

No. 20-56156

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

Joanna Maxon and Nathan Brittsan,

Plaintiffs-Appellees,

v.

Fuller Theological Seminary, Marianne Meye Thompson, Mari L. Clements
and Nicole Boymook,

Defendants-Appellants.

On Appeal from the United States District
Court for the Central District of California

APPELLEES' OPENING BRIEF

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I. Introduction

This case is about whether the government may attach non-discrimination requirements to federal laws that provide funding to private, religious organizations. Our society has long recognized that we must protect religious organizations from majoritarian views that would burden their deeply held religious beliefs. But we have also come to a place where we recognize that LGBTQ+ people, like racial, gender and other minorities, can no longer be treated as social outcasts. Equality, dignity and civility are revered and celebrated social and constitutional values as well.

Some may wonder why Joanna and Nathan would choose to attend an educational institution like Fuller Theological Seminary. There are many reasons, including that Joanna and Nathan are deeply religious. For them, it felt natural to apply to a seminary that is broadly open to students of many religious traditions, that has a strong academic reputation and that participates in federally-funded student loan programs. For Fuller, however, their same-sex marriages rendered them outcasts unworthy of its educational programs.

The law instructs us that government may not deny a generally available benefit to a religious organization merely because it is religious. However, the law also recognizes that the government may impose a nondiscrimination requirement on organizations, including religious organizations like Fuller, that choose to receive

government funding, like the federal funding made contingent on compliance with 20 U.S.C. § 1681 (“Title IX”), because the government “is dangling the carrot of subsidy, not wielding the stick of prohibition.”

Here, Congress established a broad non-discrimination mandate by enacting Title IX. Like many civil rights statutes, Congress carved out some narrow exemptions. However, courts should carefully consider those exemptions and apply them narrowly, so as not to subvert the Congressional mandate by diluting the efficacy of the statute’s protections.

II. Jurisdictional Statement

This action arises under 28 U.S.C. §§ 1331 & 1367. ER 54-92. Appellants appeal the district judge’s Order Granting Defendants’ Motion to Dismiss entered on October 7, 2020. ER 3-21. Appellants timely filed their Notice of Appeal on November 03, 2020. ER 111. Therefore, this Court has jurisdiction pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U.S.C. § 1291.

III. Statement of the Issues Presented for Review

1. Did the district court err in dismissing Plaintiff’s First Amended Complaint by concluding that Fuller was controlled by a religious organization?
2. Did the district court err in dismissing Plaintiffs’ First Amended Complaint by concluding that Fuller was not required to comply with the regulatory notice requirements for claiming a religious exemption to Title IX?

3. Did the district court err in making a factual determination that application of Title IX would violate Fuller's religious tenants?
4. Did the district court err by dismissing Plaintiffs' First Amended Complaint with prejudice?
5. Did the district court err by relying on evidence outside the Complaint in dismissing Plaintiff's First Amended Complaint?

IV. Statement of the Case

This action concerns the expulsion of two students from a taxpayer-funded educational institution for purportedly violating school policies against same-sex sexual activity. ER 3, 154. Appellants claim violations of: (1) Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, et seq., against Fuller; (2) the Unruh Civil Rights Act, Cal. Civ. Code § 51, against all Defendants; (3) breach of contract against Fuller; (4) intentional infliction of emotional distress against all Fuller Defendants; (5) fraudulent misrepresentation against Fuller; and (6) the Equity in Higher Education Act, Cal. Educ. Code §§ 66270, 66290.1-66290.2, against Fuller. ER 177-189.

A. Procedural History

Joanna filed an initial Complaint on November 21, 2019. ER 192-209. On January 7, 2020, prior to Defendants' response to Joanna's original Complaint, Joanna filed a First Amended Complaint, which added Nathan as a plaintiff. ER 153-

191. On February 20, 2020, Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint. ER 224-225. On August 4, 2020, the district court held a hearing on Defendants' Motion to Dismiss. ER 228.

The district court dismissed Plaintiffs' Title IX claims with prejudice on October 7, 2020. ER 21. The district court declined to exercise supplemental jurisdiction over Plaintiffs' remaining claims, dismissing them without discussion and without prejudice for Plaintiffs to file in state court. ER 21.

B. Fuller Theological Seminary

Fuller is a California nonprofit corporation that offers degrees in theology, intercultural studies, and psychology to its students. ER 156, 159. Students at Fuller attend classes at the main campus in Pasadena, California, at regional campuses, and online. ER 158.

