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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOANNA MAXON, AN INDIVIDUAL, and NATHAN BRITTSAN, AN INDIVIDUAL

Plaintiff,

vs.

FULLER THEOLOGICAL SEMINARY, a California nonprofit corporation; MARIANNE MEYE THOMPSON, an individual; MARI L. CLEMENTS, an individual; NICOLE BOYMOOK, an individual;

Defendants.

Case No. 2:19-cv-09969-CBM-MRW

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT [DKT 45]**

Date: April 14, 2020
Time: 10:00 am
Dept.: Courtroom 8B
Judge: Hon. Consuelo B. Marshall

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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. The freedoms of religion, speech and association are fundamental and sacrosanct. We have also come to a place where we recognize that gay 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.

A challenge for our constitutional democracy is how to maintain our commitment to religious liberty while preserving civil rights. This challenge is often presented as a battle between religion and gay rights. However, this perception oversimplifies the reality. The reality is that most gay people are religious, with an abundant diversity of religious practice and belief. Indeed, every religion has gay people within its midst, as sexuality does not discriminate among religions. And many religions affirm the rights of gay people.

But what does the law require when there is an apparent clash between values, institutions and people? If Joanna and Nathan had been expelled from their churches because of their same-sex marriages, the values of equality and dignity would give way to the values of religious and associational freedom. The law recognizes that at a church must be free to select its ministers and to select, and expel, its members. On the other hand, if Joanna and Nathan had been denied marriage licenses by a county clerk who objected on religious grounds, the value of religious freedom would give way to the values of equality and dignity. The law recognizes that a government actor may not deny a gay person the right to marry the person they love.

Here, however, the Court is not presented with the situation of a purely private actor, like a church, or a purely public actor, like a county clerk's office, as Fuller is an educational institution that is subsidized by the federal government. Consequently,



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we are in the realm of the rules that apply when the government places restrictions on benefits that it makes available to private actors, like Fuller, who carry out public purposes, like education. 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 non-discrimination 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."

## II. FACTUAL BACKGROUND

### A. The Plaintiffs' First Amended Complaint[1]

#### 1. Joanna and Nathan

Joanna is a wife and mother who financed her education through federal funding from the U.S. Department of Education. FAC ¶ 2. Joanna's peers and professors respected her as a Christian woman who was married to another woman. FAC ¶¶ 6, 28. She studied at Fuller for three years and was expelled for her same-sex marriage shortly before completing her degree. FAC ¶¶ 29, 175.

Nathan is a husband and minister licensed by his denomination who financed his education through federal funding from the U.S. Department of Education. FAC ¶¶ 3, 8. Faculty and others within the Fuller community affirmed him as a Christian man who was married to another man. FAC ¶ 8. Nathan enrolled at Fuller and attended some classes but was expelled by Fuller just as he was beginning his studies. FAC ¶¶ 93, 100, 110.

#### 2. Fuller Theological Seminary

Fuller is a religious educational institution. FAC ¶ 4. Fuller also sets

[1] Plaintiffs reject Fuller's reliance on Exhs. 2-10 in support of its Motion. Fuller's Motion relies heavily on evidence and facts outside the Complaint. Such reliance is inappropriate on a Motion to Dismiss because the Court and parties are limited to analyzing the allegations contained in the pleadings.



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community standards for its students and prohibits "homosexual forms of explicit sexual conduct." FAC ¶ 191.

Fuller admits students from a variety of faith traditions. FAC ¶ 46. Students attending Fuller come from more than one hundred denominations. FAC ¶ 47. Fuller admits students from faith traditions and churches that affirm same-sex marriages. FAC ¶ 48. Fuller hires faculty and administrators from faith traditions and churches that affirm same-sex marriages. FAC ¶ 49. Fuller admits students from faith traditions that ordain lesbian, gay and bisexual ministers who are in same-sex marriages. FAC ¶ 50. Fuller hires faculty and administrators from faith traditions that ordain lesbian, gay and bisexual ministers who are in same-sex marriages. FAC ¶ 51. Fuller does not prohibit students or faculty from attending or officiating same-sex weddings. FAC ¶¶ 52, 53.

