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' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Statutes

I. Introduction

The Constitution commands that society must tolerate private, religiously based invidious discrimination. However, the Constitution also commands that the government need not, and often must not, affirmatively aid private, religiously based invidious discrimination.

The constitutional arguments advanced in Appellees' Response Brief fail because this appeal arises out of Title IX, which is remedial non-discrimination legislation that only applies to recipients of federal financial assistance. Seminaries that are not funded by federal taxpayers are not subject to Title IX. However, seminaries, like Fuller, that receive federal funding are generally, and properly, subject to Title IX.

In *Grove City College v. Bell*, 465 U.S. 555 (1984), a religious college raised similar First Amendment challenges to compliance with Title IX as those raised by Fuller here. In response, the Supreme Court flatly rejected the arguments:

> *Grove City's final challenge to the Court of Appeals' decision—that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students—warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept…Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its*

students.

Id. at 575-76.[1] More recently, in *Christian Legal Soc. v. Martinez*, the Court recognized that the expressive-association precedents on which the religious organization relied to support its right to discriminate "involved regulations that compelled a group to include unwanted members, with no choice to opt out." 561 U.S. 661, 682 (2010) (emphasis in original) (citing *Boy Scouts v. Dale*). The Court stated that "our decisions have distinguished between policies that require action and those that withhold benefits." 561 U.S. at 682 (citing *Grove City College v. Bell* and *Bob Jones University*, 461 U.S. 574, 682-83 (1983)).

II. Argument

A. The Ministerial Exception and Ecclesiastical Abstention Doctrines Do Not Apply to Plaintiffs' Claims

Appellees' ecclesiastical abstention and ministerial exception doctrine arguments are misplaced. The church autonomy doctrine prohibits secular courts from interfering in matters of church government, church doctrine and church discipline. Fuller, while a religious educational institution, is not a church. If Fuller were a church, the U.S. Department of Education would not pay for students to attend.

The U.S. Supreme Court and federal appellate courts apply this doctrine exclusively in the context of disputes over church property, church membership and church leadership positions within hierarchical churches. *See Watson v. Jones*, 80

[1] Grove City College is a religious college.

U.S. 679 (1871) (church property dispute); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (determination of which prelate was entitled to use and occupancy of cathedral); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (review of validity of Serbian Orthodox Church's reorganization of the American-Canadian Diocese); *Paul v. Watchtower Bible Tract Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987) (shunning of dissociated member of Jehovah's Witness Church); *Maktab Tarighe Oveyssi Shah Maghsoudi v. Kianfar*, 179 F.3d 1244, 1247-48 (9th Cir. 1999) (succession of religious office); *Ammons v. N. Pac. Union Conf. of Seventh-Day Adventists*, 139 F.3d 903 (9th Cir. 1998) (unpublished opinion) (censorship of member of Seventh-Day-Adventist Church).

Appellees cite no cases in which a federal court applied the ecclesiastical abstention doctrine to a Title IX claim by a student at a religious school or seminary, let alone one that is taxpayer funded. Indeed, despite the 150-year history of the church autonomy doctrine, and the 50-year history of Title IX, a federal court has never applied the doctrine in the context of a case involving student claims regarding the admissions or disciplinary practices of an educational institution.

Because Fuller is not a church, Fuller may not benefit from the church autonomy doctrine. This Court should not expand a doctrine that has been limited to churches for over a century. In any event, the doctrine is irrelevant in the context of Plaintiffs' claims against Fuller, where, rather than meddle in the private affairs of a church or

seminary, the Court must analyze whether the federal government may attach non-discrimination requirements to laws that provide federal funding to educational institutions.

Fuller also argues that the ministerial exception of the First Amendment prohibits Plaintiffs' Title IX claims. However, the ministerial exception is limited to employment claims made by individuals considered to be ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (recognizing ministerial exception for employment claims by ministers). The Court noted that the "exception is not limited to the head of a religious congregation" but limited application of the ministerial exception to those, who on balance, qualified as a minister after examining four factors: (1) whether the church held the person out as a minister "with a role distinct from that of most of its members"; (2) whether the person has the title of minister reflected by a formal commissioning process; (3) whether the person held themselves out as a minister in the employment position at issue; and (4) whether the person's "job duties" reflected a religious leadership role. *Id*. at 191-92. None of these factors describe Plaintiffs.