Fuller admits students and hires faculty from a variety of faiths. ER 159. Students attending Fuller come from more than one hundred denominations. *Id.* Moreover, Fuller admits students from faith traditions and churches that affirm same-sex marriages. *Id.* Fuller hires faculty and administrators from faith traditions and churches that affirm same-sex marriages. *Id.* Fuller admits students from faith traditions that ordain lesbian, gay and bisexual ministers who are in same-sex marriages. *Id.* Fuller hires faculty and administrators from faith traditions that ordain lesbian, gay and bisexual ministers who are in same-sex marriages. *Id.*

Fuller does not prohibit students from officiating same-sex weddings. *Id.* Fuller does not prohibit faculty or administrators from officiating same-sex weddings. *Id.* Fuller does not prohibit students from attending same-sex weddings. Fuller does not prohibit faculty and administrators from attending same-sex weddings. *Id.* Fuller does not require students to adhere to a statement of faith. Fuller admits students who are LGBTQ+. *Id.* Fuller does not prohibit same-sex dating relationships among its students. *Id.* Fuller's policies do not prohibit students from entering into same-sex marriages. ER 160.

Fuller, while religious in nature, is an educational institution that accepts federal funding, offers a variety of degree programs and does not require students to adhere to a statement of faith. ER 154. Moreover, Fuller is an "independent institution" that is not affiliated with or a subsidiary of a religious denomination or church. ER 160.

Fuller's board of trustees is not appointed by a denomination, church or external organization. *Id.* The members of Fuller's board of trustees are not required to belong to a particular denomination or church. *Id.* As an accredited educational institution, Fuller's primary purpose is to provide educational courses and to grant certificates, diplomas and degrees in recognition of student completion of graduation requirements. *Id.* Fuller competes in the marketplace to attract revenues from students who finance their education through federal student loans.

Id.

Fuller is the largest recipient of federal funding of any seminary in the United States, having received more than \$77,000,000 in federal funding between fiscal years 2015-2018. ER 160.

C. Fuller's Policies and Correspondences with Plaintiffs

Fuller attached eleven exhibits to its Motion to Dismiss and asked the Court to incorporate them by reference. ER 54-152. Plaintiffs opposed the incorporation by reference but the district court allowed it. ER 9-11. The incorporated exhibits include:

- the Seminary's Community Standards webpages downloaded from Fuller's website on "various dates in February 2020 (35 pages);
- Plaintiffs' applications to Fuller (19 pages); and
- Letter and email correspondence from various dates (26 pages).¹

The district court relied on these exhibits in support of its rulings. For example, when the district court found that "[w]hen prospective students apply to Fuller, they agree to abide by Fuller's Community Standards," it relied in part on Plaintiffs' applications for admission, which were not part of the four-corners of

¹ Plaintiffs did not object to Defendants' Request for Judicial Notice of Exhibit 1 (Articles of Incorporation). Plaintiffs also do not object to Exhibit 11 (excerpt of judicial opinion from an unrelated case).

the complaint. ER 4. Moreover, the district court noted that “the Community Standards are comprised of multiple policies maintained by the school.” ER 4. However, many of these “multiple policies” were not included in Plaintiffs’ complaint.

Plaintiffs’ complaint did reference several Fuller policies, including Fuller’s Non-Discrimination Policy, which states that it “is committed to providing and modeling a learning...environment that is free of unlawful discrimination in all of its policies, practices, procedures, and programs....[and that] the seminary does not discriminate on the basis of race, color, national origin, ancestry, sex, sexual orientation, marital status, military and veteran status, medical condition, physical disability, mental disability, genetic characteristics, citizenship, gender, gender identity, gender expression, pregnancy, or age.” ER 174.

Additionally, Fuller’s Policy Against Unlawful Discrimination states that it “does not discriminate on the basis of sexual orientation” but that it “does lawfully discriminate on the basis of sexual conduct,” as it “believes that sexual union must be reserved for marriage, which is the covenant union between one man and one woman.” ER 174. Fuller also maintains a Title IX Policy that incorporates the standards of Title IX. ER 174.

