NO. 20-56156

IN THE

United States Court of Appeals For the Ninth Circuit

JOANNA MAXON, ET AL.

Plaintiffs–Appellants,

VS.

FULLER THEOLOGICAL SEMINARY, ET AL.,

Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 2:19-CV-09969-CBM-MRW
HON. CONSUELO B. MARSHALL

BRIEF OF WILLIAM J. SEYMOUR INSTITUTE FOR BLACK CHURCH AND POLICY STUDIES, RABBI JACOB GOLDSTEIN, JOSH GOOD, FATHER BRYAN KERNS O.S.A., DR. ANDREW T. WALKER, AND DR. HAMZA YUSUF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS–APPELLEES

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are theologians and religious leaders from around the country.[1] They belong to different denominations and religions, and they have different views of the questions of marriage and sex at issue in this case. But they all agree on the importance of religious freedom and the need for seminaries—which are training the next generation of religious leaders—to make decisions on religious questions without government interference or influence.

William J. Seymour Institute for Black Church and Policy Studies was founded by Eugene Rivers III and Jacqueline C. Rivers and incorporated in 2014. Before incorporation, the Seymour Institute was formerly known as The William J. Seymour Society at Harvard University from 1980–1987, the Seymour Institute for Advanced Church Studies from 1990–2005, and then the Seymour Institute for Black Church and Policy Studies under the auspices of the Witherspoon

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[1] Counsel for both appellants and appellees have consented to the filing of this amicus brief. See Fed. R. App. P. 29(a)(2). Amici certify that this brief was not written in whole or in part by counsel for any party, and no person other than amici or their counsel has made any monetary contribution to the preparation and submission of this brief. See Fed. R. App. P. 29(a)(4)(E).

Institute. The Seymour Institute's mission is to educate and train black church leaders, as well as the public, on Christian philosophy and theological understandings of the Black church.

Rabbi Jacob Goldstein is a former United States Army chaplain—the longest-serving Jewish Chaplain in the United States military—retiring as a Colonel after thirty-eight years of service. He served with distinction, deploying to Granada, Operation Desert Storm, Operation Enduring Freedom in Afghanistan in 2002 and again in 2012, and Operation Iraqi Freedom. He was also mobilized as the Senior Chaplain at Ground Zero in response to the World Trade Center attack in 2001. As the chief chaplain for the New York Army National Guard, he spent four and a half months at Ground Zero, tending to the spiritual needs on-site. Rabbi Goldstein also served as the Staff Chaplain for Hurricane Katrina relief efforts and TWA Flight 800 recovery efforts. He attended the Rabbinical College of Canada, where he received a degree in Religious Education, and the Lubavitch Rabbinical Seminary, where he received a Master of Divinity degree and became ordained as a Rabbi.

Josh Good is the Director of the Faith Angle Forum at the Ethics and Public Policy Center, which aims to strengthen reporting and

commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life. Good was formerly the program director of the Kern Family Foundation's Faith, Work, and Economics Program and a program manager of American Enterprise Institute's Values & Capitalism Initiative—an outreach program to Christian Colleges. Good graduated from Covenant College and has a Master's degree in Christianity and Culture from Harvard University.

Father Bryan Kerns O.S.A. is an Assistant Professor of Practice in the Religious and Theological Studies Department at Merrimack College. Father Kerns earned a Master's degree from The University of Chicago Divinity School, where he focused on the history of Christianity and religious ethics. He also earned a Master of Divinity from Catholic Theological Union at Chicago. While at Villanova University, he earned two undergraduate degrees, a Bachelor's degree in humanities, an interdisciplinary degree focusing on Catholic studies, and another, with honors, composing a thesis on the aspirations of Catholic higher education.

Dr. Andrew T. Walker is an Associate Professor of Christian Ethics and Apologetics at The Southern Baptist Seminary and the Executive Director and Fellow of the Carl F. H. Henry Institute for Evangelical Engagement. He is also a Fellow with the Ethics and Public Policy Center. He has a Bachelor of Arts degree in Religious Studies from Southwest Baptist University, where he graduated summa cum laude. He received his Master of Divinity, Master of Theology, and Doctor of Philosophy in Christian Ethics from the Southern Baptist Theological Seminary in Louisville, Kentucky. Dr. Walker researches, writes, and speaks about the intersection of Christian ethics and public theology, especially concerning religious liberty. He is the author and editor of over ten books and regularly writes for National Review, Providence Journal, The Gospel Coalition, and Public Discourse.

