, <https://tinyurl.com/ACUSpiritualLife> (“[S]tudents and staff/faculty go on missions trips, reaching the world with the hope of the gospel.”); George Fox University, *Resources for Current Students*, <https://tinyurl.com/GFUResources> (Students take “service trips” and engage in “ministry opportunities that have a local and global impact.”).

regularly focus on the temporal needs of those they serve.¹⁶ Both the students and the communities they serve benefit from this service, not only because of the physical relief it provides, but also because it tends to reduce cultural divides. All the regions comprising this Circuit thus benefit from religious colleges because their students enter society equipped with the skills to bridge gaps and an increased appreciation of the world around them.

3. Religious colleges and universities also often provide greater physical safety. Indeed, of the top twenty-five safest universities in America, eighteen (or 72 percent) are religious.¹⁷ In 2019, Fuller itself was ranked among the top 100 safest private colleges in the country.¹⁸

¹⁶ See Whitworth University, *Ministry/Service Opportunities*, <https://tinyurl.com/WhitworthMinistry> (advertising how students “tutor[] in local schools”); Nevada Christian College, *About*, <https://www.nvcc.school/about> (explaining how students provided “comfort to orphans in southern India, lending their energy to a cultural development project in Africa or partnering with nonprofits closer to home”).

¹⁷ Tanya Loudonback, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016), <https://tinyurl.com/SafeCampuses>.

¹⁸ State University, *Top 500 Ranked Colleges - Safest Private Colleges and Universities – Page 4*, <https://tinyurl.com/SafetyScore>.

Moreover, colleges classified as “most religious” consistently report lower rates of sexual assault than the national average.¹⁹

Accordingly, for students and parents concerned about physical safety, religious colleges and universities are an attractive option.²⁰ And the mere existence of such options in the higher-education market helps ensure that other institutions place greater emphasis on student safety.

4. Religious colleges also contribute substantially to the diversity of American higher education. In most religious traditions, the call of faith is a challenge to think and live differently from the rest of society. From the Islamic command to “[b]e in the world as if you were a stranger or traveler” to Jesus’ command that his disciples be “a light to the world,”²¹

¹⁹ EDSmart, *College Sexual Assault Statistics of Top Ranked Schools 2015*, <https://tinyurl.com/EDSmartStats>.

²⁰ Indeed, though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. *See, e.g.*, Kristen Whitney Daniels, *Muslim Students Find Catholic Haven*, National Catholic Reporter (Nov. 4, 2016), <https://tinyurl.com/NCRMuslimStudents> (“[S]ome Muslim students have found an unexpected haven in Catholic universities and colleges.”)

²¹ *See also* Sahih al-Bukhari 6416, <https://sunnah.com/bukhari/81/5> (“Be in this world as if you were a stranger or a traveler.”); Avi Lazerson, *Holiness and Judaism*, Jewish Magazine (Jan. 2001),

to Revelation’s injunction to for the eternal gospel to go to “every nation, tribe, language and people,”²² people of faith are encouraged to transcend the cultures in which they live.

Throughout the Nation’s history, this effort to live differently has encouraged numerous religious schools to depart from contemporaneous norms—compelling them, for example, to help lead the fight against slavery long before it became fashionable.²³ Thus, it is no surprise that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

For example, a comprehensive study addressing the political leanings of university faculties confirms that religious colleges and universities provide value in part because they do a far better job than secular institutions in attracting professors and students from across the

<http://www.jewishmag.com/39mag/holy/holy.htm> (directing Jews to “liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences”); Matthew 5:14–15 (NIV) (Christians are to be a “light” to the world).

²² Revelation 14:6 (NIV).

²³ Yale, Slavery & Abolition, *The Story of Yale Abolitionists*, <http://www.yaleslavery.org/Abolitionists/abolit.html>.

political spectrum. The study found that, at non-religious, public universities, 65.7 percent of faculty across disciplines self-identify as either “liberal” or “far left,” while only 7.8 percent identify as “conservative” or “far right.”²⁴ In contrast (aside from Catholic colleges²⁵), at religious colleges only 42.6 percent of faculty identify as “liberal” or “far left” while 25.9 percent identify as “conservative” or “far right”²⁶—still far lower than the percentage who identify as “liberal,” but nearly four times the percentage of faculty identifying as “conservative” at non-religious institutions.