Fuller’s Title IX policy does not refer to a religious exemption to Title IX and states: “No person in the United States shall, on the basis of sex, be excluded

from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

Title IX of the Education Amendments of 1972[.] Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination based on gender in educational programs that receive federal financial assistance. Programs and activities that may be included are admissions, recruitment, financial aid, academic programs, athletics, housing, and employment. Title IX also protects men and women from unlawful sexual harassment in school programs and activities.”

D. Fuller Admits Nathan and then Expels him for his Same-Sex Marriage

Nathan applied to Fuller on August 11, 2017, was accepted on August 28, and paid a nonrefundable matriculation/enrollment fee on August 29. ER 158.

Nathan accepted his approved financial aid awards, and Fuller received the distributed federal student loan funds used to pay his tuition. *Id.* Fuller also granted Nathan’s federally mandated health insurance waiver by acknowledging that Nathan was covered by his husband’s insurance policy. *Id.*

Prior to the start of his classes, Nathan requested the school to change the last name listed on his student files from “Henning” to “Brittsan.” ER 161. In early September 2017, Director of Admissions Max Wedel and Professor Kurt Frederickson spoke with Nathan concerning a perceived Community Standards violation Nathan allegedly committed concerning his same-sex

marriage. ER 162.

On September 21, 2017, two business days before classes started, Defendant Mari L. Clements (“Dean Clements”), Dean of the School of Psychology, sent Nathan a “Letter of Dismissal” from Fuller. ER 161. The Letter of Dismissal stated Fuller decided to dismiss Nathan from enrollment because he violated the Sexual Standards Policy. *Id.* Dean Clements explained to Nathan that Fuller learned of his same-sex marriage when he requested his last name be changed on his student files and that the Department of Admissions determined this was a student-conduct matter. *Id.* Dean Clements directed Nathan to contact Defendant Nicole Boymook (“Director Boymook”), Executive Director of the Office of Student Concerns, for information concerning his ability to appeal her decision to the Provost. ER 162. Director Boymook held a dual role as head of the Office of Student Concerns, which investigates and processes complaints by the institution against students, and Title IX & Discrimination Officer for Students, which investigates complaints of discrimination brought by students against the institution. ER 168.

Director Boymook wrote to Nathan that he should begin to draft an appeal letter on September 27th, and later informed him that he could send an appeal letter to Bryant L. Meyers, Acting Dean of the School of Intercultural Studies. ER 163. Nathan sent an appeal letter to Mr. Myers the next day. *Id.* In the letter, Nathan stated he had already invested time and money into his studies, had declined an

offer of admission and scholarship to another seminary school in order to attend FTS, and that his dismissal would “set him back a year in his educational studies.” ER 164. Nevertheless, Nathan’s appeal was denied and he was not permitted to continue his students at Fuller. ER 164-68.

E. Fuller Admits Joanna, Allows her to Study for Three Years, then Expels her for her Same-Sex Marriage shortly before Completing her Degree

Joanna enrolled in the school of theology at FTS in 2015 pursuing a Master of Arts in Theology (“MAT”). ER 156-57. After Joanna enrolled at Fuller but before her start date, she divorced her husband and reported to Fuller her changed marital status and last name. ER 157. Joanna began dating a woman and, after the legalization of same-sex marriage in 2016, married her wife. *Id.* Joanna discussed her marriage with faculty and students at Fuller, who were supportive of her marriage and family. *Id.*

Joanna and her wife filed a joint tax return in 2016 and authorized the IRS to share her tax return with Fuller for the purposes of financial aid. *Id.* On August 29, 2018, Director Boymook submitted a Complaint Resolution Report regarding a complaint against Maxon from the Office of Student Financial Services (“OSFS”). ER 170. Although Fuller did not provide a copy of the complaint to Joanna, the Complaint Resolution Report stated the basis of the complaint was that Joanna’s 2016 income tax return was received by OSFS and indicated Joanna was married to another female, and Joanna acknowledged her

marriage during a telephone call with Director Boymook. ER 170. On September 20, 2018, one business day before classes began, Director Boymook provided Joanna the Complaint Resolution Report and told Maxon she could respond in writing whether she accepted the findings in the report. ER 171.