In limited circumstances, courts have applied the ministerial exception beyond churches to cover other religious organizations, including educational institutions. *See Petruska v. Gannon Univ.*, No. 1:04-cv-80, 2008 WL 2789260 (W.D. Pa. Mar. 31, 2008) (dismissing employment claim by chaplain of Catholic diocesan college).

However, the doctrine has always been limited to employment claims by those who are ministers.

Fuller relies on *Alcazar v. Corporation of Catholic Archbishop of Seattle*, in support of its position that the ministerial exception should apply to a Title IX claim brought by seminary students. 627 F.3d 1288, 1292 (9th Cir. 2011). However, *Alcazar* did not address whether the ministerial exception applied to a seminary student who was asserting a Title IX claim as a student (regarding admissions, discipline, etc.), like Plaintiffs assert here. Rather, *Alcazar* concerned a seminary student *employed* by the seminary. The seminarian asserted employment claims.

The Court recognized that "Churches, like all other institutions, must adhere to state and federal employment laws" but that courts have "recognized a 'ministerial exception' to that general rule" for plaintiffs like *Alcazar*, who were hired to perform religious duties, such as assisting with Mass. *Id*. at 1289, 1292-93. Here, Plaintiffs assert claims as students, not as employees.

Finally, *Alcazar* did not analyze whether the government may attach non-discrimination requirements when providing federal funding to a seminary. Consequently, *Alcazar* is not controlling.

The ministerial exception is a narrow exception that federal courts have never applied to claims like those before this Court. In order to preserve the broad mandate of Title IX's prohibition on sex discrimination in federally-funded education, this

Court should decline Fuller's invitation to drastically expand the ministerial exception.

B. Fuller's Freedom of Association Does Not Foreclose Plaintiffs' Claims

Fuller argues that Plaintiffs' claims are also barred by the freedom of association. Plaintiffs agree that the freedom of association protects a religious organization's right not to associate and to be insulated from being forced to accept members it does not desire. *See Boy Scouts v. Dale*, 530 U.S. 640 (2000) (exclusion of gay scoutmaster). Fuller is correct that the "exercise of these constitutional rights is not deprived of protection if the exercise is not politically correct and even if it is discriminatory against others." *AHDC v. City of Fresno*, 433 F.3d 1182 (9th Cir. 2006).

Here, Plaintiffs acknowledge that Fuller is an expressive association with associational rights protected by the First Amendment. If Fuller were a truly private actor, the Constitution might permit Fuller to discriminate based on sex. However, Plaintiffs' Title IX claim is not based on Fuller's status as a private actor, it is based on Fuller's status as a federally funded educational institution that is heavily subsidized by the federal government. The Constitution does not compel the government to subsidize discrimination through federal funding.

In *Norwood v. Harrison*, 413 U.S. 455, 468–469 (1973), the Court reasoned that "a private school—even one that discriminates—fulfills an important educational

function; however,… [that] legitimate educational function cannot be isolated from discriminatory practices ... discriminatory treatment exerts a pervasive influence on the entire educational process." (emphasis added). Consequently, the Court has upheld statutes prohibiting discrimination by private educational institutions. *See Runyon v. McCrary*, 427 U.S. 160 (1976) (statute requiring private schools to admit black students does not violate associational rights). In *Runyon*, the Court noted that "it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Id*. at 176.

Moreover, in the context of religious universities receiving indirect government benefits, the Court has rejected First Amendment arguments that sought to insulate the discriminatory practices of such institutions. *See Bob Jones University v. United States*, 461 U.S. 574 (1983) (holding that private religious university that maintained racially discriminatory admission policies on the basis of religious doctrine did not qualify as tax-exempt organization under Internal Revenue Code). At the time, and even through the year 2000, Bob Jones University prohibited interracial dating and interracial marriage based on the institution's religious beliefs concerning God's intentions for the races. *Id*. at 580-81.