Dr. Hamza Yusuf is the President of Zaytuna University, the first accredited Muslim liberal arts college in the United States. Dr. Yusuf is an advisor to the Center for Islamic Studies at Berkeley's Graduate Theological Union. He also serves as vice president for the Forum for Promoting Peace in Muslim Societies. Dr. Yusuf has spent over thirty years focusing on advancing his Islamic education, both formally and

through private studies. Dr. Yusuf earned a Ph.D. in Islamic Studies from GTU/UC Berkeley and a Bachelor of Arts in Religious Studies from San Jose State.

INTRODUCTION

The district court held that Title IX's Religious Organization Exemption applies in this case. Appellees have explained why the district court's analysis is legally correct. *Amici* submit this brief to explain why the Religious Organization Exemption matters.

To begin, it is important to note what *amici* do not do: argue that Fuller Theological Seminary's beliefs are correct. In other words, *amici* do not take a position in this brief on whether the seminary adopted the right Community Standards. That's because *amici* don't necessarily agree on that question.

But *Amici* do agree on this: the law must allow seminaries to make those decisions for themselves, free from government interference or influence. That remains true even when decisions involve sensitive or divisive subjects. Indeed, it is especially true when decisions involve sensitive or divisive subjects.

Protecting religious organizations from state interference is the essence of religious liberty and a well-established principle in American law. The Framers understood the importance of religious liberty. They knew its checkered history in England and the problems that arose from government interference with religion. The colonial experience, although better than the English one, still saw significant government involvement in religion. That history proved the need for the religious liberty enshrined in the First Amendment's Religion Clauses.

But high-minded aspirations are not enough; judicial enforcement of religious protections is essential. When seminaries make decisions on sensitive or divisive subjects, the external pressures on them are at their greatest. There is, to be sure, nothing government can or should do about social pressure. The First Amendment's Speech and Assembly Clauses ensure that. But government itself cannot pressure seminaries. The First Amendment's Religion Clauses ensure that too, and so does Title IX's Religions Organization Exemption.

Allowing seminaries to make decisions free from threat of government-imposed legal consequences means that seminaries' decisions are truly free. If those decisions are based, even in part, on

fear of legal repercussions, the effect on seminaries' religious liberty would be devastating. Concern about a potential discrimination claim from a student expelled for openly violating a seminary's teaching on marriage could result in a seminary training a faith leader who did not subscribe to the faith's teachings. Or—even more drastically—concern about broader claims of hate speech and discrimination could lead to a seminary changing what (not just whom) it teaches, thereby altering the tenets of the faith itself. Neither of those scenarios (or countless other similar hypotheticals) is consistent with religious freedom, Title IX, or the Religion Clauses.

ARGUMENT

A. Religious freedom is well established in our law.

Freedom of religion is entrenched in American jurisprudence. The First Amendment decrees that government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I; *accord Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause). The Supreme Court has succinctly explained both Religion Clauses this way: "State interference in that sphere would

obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). That includes not only express intrusion but also "indirect coercion" of religion. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

Protection of religious freedom extends beyond the Constitution and into the United States Code. Importantly for this case, Title IX includes an exception for religious freedom. *See* 20 U.S.C. § 1681(a)(3) (stating that "this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization"). Other statutes provide similar protection for religious beliefs. *See, e.g.*, 20 U.S.C. § 7908(c) (military recruiting at secondary schools); 42 U.S.C. § 3607(a) (Fair Housing Act); 42 U.S.C. § 2000bb *et*

seq. (Religious Freedom Restoration Act); 42 U.S.C. § 2000e-1(a) (Title VII); 42 U.S.C. § 12187 (Americans with Disabilities Act).

B. The colonial experience demonstrated the need for religious freedom.

Legal protection of religious liberty should be no surprise given our history. And that history begins before the colonization of the Americas.

1. Parliament and the Crown exercised great control over religion in England before 1791.

The American colonies, of course, had an English background.[2] The idea of religious freedom goes back in English law to at least 1215, when that concept "was addressed in the very first clause of Magna Carta." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 182 (2012).