In a letter to Dean Thompson, Joanna responded to the report by admitting she was in a same-sex marriage but without stating she engaged in “homosexual forms of explicit sexual conduct.” ER 172. On October 9, 2018, Dean Thompson sent a letter to Joanna informing her she was dismissed from Fuller effective immediately for violating the Sexual Standard Policy of the Community Standard. ER 172-73. Fuller expelled Joanna after Joanna had spent three years studying at Fuller. ER 172. Joanna was only a few classes shy of completing her degree. *Id.*

V. Summary of Argument

This Court should reverse the district court’s Order Granting Defendants’ Motion to Dismiss for five reasons. If the Court resolves any of these issues in Plaintiffs’ favor, the district court’s Order should be reversed.

First, the text of the Title IX exemption requires that an educational institution, like Fuller, be controlled by a religious organization, like a church or denomination, to qualify for the exemption. Plaintiffs allege that Fuller is an independent educational organization, controlled by its own board, rather than by a

church or denomination.

Second, the federal regulations in effect during the relevant time period require an educational institution controlled by a religious organization to affirmatively request such an exemption in writing from the Department of Education. Plaintiffs allege that Fuller did not request, or receive, such an exemption.

Third, the district court improperly decided disputed questions of fact in ruling on Defendants' Motion to Dismiss, namely, that (1) Fuller is controlled by a religious organization and (2) that it would have been inconsistent with Fuller's religious tenets to allow Joanna and Nathan to complete their degree programs.

Fourth, the district court improperly relied on evidence outside the complaint in making the factual determinations described above, depriving Plaintiffs of the opportunity to put forward their own evidence regarding disputed facts.

Fifth, the district court improperly dismissed Plaintiff's Title IX claim with prejudice, depriving Plaintiff of any opportunity to amend their complaint to conform to the court's rulings.

VI. Standard of Review

This Court reviews dismissal under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011).

This Court reviews a district court’s incorporation of documents by reference for abuse of discretion. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003-04 (9th Cir. 2018).

VII. Argument

A. The district court erred by concluding that Fuller is controlled by a religious organization.

Title IX regulates all educational institutions that receive federal funding. “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. § 1681(a).

Title IX’s coverage is broad and its exemptions are narrow. *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 173-75 (2005) (“Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition.”); *Goodman v. Archbishop Curley High School, Inc.*, 149 F. Supp.3d 577, 583-86 (D. Maryland 2016) (finding that Title IX’s religious organizations exemption must be viewed narrowly and did not bar plaintiff’s Title IX claim against religious school).

Pursuant to 20 U.S.C. § 1681(a)(3), a limited exception applies 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.” Here, Fuller fails to qualify for the exemption because it cannot satisfy the “controlled by” test. Fuller is not owned by a church, denomination or other religious organization. ER 160. Fuller’s board is not selected by a church, denomination or other religious organization. *Id.* Rather, Fuller is an independent institution. *Id.* Fuller is controlled by its own self-perpetuating board. *Id.* Fuller’s control structure differs from many seminaries and other religious educational institutions that are controlled by religious organizations through direct ownership, financial control or the right to appoint board members. For example, numerous Catholic seminaries are owned by the Catholic Church and run by various dioceses. Such institutions would satisfy the control test of Title IX as the seminaries (the educational institutions) are controlled by a religious organization (the Catholic Church).

Nonetheless, Fuller argued, and the district court determined that Fuller’s Board satisfied the requirement of control by a religious organization. ER 18. The district court stated that “Here, although the text of the Religious Organization Exemption may be read to require the ‘religious organization’ and ‘educational institution’ to be two separate entities, the ordinary meaning of the term ‘organization’ is sufficiently broad to include the board of directors.” ER 18-19. The district court determined that, to the extent ambiguity existed, it must defer to the agency’s internal guidance so long as the guidance is “based on a permissible

construction of the statute.” ER 19.

The district court erred in its reasoning. First, district court conflates Fuller’s religious identity, which it has, with Fuller’s control by a religious organization, which it lacks. The religious exemption does not exempt “religious educational institutions.” Rather, it exempts “educational institutions” that are “controlled by a religious organization[.]” The board of trustees of an educational institution is a part of the educational institution itself. The board is not a separate organization. A plain reading of the text of the statute requires two separate entities as a condition of qualifying for the religious exemption.

The district court relied heavily on deference to an administrative memorandum written during the Reagan administration, and its incorporated administrative instructions on how to fill out a form, which states that an educational institution can qualify for the religious exemption, even if there is no clear external religious organization, if it is a “school or department of divinity.” ER 18-19; *see* Memorandum of Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Directors, Feb. 19, 1985 (“Singleton Memo”).