The Court recognized that Bob Jones University, as a religious educational institution, possessed rights under the First Amendment. *Id*. However, the Court determined that the government's compelling interest in eradicating racial discrimination in education outweighed the university's interest in maintaining racially discriminatory policies based on its sincerely held religious beliefs. Id. at 604.

Much like Bob Jones University's sincerely held religious beliefs regarding marriage and sexuality, which gave rise to its community standards prohibiting interracial dating, Fuller claims that its religious beliefs have given rise to its community standards prohibiting same-sex marriage. However, the community standards at both institutions violate federal laws that prohibit discrimination when the government provides financial benefits. The First Amendment does not require the federal government to subsidize such discriminatory practices.

In his concurrence in *Christian Legal Society*, Justice Stevens noted that the religious group at issues excluded students who engage in "unrepentant homosexual conduct" but went on to note that the group's expressive association argument "is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women…A free society must tolerate such groups. It need not subside them[.]" 561 U.S. at 702-03.

Congress, in enacting Title IX, clearly expressed its agreement that sex

discrimination in education violates a fundamental public policy. Moreover, numerous Supreme Court decisions have preserved Congress's ability to further its public policy goals by mandating non-discrimination requirements when extending public benefits to private religious organizations. This Court should not accept Fuller's invitation to upend decades of Supreme Court precedent.

C. To the Extent the Religious Exemption is Unconstitutional, it Cannot Be Saved by the Constitutional Avoidance Doctrine.

The constitutional avoidance doctrine cannot be used to circumvent the clear language of Title IX. The religious exemption to Title IX requires (1) an "education institution" that is (2) "controlled by a religious organization" with "religious tenets." 20 U.S.C. § 1681(a)(3). Congress used similar language when it defined "tribally controlled college or university" to mean "an institution of higher education which is formally controlled, or has been formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes, except that no more than one such institution shall be recognized with respect to any such tribe." 25 U.S.C.S. § 1801.

In contrast, Congress has used broader language in other statutes. See e.g. *see also* 29 U.S.C.S. § 1002 (mentions organizations "controlled by *or associated* with a church or a convention or association of churches.") (emphasis added); 20 U.S.C.S. § 1066c (discrimination prohibition "shall not apply to an institution which is controlled by *or* which is *closely identified* with the tenets of a particular religious organization if the application of this section would not be consistent with the

religious tenets of such organization") (emphasis added).

While Congress has repeatedly used "control" language *in addition to* other extensive language such as "associated with" or "identified with" or similar in granting religious exemptions, Congress chose not to make that same extension in Title IX.

Consequently, the religious exemption unambiguously requires an educational institution to be controlled by a religious organization, rather than an educational institution that is controlled by itself through its board of directors. Moreover, the religious exemption requires the controlling religious organization to identify religious tenets that conflict with compliance with Title IX.

Given the structure of the exemption, it is, as Fuller suggests, not religiously neutral as it favors some types of religious educational institutions, namely, those controlled by religious organizations whose tenets conflict with Title IX, over other religious educational institutions, those that lack control by a religious organization or whose religious organization's tenets do not conflict with Title IX. The Establishment Clause prohibits such favoritism. *See Texas Monthly, Inc., v. Bullock*, 489 U.S. 1, 8 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("the Establishment Clause prohibits government from…favor[ing] the adherents of any sect or religious organization.").

If Congress had categorically exempted all religious educational institutions from Title IX, this type of favoritism would not exist. However, Congress only exempted a subset of religious educational institutions, and the exemption applies to varying degrees, depending on the specific regulations a religious organization claims to conflict with its religious tenets. Consequently, on its face, the exemption discriminates among religious educational institutions.

The exemption also favors educational institutions controlled by religious organizations over secular educational institutions because secular educational institutions cannot benefit from the religious exemption as they, by nature, are not controlled by a religious organization. The Establishment Clause also forbids this type of favoritism. *Texas Monthly*, 489 U.S. at 8; *see also Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("[n]either a State nor the Federal Government can constitutionally…pass laws or impose requirements which aid all religions as against non-believers").