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[2] It would, no doubt, be hubris to think that religious freedom is uniquely American or even Anglo-American. The concept has existed for thousands of years. One famous example is Emperor Constantine's Edict of Milan in A.D. 313 that made it legal for people in the Roman Empire to practice any religion, including Christianity. (Christianity did not become the Empire's official religion until A.D. 380, with the Edict of Thessalonica.)

Whatever effect that clause had for a time, true religious freedom did not last. During the reign of Henry VIII, the Crown became the head of the Church of England. *See* Diarmaid MacCulloch, *The Reformation* 193–96 (2003); *see also* Supremacy Act of 1534, 26 Hen. 8, c. 1 (Eng.). Despite the passage of a century that included dynastic change, civil war, regicide, and Cromwell's Protectorate, the close connection between government and the Church of England continued after the Restoration of Charles II. *See* MacCulloch, *supra* at 511–14; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2114 (2003). In that era, Parliament required ministers to pledge "'unfeigned assent and consent' to the Book of Common Prayer" and mandated that teachers conform to church liturgy. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061. Even following the Toleration Act in 1689 and the Glorious Revolution, England still "impose[d] religious restrictions on education" into the next century. *Id.*; *accord* Toleration Act of 1689, 1 William & Mary c. 18; McConnell, *Establishment*, *supra* at 2114.

As Professor Michael McConnell has put it, this "English legacy was not a happy one," as that country "suffered from chronic religious strife and intolerance." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990).

2. Religious freedom was important—if imperfect—in the colonies and the early United States.

The colonies were a mix of religious freedom and government interference. In some ways, they resembled England. In other ways, they deliberately broke from English ways. The arc of colonial history, however, bent toward religious freedom.

Some colonists crossed the Atlantic Ocean specifically in search of the religious freedom they lacked in England. *See Everson*, 330 U.S. at 8 ("A large proportion of the early settlers in this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches."); MacCulloch, *supra* at 517. Perhaps most famously, the pilgrims on the *Mayflower* "were willing to endure almost anything if it meant they could worship as they pleased." Nathaniel Philbrick, *Mayflower* 4 (2006). But over time, the colonies imposed their own religious rules, which unsurprisingly resulted in

more religious dissent. That dissent, in turn, led to the establishment of new colonies, like Rhode Island under Roger Williams, that were designed for religious dissenters. *See* MacCulloch, *supra* at 521; McConnell, *Origins*, *supra* at 1424–25.

In contrast with New England, the southern colonies did not break as sharply with England's religious structure. Maryland, Virginia, North Carolina, South Carolina, and Georgia all eventually established the Church of England as their official church. *See* McConnell, *Establishment*, *supra* at 2110. Their stories vary to some extent. For example, Maryland was founded by Catholics, only later to become anti-Catholic. *See id.* at 2128. But there are many similarities. South Carolina offers a good example. By the early 1700s, the colony had made the Church of England South Carolina's official church. *See* Walter Edgar, *South Carolina: A History* 95 (1998). Even so, the colony still had many Presbyterians and Baptists, as well as a thriving Jewish community. *See id.* 61–62, 182–83. Those who practiced faiths other than the established church were largely still able to worship as they wished. *See* McConnell, *Establishment*, *supra* at 2127–29.

Pennsylvania was unique among the colonies in religious freedom. Although founded by a Quaker (William Penn), no religious group was a majority there, and the colony established no official church. *See* MacCulloch, *supra* at 525. Pennsylvania was, in other words, closer than any other colony to providing the religious freedom that would exist after ratification of the First Amendment. *See id.*

Still, all of the colonies enjoyed greater religious freedom than England. Massachusetts, for instance, granted "liberty of Conscience" to all Christians except Catholics in 1691. McConnell, *Establishment*, *supra* at 2124. And before that, Maryland promised "free exercise" of religion to residents in 1648. Rhode Island did so in 1663, and Carolina in 1664. *See* McConnell, *Origins*, *supra* at 1426–27. Particularly in Carolina, Carolinians were influenced by the work of John Locke on the importance of religious toleration. *See id.* at 1428–29; *see also* John Locke, A Letter Concerning Toleration in *Locke: Political Writings* 390–436 (David Wootton ed., Hackett Publishing Co. 1993) (1685).