The control test as described in the Singleton Memo has never been formalized as a regulation and has only publicly appeared in a government publication twice over the past thirty years. *Religious Exemptions to Title IX*, Charles E. Jones, 65 U. KAN. L. REV. 327 (2016). Indeed, the control test as

described by Fuller “began as and has remained an internal administrative agency policy and practice rather than a formalized statement of law or regulation.” *Id.* at 350.

Moreover, the Singleton Memo merely states that “[A]n applicant or recipient will *normally* be considered to be controlled by a religious organization if one or more of the following conditions prevail:

- (1) It is a school or department of divinity; or
- (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the *religion of the organization by which it claims to be controlled*;
- (3) Its charter and catalog, or other official publication, contains explicit statement that it is *controlled by a religious organization* or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed *by the controlling religious organization or an organ thereof*, and it receives significant amount of financial support from the *controlling religious organization or an organ thereof*.
(emphasis added)

Consequently, even the Singleton Memo recognizes that there must be an external religious organization that controls the educational institution. While

Fuller might normally be considered a “school or department of divinity” in the common sense of those terms, to conform to the text of the statutory exemption, the school or department of divinity must be one that is controlled by a religious organization.

In any event, to the extent that the Singleton memo contradicts the express terms of the statute, courts must reject its interpretation. Under principles of administrative deference, courts defer to agency interpretations of statutes, as well as their own regulations, but only if the regulations or statutes are ambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (as to ambiguous agency regulations); *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (as to ambiguous statutes). Moreover, before concluding that a regulation or statute is truly ambiguous, “a court must exhaust all the ‘traditional tools’ of construction.” *Kisor*, 139 S. Ct. at 2415; *Chevron*, 467 U.S. at 843, n. 9. Here, the text of the statute is unambiguous. The statute calls out two separate entities: the educational institution and the controlling religious organization

As is the case with any statute, courts begin with the statutory text and interpret “statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary.” *I.R. ex rel. E.N. v. L.A. Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015) (citation omitted). Courts will generally give a statute “its most natural grammatical meaning....” *United*

States v. Price, 921 F.3d 777 (9th Cir. 2019). The most natural grammatical meaning for Title IX’s religious exemption is to recognize that two distinct entities must be involved, an educational institution and a controlling religious organization. 20 U.S.C. § 1681(a)(3) (exempting “an educational institution which is controlled by a religious organization”). Indeed, “[t]he language of the statute, regulations, and control test all suggest by their grammatical structure that two different entities must be involved to manifest the required control for religious exemption to Title IX: a religious organization that exerts control and an educational institution that receives it.” 65. U. Kan. L. Rev. 327, 367.

This interpretation of the control test for the Title IX exemption is further supported by a comparison to the religious exemption from Title VII, which exempts an educational institution that is “in whole or substantial part, owned, supported, controlled, or managed by a particular religion or religious corporation, association, or society[.]” 42 U.S.C. § 2000e–2(e). This exemption is much broader than the exemption in Title IX. Of note, the religious exemption in Title VII provides that control by a *religion* or a religious organization satisfies the statute, while the religious exemption in Title IX provides that only control by a religious organization, not by a religion, satisfies the statute. Congress knew how to craft a boarder religious exemption when it enacted Title VII in 1964 but it

chose to craft a narrower religious exemption when it enacted Title IX in 1973.

Moreover, the legislative history of Title IX supports a narrow reading of the control test for the religious exemption. *See* S. Rep. 100-64 (1987), 1987 WL 61447, S. Rep. No. 64, 100th Cong., 1st Sess. 1987 (rejecting amendment “to loosen the standard for the religious exemption in Title IX from ‘controlled by a religious organization’ to ‘closely identified with the tenets of a religious organization.’”), (“The committee is concerned that any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education.”); 134 Cong. Rec. H565-02 (1988), 1988 WL 1083034 (“It is critical that the control test remain in effect, and enforced severely for that aspect of the test is the linchpin for assuring that only a limited number of institutions may discriminate with Federal funds.”).

Consequently, merely being a religious educational institution, or one aligned with certain aspects of the Christian religion, does not qualify Fuller for the religious exemption to Title IX. This Court should decline Fuller’s invitation to dramatically expand the scope of the narrow religious exemption.

B. The district court erred by concluding that Title IX regulations permit Fuller to claim a religious exemption from Title IX without affirmatively requesting it.