Rather than applying the constitutional avoidance doctrine to save the exemption by forcing a definition of control that Congress clearly never intended, the Court should determine that the religious exemption is unconstitutional as applied to Plaintiffs. *See Tilton v. Richardson*, 403 U.S. 672 (1971) ("To this extent the Act therefore trespasses on the Religion Clauses… This circumstance does not require us to invalidate the entire Act, however…. In view of the broad and important

goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.")

D. RFRA Does Not Apply to Lawsuits Between Private Parties

This suit involves claims by private parties against a private party. RFRA does not bar Plaintiffs' claims because RFRA applies only to suits in which the government is a party. 42 U.S.C. 2000bb–1(b) (the "government " must "demonstrate...that application of the burden" is the least restrictive means of furthering a compelling governmental interest); 2000bb–1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.") (emphasis added); *see also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (RFRA not applicable to suits between private parties); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) ("The text of the statute makes quite clear that Congress intended RFRA to apply only to suits in which the government is a party."); *Hankins v. Lyght*, 441 F.3d 96, 114-15 (2d Cir. 2006 (Sotomayor, J., dissenting)) ("this provision strongly suggests that Congress did not intend RFRA to apply in suits between private parties."); *Rweyemamu v. Cote*, 520 F.3d 198, 203-204, n. 2 (2d Cir. 2008) (the "text of RFRA is plain" and "we do not understand how

[RFRA] can apply to a suit between private parties").

Moreover, even if RFRA were to apply to suits between private parties, it would not bar Plaintiffs' claims because RFRA cannot act as a shield to discrimination claims. In *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), the Court addressed "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction" and clearly stated that "[o]ur decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id*. at 733.

Seminaries are no less immune from invidious discrimination than other educational institutions. Indeed, Southern Baptist Theological Seminary did not integrate its classrooms until 1951. The School of Theology at the University of the South did not integrate until 1953. Bob Jones University and its Seminary integrated in 1975 and maintained a prohibition on interracial marriage until the year 2000.

Here too, the government has a compelling interest in providing an equal opportunity to LGBTQ+ Americans to participate in federally funded educational programs. Prohibitions on sex discrimination are precisely tailored to achieve that critical goal. Indeed, Title IX is narrowly tailored because it only applies to educational institutions that receive federal funding and it offers a mechanism for

qualifying religious educational institutions to claim exemptions.[2]

E. The district court applied a broad version of the control test that had not been through a formal rulemaking required by the Administrative Procedures Act at the time of Plaintiffs' expulsions.

The core of the Title IX religious exemption is found where an educational institution is clearly controlled by a religious organization, such as a seminary owned by the Catholic Church or a seminary whose board of trustees is appointed by a denominational body. Where, as here, the allegations are outside of this core, the Court should decline to resolve the religious exemption issue on a motion to dismiss and should allow further discovery into the governance structure and policies of the educational institution and its alleged controlling organization. *See Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017) ("[T]he factual allegations in the complaint are too far removed from the core of the exception for us to conclude at this stage of the proceedings that the exclusion of the plaintiffs from the board positions is a 'protected employment decision' falling within the ministerial exception affirmative defense.").

Moreover, Fuller continues to rely heavily on the Singleton Memorandum in support of its broad reading of the control test. Memorandum of Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Directors,

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[2] However, Plaintiffs intend to allege that the religious exemption is unconstitutional and violates the Administrative Procedures Act as applied to them if they are permitted to amend their complaint.

Feb. 19, 1985 ("Singleton Memo"). However, the Singleton Memo did not go through a formal rulemaking as required by the Administrative Procedures Act. Indeed, the formal rulemaking that implemented a version of the control test largely modeled after the Singleton Memo did not occur until the year 2020. Resp. Brief p. 38. This was several years after Plaintiffs' expulsions.

Administrative rules do not apply retroactively unless the rules clearly command retroactive application. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("administrative rules will not be construed to have retroactive effect unless their language requires this result"); *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179, 1197 (9th Cir. 2016) (recognizing presumption against retroactivity that generally requires legal effect of conduct ordinarily be assessed under law that existed when conduct took place); *Sathanthrasa v. Attorney General United States*, 968 F.3d 285, 293, n.5 (3rd Cir. 2020) (same).