The push toward religious liberty grew during the Revolution. For example, Georgia, North Carolina, South Carolina, and New York all

disestablished the Church of England between 1776 and 1778. *See* McConnell, *Origins*, *supra* at 1436.

The debate over disestablishment in Virginia in 1785 marked a significant moment in America's story of religious liberty. When Virginia was deciding whether to renew a tax to support the clergy for the state's established church, Thomas Jefferson and James Madison opposed the idea. During that debate, Jefferson authored the Virginia Statute for Religious Freedom. In that famous document that the state legislature would adopt, Jefferson wrote, "[A]ll men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." Thomas Jefferson, Virginia Statute for Religious Freedom, in *The Quotable Jefferson* 363 (John P. Kaminski, ed. 2006). The Supreme Court has called that event the "dramatic climax" of the movement for religious liberty and has noted that the First Amendment seeks to "provide the same protection against governmental intrusion on religious liberty." *Everson*, 330 U.S. at 11, 13.

Both sides of the debate over ratification of the Constitution in the late 1780s discussed the need for religious freedom. In Federalist No.

51, Madison observed, "In a free government the security for civil rights must be the same as that for religious rights." The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). Meanwhile, on the anti-federalist side, the Federal Farmer argued that, even if religious differences at that time were not so great, the country was "making a constitution, it is to be hoped, for ages and millions yet unborn," so "why not establish the free exercise of religion as part of the national compact." Letters from the Federal Farmer IV (Oct. 12, 1787), in *The Anti-Federalist, An Abridgement* 54 (Herbert J. Storing, ed. 1985).

The push for religious liberty continued after ratification. When the First Congress took up amendments to the Constitution, James Madison pushed for the adoption of what is now the First Amendment. During those debates in the House of Representatives, Madison argued that enacting the Free Exercise Clause would ensure that no one thought that Congress had the authority to "infringe the rights of conscience." 1 Annals of Cong. 758 (Aug. 15, 1789) (remarks of J. Madison); *accord Hosanna-Tabor*, 565 U.S. at 183 (discussing Madison's remarks in support of the Establishment Clause).

3. Early American governments' involvement in education bolstered the need for religious freedom.

Given this case focuses on education and religious freedom, a brief discussion of religion, government, and education in early American history is useful. In that era, government and religion were intertwined in educating students. By 1647, for instance, Massachusetts required towns of at least 100 households to provide a grammar school. The towns funded the schools, but clergy taught the students. *See* McConnell, *Establishment*, *supra* at 2172. Connecticut charged parishes (instead of towns) with education in the early 1700s. *See id.* Similarly in Virginia, clergy were supposed to preach and serve as school masters. *Id.* at 2173.

Other colonial governments imposed various laws on religion and education as well. For example, Maryland forbade Catholic priests from teaching young people, and New York required teachers coming from England to obtain a license from the Bishop of London. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2062. And South Carolina required that teachers be members of the Church of England. *See* Education, *The South Carolina Encyclopedia* 287 (Walter Edgar, ed. 2006).

So religious organizations have always been involved in education in this country. Before ratification of the First Amendment, however, government was closely intertwined in those organizations' efforts.

By contrast, after its ratification, government recognized the importance of allowing religious schools to operate free of government influence. An early example of this is from 1804, when shortly after the Louisiana Purchase, Ursuline Nuns from New Orleans wrote President Jefferson, seeking protection for the school they ran. *See* Letter from the Ursuline Nuns of New Orleans to Thomas Jefferson (Apr. 23, 1804), National Archives, https://tinyurl.com/2b27z2x2. Jefferson responded: "[T]he principles of the constitution and government of the United states are a sure guarantee to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [sic] own voluntary rules, without interference from the civil authority." Letter from Thomas Jefferson to Ursuline Nuns (July 13, 1804), National Archives, https://tinyurl.com/b2ac6wan.

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It was against this background that the States ratified the First Amendment in 1791. That amendment "secured religious liberty from the invasion of the civil authority," *Watson v. Jones*, 80 U.S. 679, 730 (1871), and gave religious organizations the freedom to "decide matters of faith and doctrine without government intrusion," *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. Thus, in the Religion Clauses, "the founding generation sought to prevent a repetition of" government involvement with and restrictions on religion. *Id.* at 2061.