As a result, religious colleges are more likely than others to provide students meaningful exposure to diverse political views. This includes not only the more “conservative” views that are often largely missing in

²⁴ Ellen B. Stolzenberg, et al., Higher Education Research Institute at UCLA, *Undergraduate Teaching Faculty: The HERI Survey, 2016-2017*, at 38 (2019), <https://tinyurl.com/HERIStudy>.

²⁵ The study does not explicitly provide a category for non-Catholic religious universities as opposed to colleges. *Ibid. Amici* have no reason to believe that the ideologies of professors at non-Catholic religious universities differ in any meaningful respect from those at non-Catholic religious colleges.

²⁶ *Id.* at 38. Professors in Catholic colleges more closely align with national ideological averages, with 57.5 percent identifying as “liberal” or “far left” and 13.5 percent identifying as “conservative” or “far right.” *Ibid.*

many non-religious institutions, but also progressive views informed by religious perspectives.²⁷

The diversity that religious colleges add has long been recognized and valued by Congress. As Congress found in the Higher Education Opportunity Act, “the diversity of institutions and educational missions is one of the key strengths of American higher education.” 20 U.S.C. §1011a(a)(2). The people living within the Ninth Circuit, no less than the rest of the nation, benefit from the existence of such educational diversity.

5. The religious education offered by religious colleges and universities also promotes overall health and well-being. For example, Islam teaches the importance of personal hygiene, stress management, and eating healthfully.²⁸ So too Buddhism teaches the importance of avoiding alcoholic beverages and drugs, both of which can cloud the

²⁷ CCCU, *The Case for Christian Higher Education*, *supra*, at 12 (reporting that 67% of CCCU students say their courses “often” or “very often” address topics such as religion).

²⁸ Salman Assad et al., *Health and Islam*, 4 J. of Mid-Life Health 65 (2013), <https://doi.org/10.4103/0976-7800.109645>.

mind.²⁹ The Judeo-Christian tradition also emphasizes the importance of healthy living. Christianity teaches the importance of confessing sins to mental well-being, and Judaism emphasizes how our bodies belong to God and should be taken care of by maintaining proper diet, exercise, sleep, hygiene, and a healthy mind.³⁰ Seventh-day Adventists teach abstinence from harmful substances, promote vegetarianism and healthy eating, produce members that live on average almost a decade longer than the general population,³¹ and operate a string of medical schools and hospitals in America and around the world.

In part because of these beliefs, religious schools have been shown effective in combating risky health behaviors such as alcohol use,³²

²⁹ Conrad Harvey, *A Buddhist Perspective on Health and Spirituality*, 9 *Scottish Journal of Healthcare Chaplaincy* 33 (2006), <http://journals.equinoxpub.com/HSCC/article/download/16921/13195>.

³⁰ Elliot N. Dorff, *The Jewish Tradition: Religious Beliefs and Healthcare Decisions*, *Advocate Health* (2002), <https://tinyurl.com/EDorff>.

³¹ Blue Zones, *Loma Linda, California: A group of Americans living 10 years longer*, <https://tinyurl.com/7DAarticle>.

³² Brigham Young University, for example, has been the No. 1 “Stone-Cold Sober School” for 23 consecutive years. Tad Walch, *Stone-Cold Sober XXIII: BYU repeats (and repeats) atop Princeton Review list*,

violence,³³ and suicidal ideation.³⁴ Lastly, recent data reveals that some LGBTQ+ persons thrive better at many religious colleges than at secular universities.³⁵

In each of these ways, religious colleges in the Ninth Circuit provide significant benefits to the people living within its boundaries.

B. The district court’s decision helps preserve these unique benefits.

These unique educational benefits stem, in large part, from the ability of religious colleges to decide who will further their religious missions—whether students or faculty—without fear of their students

Deseret News (Aug. 18, 2020), <https://tinyurl.com/BYUSoberCampus>. Students at secular universities, by contrast, are four times more likely than students at religious colleges to be moderate or heavy drinkers. Gayle M. Wells, *The effect of religiosity and campus alcohol culture on collegiate alcohol consumption*, 58 J. Am. Coll. Health 295 (2010), <https://pubmed.ncbi.nlm.nih.gov/20159753/>.

³³ Richard Isralowitz & Alexander Reznik, *Impact of Religious Education and Religiosity on Adolescent Alcohol Use and Risk-Taking Behavior*, 110 J. of the Religious Ed. Ass’n 306 (2015), <https://doi.org/10.1080/00344087.2015.1039388>.

³⁴ Mehmet Eskin, *The Effects of Religious Versus Secular Education on Suicide Ideation and suicidal Attitudes in Adolescents in Turkey*, 39 Social Psychiatry Psychiatric Epidemiology 536 (2004), <https://doi.org/10.1007/s00127-004-0769-x>.