Here, there is no language in the administrative rule expressing retroactive application. *See* 85 Fed. Reg. at 59,980-81; 34 C.F.R. 106.12(c). Consequently, Plaintiffs' claims should not be held to the standard of a regulation that was not in effect at the time of their expulsions. Rather, Plaintiffs' claims should be examined under the rules in effect at the time. Based on an ordinary and plain reading of the text of the religious exemption, the exemption does not apply to an independent educational institution that is controlled by its board of trustees. *See I.R. ex rel.*

E.N. v. L.A. Unified Sch. Dist., 805 F.3d 1164, 1167 (9th Cir. 2015) (courts interpret "statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary.") (citation omitted); *United States v. Price*, 921 F.3d 777 (9th Cir. 2019) (courts generally give a statute "its most natural grammatical meaning….").

Here, 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").

Additionally, contrary to Fuller's assertion, the Department of Education has not consistently interpreted the religious exemption pursuant to broad language of the Singleton Memo. For example, in the religious exemption response letter for Biola University, the Department wrote: "Also, in the unlikely event that a complainant alleges that the practices followed by the institution are not based on the religious tenets identified in your request, *OCR is obligated to identify a controlling organization* to contact to verify those tenets." The Department used this language because it could not actually identify a controlling organization for Biola University, despite Biola's statement to the Department that it "is governed and controlled by its Board of Trustees pursuant to the statement of mission and

purpose and Articles of Faith contained in its Articles of Incorporation." Letter from Catherine E. Lhamon, Assistant Sec'y, DOE-OCR, to Barry H. Corey, President, Biola Univ. 1 (Aug. 29, 2016).[3]

Additionally, the federal regulation in place at the time of Plaintiffs' expulsions required 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). The Department of Education amended this regulation in 2020 to remove this requirement. 85 Fed. Reg. 30,026, 30,475 (May 19, 2020); 34 C.F.R. 106.12(b). However, as with the control test regulation described above, administrative rules do not apply retroactively. At the time Plaintiffs' were expelled, Fuller was required to apply for and receive a religious exemption in order to acquire immunity from Title IX liability.

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

Fuller attempts to argue that Plaintiffs conceded that there are no factual

[3] https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/biola-university-response-08292016.pdf

disputes regarding Fuller's religious tenets and whether Plaintiffs' were dismissed according to, or outside of, Fuller's policies. Not so. Defendants mischaracterize the language and significance of the Joint 26(f) Report. The Report states that "The core factual issues are not in dispute at this stage of the litigation: The parties agree that Fuller dismissed Plaintiffs because of their same-sex marriages. The parties mainly dispute the legal significance of the facts." SER011. The Report's statements regarding the core factual issues are limited by the reference to "this stage of the litigation," where discovery had not occurred. Moreover, in Plaintiffs' Opposition to Defendants' Motion to Dismiss, Plaintiffs argued that "Determining the consistency between Fuller's religious tenets and application of Title IX requires a factual analysis." SER036. 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 other factors, which could include Fuller reacting to pressure from donors or covering for the personal animus of the administrators involved in Plaintiffs' expulsions.

Additionally, other factual disputes remain. For example, Plaintiffs allege that

Fuller expelled them for violating a student conduct rule prohibiting "explicit forms of homosexual conduct" but that Fuller never asked them about their sexual conduct. ER161, 171. Plaintiffs allege that Fuller actually expelled them because of their same-sex marriages but that Fuller does not have any policies prohibiting students from entering into a civil same-sex marriage and, in fact, allows faculty, administrators and students to attend and even officiate same-sex weddings. ER 159-160.

Plaintiffs also alleged that Fuller "discriminated against [Plaintiffs] by subjecting [them] to different disciplinary processes and stricter disciplinary action than Fuller would have subjected a male student who committed a sexual standards violation with a female or a female student who committed a sexual standards violation with a male." ER 178. Discovery is necessary to determine whether these allegations are true, and, if they are true and the Title IX religious exemption applies to Fuller, whether Fuller's religious tenet's require more severe punishments for LGBTQ+ students than for heterosexual and cisgender students. Fuller has not put forth any policies suggesting as much, nor does the District Judge's opinion address these issues.