The regulation requires that “[a]n educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by

submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.” 34 C.F.R. § 106.12(b). Fuller has not gone through this process. ER 154.

The district court held that “Construing the language of the statute, the Religious Organization Exemption does not condition an educational institution’s liability under Section 1681 on its submission of a written claim for exemption.” ER 15. The district court stated that “A plain reading of Section 1681 together with the Religious Organization Exemption indicates that the prohibition of sexual discrimination provided by Section 1681 ‘shall not apply’ to an educational institution if it ‘is controlled by a religious organization’ and ‘application of this subsection would not be consistent with the religious tenets of such organization[.]’ 20 U.S.C. § 1681. If these elements are met, then by its own terms Section 1681 does not apply to the educational institution.” ER 15.

However, the district court’s interpretation of Section 1681 renders the implementing regulations superfluous. See 34 C.F.R. § 106.12 (stating that an educational institution seeking to avail itself of the religious exemption “*shall do so*” in writing). Moreover, the procedural process of requesting an exemption provides some notice and transparency to the Department of Education, and to consumers like Nathan and Joanna, concerning an institution’s intention to comply

with Title IX. Consequently, this Court should enforce the unambiguous requirements of the regulation.

C. The district court erred by finding that Fuller’s religious tenets would be violated by compliance with Title IX even though Plaintiffs allege otherwise.

The regulation Fuller relies on inferences in its favor and documents outside the complaint to argue that its religious tenets are inconsistent with application of Title IX. Motion, pp. 8-9. Such an analysis is inappropriate on a motion to dismiss, where all inferences must be drawn in favor of Plaintiffs. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (1987). While a court should not second-guess the sincerity of Fuller’s religious beliefs, discovery may show that Title IX’s prohibition on expelling Joanna and Nathan because of their civil same-sex marriages would not violate Fuller’s religious beliefs. Indeed, in light of Fuller’s seemingly contradictory policies and practices on non-discrimination, Title IX, the admission of LGBTQ students and sexual conduct, discovery may demonstrate that Joanna and Nathan’s expulsions were based on the personal animus of a couple of administrators, rather than on Fuller’s religious beliefs.

D. The district court erred by dismissing Plaintiffs’ complaint with prejudice, denying Plaintiffs an opportunity to amend to conform to the district court’s rulings.

“In dismissing for failure to state a claim, ‘a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.’” *Doe*

v. U.S., 58 F3d 494 (9th Cir. 1995) (internal citations omitted). Where the record contains “no indication of such a determination” a district court abuses its discretion in dismissing [the complaint] with prejudice. *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986).

Here, the district court’s opinion contains no discussion of whether Plaintiffs’ complaint could be cured by the allegation of other facts. ER 3-21. Consequently, the district court abused its discretion by dismissing Plaintiffs’ complaint with prejudice.

E. The district court erred by incorporating Defendants’ exhibits by reference and relying on them in its rulings.

The incorporation by reference doctrine allows a court to consider a document “if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

However, where the parties disagree as to whether a document accurately reflects the terms of the document as it was actually implemented, consideration of such documents “does not resolve the relevant issues in the context of a motion to dismiss.” *Sgro v. Danone Waters of N. Am., Inc.*, 532 F.3d 940, 942, n.1 (9th Cir. 2008) (finding it proper to consider disability benefits plan referenced in complaint, but declining to accept truth of the plan’s contents where the parties disputed whether defendant actually implemented the plan according to its terms);

Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1122 (9th Cir.1998) (whether a plan is governed by ERISA is a question for the trier of fact).

Here, the district court may have properly incorporated Fuller's proposed documents by reference. However, it should not have used such documents to decide questions of fact in favor of Fuller. Plaintiffs have alleged that Defendants did not follow its Community Standards according to their terms.

Conclusion

For the foregoing reasons, Appellants respectfully request this Court to reverse the district court's Order Granting Defendants' Motion to Dismiss and to remand to the district court.

Dated this 14th day of April, 2021.

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Statement Required by Circuit Rule 28-2.6

Hunter et al. v. Department of Education, et al, Case No. 6:21-cv-00474-AA.

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Certificate of Compliance with Rule 32(A)

I am the attorney for Plaintiffs-Appellants in this matter. This brief contains 4,990 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman.

Dated this 14th Day of April, 2021.

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