³⁵ See CCCU, *Additional Resources: Hunter v. Department of Education Lawsuit* (May 12, 2021), <https://tinyurl.com/CCCUResources>.

losing federal funding. As Appellees (at 17-28) correctly point out, both the statute's plain terms and the Department of Education's regulations demonstrate that Title IX's religious exemption applies to schools like Fuller. For that reason alone, the decision below should be affirmed. But another powerful reason to adopt that (correct) interpretation is that it would allow religious colleges to continue providing their unique benefits to society.

Students at religious colleges in the Ninth Circuit receive millions of dollars in federal funding each year.³⁶ If the Title IX religious exemption did not apply to schools like Fuller, it would place these colleges in an untenable position: Either forego federal funding that benefits their students or abandon deeply held religious beliefs about sex and gender. The former would cut off an important option for many

³⁶ Of the roughly \$13 billion dollars that religious colleges and universities received from the federal government in 2018, more than \$12 billion of that federal investment came through student aid. Brief for Council for Christian Colleges & Universities et. al. as Amici Curiae Supporting Petitioners at App. B, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. argued June 3, 2020). "Student aid" includes "grants, scholarships, work-study, and loans to students for their educational expenses." Datalab, *Federal Investment in Higher Education*, <https://datalab.usaspending.gov/colleges-and-universities>.

religious students, many of whom come from lower income and racial minority communities, as well as the LGBTQ+ community, and would harm religious colleges and universities financially. The latter choice would strip such communities of their spiritual identity.

The better path is to hold that where, as here, a school requires its “faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, [its] religion,” the Title IX religious exemption applies fully.³⁷ Only that holding will ensure that students at religious colleges throughout the Ninth Circuit are able to continue receiving federal funding, thereby allowing religious colleges to continue offering their unique societal benefits.

³⁷ 34 C.F.R. §106.12 (2020).

CONCLUSION

This appeal threatens the many societal benefits that religious colleges and universities provide, while simultaneously inviting this Court to interpret a federal statute in a way that would violate the Constitution. To avoid harming religious colleges and universities throughout the Ninth Circuit, this Court should affirm the decision below.

Respectfully submitted,

/s/ Gene C. Schaerr

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June 21, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with Fed. R. App. P.29(a)(5), Cir. R. 32-3(2) as it contains (including the appendix) 6,754 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's typesize and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: June 21, 2021

/s/ Gene C. Schaerr
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Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2021, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

Dated: June 21, 2021

/s/ Gene C. Schaerr
Gene C. Schaerr
Attorney for Amici Curiae

APPENDIX A

APPENDIX A - LIST OF AMICI¹

ASSOCIATIONS

Agudath Israel of America, New York, NY

Coalition for Jewish Values, Baltimore, MD

Council for Christian Colleges & Universities, Washington, D.C.

International Alliance for Christian Education, Fort Worth, TX

INDIVIDUAL COLLEGES AND UNIVERSITIES

Allen University, Columbia, SC

Bethel University, Mishawaka, IN

Biola University, La Mirada, CA

Brigham Young University, Provo, UT

College of the Ozarks, Point Lookout, MO

Crown College, Saint Bonifacius, MN

Dordt University, Sioux Center, IA

Evangel University, Springfield, MO

Geneva College, Beaver Falls, PA

Grace College and Seminary, Winona Lake, IN

Hannibal-LaGrange University, Hannibal, MO

¹ The name of each amicus in this appendix is hyperlinked to its mission statement.

Hope International University, Fullerton, CA
Indiana Wesleyan University, Marion, IN
John Brown University, Siloam Springs, AR
Latin American Bible Institute, La Puente, CA
Lee University, Cleveland, TN
Liberty University, Lynchburg, VA
Mid-Atlantic Christian University, Elizabeth City, NC
Moody Bible Institute, Chicago, IL
New Saint Andrews College, Moscow, ID
Northwestern College, Orange City, IA
Saint Photios Orthodox Theological Seminary, Etna, CA
Spring Arbor University, Spring Arbor, MI
Tabor College, Hillsboro, KS
Taylor University, Upland, IN
Union University, Jackson, TN
University of Northwestern-St. Paul, Saint Paul, MN
Walla Walla University, College Place, WA
Walsh University, North Canton, OH
Wheaton College, Wheaton, IL
William Jessup University, Rocklin, CA
York College, York, NE