C. Religious freedom requires seminaries be able to choose what and whom to teach without fear of government interference or influence.

The Supreme Court has recognized that it is "offensive" for government to inquire into someone's religious views. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). That's because religion is a deeply personal matter, and all people should be free to decide for themselves what they believe about fundamental questions[3] Religious freedom promotes a respectful, healthy society that gives people the ability to pursue those life-shaping inquiries while still participating fully in public life.

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[3] For example, is there a God or Gods? If so, who is God? What is the purpose and meaning of life? What happens to us after we die?

Of course, answering those fundamental questions often leads to more questions and more answers. Hence, "[r]eligious teachings cover the gamut from moral conduct to metaphysical truth." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring).

People wrestling with these types of questions leads to two conclusions. First, they are hard questions. In a pluralistic society, people will reach different—and sometimes mutually exclusive—answers. Thus, some segment of society may find other people's answers on religious questions wrong and even offensive. *Cf. Paul v. Watchtower Bible & Tract Soc. of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) ("Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be meaningless.").

Second, people do not always answer those questions by themselves. In fact, many faiths teach people to seek answers in community instead of in isolation. *See, e.g.*, Ex. 19:1–25, 25:40; Col. 3:16; Quran 3:102–05. People who share the same beliefs have for millennia come together for worship, fellowship, and education.

1. Seminaries should be free to choose what and whom to teach.

As people come together, they often choose leaders to teach and counsel. The Supreme Court has recognized the importance "of religious groups . . . choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. The Fifth Circuit has observed that this "relationship between an organized church and its ministers is its lifeblood." *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). People who preach and teach a faith tradition are often trained in seminaries like Fuller. This sort of training prepares tens of thousands of people to be faith leaders.[4]

As a starting point, seminaries must be free to decide what to teach. What these future faith leaders learn impacts what they will teach the rest of the members of their faith for decades to come. In this way, the potential effect of controlling or influencing seminaries is far greater than the potential effect of whether the ministerial exception

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[4] The Association of Theological Schools Commission on Accrediting had 273 schools report a total of 78,394 enrolled students in 2020-21. *See* Table 2.2-A, 2020-2021 Annual Data Tables, Ass'n of Theological Schs. Comm'n on Accrediting, https://tinyurl.com/2w79hy3y.

applies in one particular case. But even in that narrower circumstances of a single minister, the Supreme Court has recognized that one "wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. An entire generation of wayward ministers who were not taught a religion's tenets could lead an entire faith tradition away from its historical beliefs.

Seminaries must also be able to require students to live out that doctrine. As Justice Alito rightly explained, a "religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Or as St. Jerome (who translated the Bible into Latin in the late fourth century) put it, "Why do you not practice what you profess?" *Letter LII of Saint Jerome, to Nepotian*, The Tertullian Project, https://tinyurl.com/478r38n8.

Along the same lines, seminaries must be free to decide whom they will teach. This is necessarily part of a religious organization's

"autonomy [in] the selection of the individuals who play certain key roles." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. The Supreme Court has said that "the authority to select and control who will minister to the faithful . . . is the church's alone." *Hosanna-Tabor*, 565 U.S. at 195 (majority opinion); *see also id.* at 200–01 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."). Seminaries, having close relationships with certain faiths or denominations, must necessarily have this same authority to include or exclude. After all, a seminary's primary purpose is to train those "who will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 195.

These concepts of what is taught and who teaches it are found in religious texts themselves and in history. As for the texts, Moses and Ezekiel both warned the Israelites about teachers who would lead them astray. *See* Deut. 18:20; Ezek. 22:28. Jesus spoke of false prophets in the Sermon on the Mount. *See* Matt. 7:15–20. Paul warned Timothy about false teachers. *See* 1 Tim. 6:2–10. The Quran instructs to obey only God and the Prophet Muhammad. *See* Quran 59:7.