Plaintiffs also alleged that "Fuller monitored and investigated Joanna and Nathan for sexual standards violations using methods that it does not use to monitor or investigate students in heterosexual marriages, male students who have sex with

females or female students who have sex with males." ER 179.

Additionally, in Plaintiffs' Opposition to Defendants' Motion to Stay Discovery, Plaintiffs stated that "there are numerous factual issues in dispute" relating to Defendants' First Amendment and statutory exemption defenses. SER004. For example, Plaintiffs argued that while the parties agree that Fuller is a religious educational organization, they do not agree "as to the type or nature of the religious organization." SER008.

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

"The standard for granting leave to amend is generous." *Balistreri*, 901 F.2d 696, 701 (9th Cir. 1988). "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, as here (ER 3-21), 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).

Appellees argue that to obtain leave to amend, a plaintiff must show that the "deficiencies can be cured with additional allegations that are 'consistent with the

challenged pleading' and that do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Not so. While leave to amend is certainly "warranted" under those circumstances, plaintiff need not make such a showing. *Id.* Rather, "leave to amend should be granted when a court can 'conceive of facts' that would render the plaintiff's claim viable." *Id*. (citing *Balistreri*, 901 F.2d at 701.

In *Corinthian Colleges*, the Court determined that it could "conceive of additional facts that could, if formally alleged, support the claim that Corinthian made false statements to the [Department of Education]," regarding its recruiter compensation system's compliance with the government's ban on incentive compensation (compensation based on number of students a recruiter enrolls). 655 F.3d at 995. In supporting their claim of a false statement, the Court noted that in an amended pleading, the plaintiffs "could allege that the Corinthian employee performance rating system is merely a proxy for employee recruitment numbers…[or that] salary increases are *in practice* determined on the basis of recruitment numbers." *Id*. at 996 (emphasis in original). The Court went on to state that "It is Corinthian's implementation of its policy, rather than the written policy itself, that bears scrutiny…and such allegations would require additional discovery." *Id*.

Here, Plaintiffs could allege additional facts that would render their Title IX

claim viable. To begin, Plaintiffs' Title IX claim could be rendered viable if Plaintiffs alleged facts showing that the religious exemption to Title IX is unconstitutional as applied to their claim as a violation of the First and Fifth Amendments to the U.S. Constitutions. Plaintiffs have made such allegations in their constitutional challenge to Title IX's religious exemption in *Hunter v. Department of Education*, No. 21-cv-474 (D. Or.). In *Hunter*, Fuller is not a defendant. Plaintiffs do not seek remedies against Fuller in the *Hunter* lawsuit.

However, Plaintiffs could amend their complaint in this case to include allegations that the religious exemption to Title IX: (1) targets them as homosexuals, a socially despised minority, for legal disfavor in violation of the equal protection guarantee of the Fifth Amendment; (2) impermissibly burdens their fundamental right to marry the person they love by punishing them for having exercised that right; (3) is not narrowly tailored in furtherance of a compelling governmental interest because it could have been limited to an exemption for co-religionists, as are the exemptions to Title VII and the Fair Housing Act; (4) furthers invidious discrimination towards an unpopular group, which, even when based on sincerely held religious beliefs, cannot constitute a legitimate government interest; (5) results in excessive entanglement with religion because the Department of Education must request and analyze the governing structure and religious beliefs of the religious educational institution and/or its governing religious organization to determine

whether the institution qualifies for a religious exemption; and (6) penalizes Plaintiffs for their religious beliefs regarding marriage and sexuality.

Plaintiffs could also amend their complaint to assert allegations that the religious exemption to Title IX, as applied by through reliance on the Singleton Memo, violates their procedural rights under the Administrative Procedures Act.

III. 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 4th day of August, 2021.

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Certificate of Compliance with Rule 32(A)

I am the attorney for Plaintiffs-Appellants in this matter. This brief contains 5,225 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 4th Day of August, 2021.

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