And as for history, it is replete with examples of the negative effects of government trying to control religious positions. The saga of Henry VIII's divorces still stands as a cautionary tale. *See* MacCulloch, *supra* at 193–96. In the colonies, government control of ministers (particularly where there was an established church) resulted in ministers who were "less than zealous in their spiritual responsibilities and less than irreproachable in their personal morals." McConnell, *Establishment*, *supra* at 2141. More recently, a journalism student was sentenced to death in Afghanistan for distributing an article considered insulting to the Prophet Muhammad. *See* Abdul Waheed Wafa & Carlotta Gall, *Death Sentence for Afghan Student*, N.Y. Times (Jan. 24, 2008), https://tinyurl.com/6nmzhh2x. And the role of the Chinese Communist Party in appointing Catholic bishops has raised questions about the independence of the Catholic Church in China. *See, e.g.*, Jason Horowitz, *Vatican Extends Deal with China over Appointment of Bishops*, N.Y. Times (Nov. 14, 2020), https://tinyurl.com/cnedj8ev.

2. Pressure from government prevents seminaries from having true freedom to decide what and whom to teach.

The landscape in which seminaries teach the next generation of faith leaders is important. Society is full of pressure. From a young age, we face peer pressure. Sometimes, this pressure is about something relatively trivial, such as sneaking an extra cookie for dessert or going a few miles per hour above the speed limit. Other times it is about something more serious, like lying to an employer or committing adultery. Those pressures extend beyond individual relationships, existing also on larger scales. The media exerts pressure. So do corporations. All of those pressures have the potential to influence religious organizations.

But all of those sources exert a pressure that is different in kind from government pressure. Neighbors, family, friends, media, and corporations can exert pressure. But they cannot fine. They cannot enjoin. They cannot jail. Governments, however, can. And they sometimes have.

The Supreme Court has recognized that government can exert inappropriate pressure on religion in this way. Whenever the coercive

power of government is in play, "[i]t carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). To avoid some legal consequence, religious organizations "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Id.* Either of those options destroys religious freedom and the right to hold religious beliefs, especially unpopular ones.

Two cases illustrate these principles. The first involved a Title VII claim by an employee who was fired by a gymnasium owned and operated by the Church of Jesus Christ of Latter-day Saints for not meeting religious standards required by that church. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). The Supreme Court held that Title VII's religious exemption applied. The Court explained that for religious organizations trying to anticipate how civil courts might rule in determining whether activities were "religious" enough to qualify for the exemption, "[f]ear of potential liability might affect the way the

organization carried out what it understood to be its religious mission." *Id.* at 336.

The second involved tort claims based on shunning by Jehovah's Witnesses. This Court held that Jehovah's Witnesses could not face tort liability for shunning "disfellowshiped" members because that was a practice based on "their interpretation of canonical text," and courts were "not free to reinterpret that text." *Paul*, 819 F.2d at 878–80. Imposing liability for shunning "would compel the Church to abandon part of its religions teachings" because "the pressure to forgo that practice would be unmistakable." *Id.* at 881 (cleaned up).

This threat of government influence on religious decision making is why the Supreme Court has "long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring); *see also Trinity Lutheran*, 137 S. Ct. at 2019–21 (discussing how the Religion Clauses preclude government from coercing a religion into giving up a particular religious belief by threat of legal penalty or by denying them a public benefit). As the Fourth Circuit has put it, "[t]he right to choose ministers without

government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167–68 (4th Cir. 1985) (citation omitted). Government involvement in those decisions would lead not only to substantive disagreements between government and religion, but it would also almost certainly result in more litigation. *See id.* at 1170–71. Statutory exemptions like the one in Title IX serve the same purpose of preserving religious freedom for schools of all religions.

D. Marriage and sex have long been issues of religious doctrine.

There should be no doubt that marriage and sex fall within the "gamut from moral conduct to metaphysical truth" that religious teachings encompass. *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Religious texts, historical writings, and current position statements all address these topics.

Start with the Tanakh. It teaches about marriage. *See, e.g.*, Gen. 2:24; Prov. 31:10–11. It addresses adultery. *See* Ex. 20:14. And it speaks about homosexuality. *See* Lev. 18:22.

These subjects also appear in the New Testament of the Bible. Jesus spoke about marriage and divorce. *See* Mark 10:9. Paul wrote about husbands and wives. *See* Eph. 4:22, 25. Paul also wrote about homosexuality.[5] *See* Rom. 1:26–27. The author to the Hebrews discussed sexual ethics. *See* Heb. 13:4.

The Quran similarly provides instruction on these topics. It includes passages on marriage. *See* Quran 30:21. And on homosexuality. *See* Quran 7:81.

Sikhism teaches that a husband and wife are "one light in two bodies." Guru Granth Sahib 788-12. And its scriptures more than once condemn adultery. *See, e.g.*, Guru Granth Sahib 213-12, 298-15, 672-6.

Buddhists following the Five Precepts branch of the Noble Eight-Fold Path believe that Buddhists should not engage in sexual

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[5] Unsurprisingly, there is debate about what Paul meant. *See* Margaret A. Farley, *Just Love: A Framework for Christian Sexual Ethics* 274–77 (2008).

misconduct and that sex should form part of a loving relationship. "Five Precepts of Buddhism Explained," *Tricycle: The Buddhist Review*, https://tricycle.org/magazine/the-five-precepts/.

To be sure, religious teachers and people of faith have debated these texts (as well as the many other religious texts on these subjects) for centuries. The first-century Jewish historian Flavius Josephus wrote about them. *See* Flavius Josephus, *Antiquities of the Jews* XV:2:6 (William Whitson trans. 1737) (93), *available at* https://tinyurl.com/s287c3rn. Polycarp wrote on these topics in Christianity's first hundred years. *See* Polycarp, *Letter to the Philippians*, in *The Apostolic Fathers* 125–26 (J.B. Lightfoot & J.R. Harmer trans., Michael Holmes ed., Baker 2d ed. 1985) (1891). Several hundred years later, Augustine did too. *See* Augustine, *City of God* 553–54 (Marcus Dods trans., Modern Library 1983) (426). The Reformers addressed them as well, including in the Westminster Confession, for example. *See Westminster Confession of Faith*, Chapter XXIV (Great Commission Publications 2011) (1647).

Even today, religious leaders offer different answers on the meaning of these texts. As just a few examples, the Presbyterian

Church in America has treated marriage as an institution between one man and one woman and homosexuality as inconsistent with biblical teaching. *See, e.g.*, *Report on the Ad-Interim Committee on Divorce and Remarriage*, Presbyterian Church in Am., 20th Gen. Assem. (1992), https://tinyurl.com/7v9dpujz; *Homosexuality*, Presbyterian Church in America, 5th Gen. Assem. (1977), https://tinyurl.com/232r86zn. So has the Southern Baptist Convention. *See Baptist Faith & Message 2000: XV: The Christian and the Social Order & XVIII: The Family*, Southern Baptist Convention, https://tinyurl.com/3xe65w87 (last visited Mar. 4, 2021). And the U.S. Conference of Catholic Bishops. *See Promotion and Defense of Marriage*, U.S. Conference of Catholic Bishops, https://tinyurl. com/yt4yse7s (last visited Mar. 4, 2021). Other religious groups have taken the opposite position, accepting and blessing same-sex relationships. *See, e.g.*, *LGBTQ in the Church*, The Episcopal Church, https://tinyurl.com/ykz4ar75; *Support of the Right to Marry for Same Sex Couples*, Universalist Unitarian Association (July 1, 1996), https://tinyurl.com/2t7r9r23; *Civil Marriage for Gay and Lesbian Jewish Couples*, Union for Reformed Judaism (1997), https://tinyurl.com/3m6phptt. Religious members of faiths without

central governing authorities, such as Muslims, rely on their communities to guide them to form an opinion on whether to approve of same-sex relationships. *See Stances of Faiths on LGBTQ Issues: Islam,* Human Rights Campaign, https://tinyurl.com/3kdkc6k3. Keith Ellison, one of the nation's most well-known American Muslims, believes unequivocally that same-sex couples should have marriage rights. *Id.* And some groups are so divided that they have struggled to take official positions. *See, e.g.*, *What Is the Church's Position on Homosexuality?*, United Methodist Church, https://tinyurl.com/6effrem4.

Indeed, *amici* themselves do not necessarily agree on these questions. But they should be free to debate the answers without fear of government coercion influencing the debate. That is what the Religion Clauses guarantee. And it's what the Religious Organization Exemption in 20 U.S.C. § 1681(a)(3) ensures seminaries may do too.

VI. CONCLUSION

For these reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

s/ E. Travis Ramey
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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