Fuller admits students who, like Joanna and Nathan, are sexual or gender minorities. FAC ¶ 57. Fuller does not prohibit same-sex dating relationships among its students. FAC ¶ 58. Fuller's written policies do not prohibit its students from entering into same-sex marriages. FAC ¶ 59.

Fuller is an independent institution. FAC ¶ 60. Fuller is not affiliated with a denomination or church. FAC ¶ 61. Fuller's board of trustees is not appointed by a denomination, church or external organization. FAC ¶ 63. The members of Fuller's board of trustees are not required to belong to a particular denomination or church. Students are not required to adhere to a statement of faith. FAC ¶ 64. While Fuller is a religious educational institution, it is not a church. FAC ¶ 65. As an accredited and federally-funded 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 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. FAC ¶ 69.

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### 3. Fuller's non-discrimination policies

Fuller's Non-Discrimination Policy 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." FAC ¶ 190.

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." FAC ¶ 191. Fuller also maintains a Title IX Policy that incorporates the standards of Title IX. FAC ¶ 192.

## III. LEGAL ARGUMENT

### A. Standard for Motion to Dismiss

When deciding a motion to dismiss, a court must accept "all factual allegations in the complaint as true and construe them in the light most favorable to the Plaintiff." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F. 3d 1005, 1014 (9th Cir. 2012); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1058 (9th Cir. 2012). Moreover, a court must "draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Fed. R. Civ. P. 12(b)(6) motions are "viewed with disfavor" and "rarely granted." *Hall v. Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). Here, numerous fact issues remain to be resolved through discovery and the reasonable inferences that must be drawn in Plaintiffs' favor militate against granting Fuller's Motion.



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## B. Plaintiffs State a Title IX Claim

### 1. Title IX Prohibits Sex Discrimination Based on Sex Stereotypes and Sexual Orientation

Title IX's prohibition of discrimination based on sex encompasses both sex (in the biological sense) and gender (in the social roles and constructs senses). *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (discrimination based on sex stereotyping is sex discrimination); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Thus, under *Price Waterhouse*, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

The Supreme Court has also recognized that same-sex sexual harassment is actionable as sex discrimination. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998) (male being harassed physically and verbally by other males with derogatory language that was homosexual in nature); *see also Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (male employee discriminated against for walking "like a woman" and not having sexual intercourse with female waitress stated sexual harassment).

Moreover, this district court has recognized that, under Title IX, discrimination based on sex includes sexual orientation discrimination. *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015) (claims of sexual orientation discrimination are gender stereotype or sex discrimination claims covered by Title IX). This court reasoned that "It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender." *Id.* at 1160. *See also Harrington by Harrington v. City of Attleboro*, No. 15-cv-12769-DJC, 2018 WL 475000 (D. Mass. Jan 17, 2018) ("[t]he gender stereotype at work here is that 'real' men should date women, and not other men") (*citing Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)); *Riccio v. New*



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*Haven Bd. Of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (same-sex sexual harassment actionable under Title IX); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) (anti-gay harassment actionable under Title IX); *Whitaker v. Kenosha Unified School Dist.*, 858 F.3d 1034 (7th Cir. 2017) (Title IX prohibits gender identity discrimination), *cert. denied*, 138 S. Ct. 1260 (2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (Title VII prohibits sexual orientation discrimination); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc) (same).

Consequently, Joanna and Nathan have stated claims for sex discrimination under Title IX due to Fuller's discrimination against them on the basis of sex stereotyping (*i.e.* real women only marry men) and sexual orientation (*i.e.* lesbians should not be allowed to marry women). FAC ¶¶ 201-216.

**2. Title IX applies to independent, religious institutions like Fuller**

Fuller does not qualify for a religious exemption to Title IX because Fuller, as an independent, non-denominational institution, is not controlled by a religious organization. FAC ¶¶ 60-64. Moreover, even if it were, Fuller has not requested or been granted a religious exemption pursuant to Title IX's implementing regulations. FAC ¶ 5.

**a. Fuller is not controlled by a religious organization**

Title IX regulates all educational institutions that receive federal funding. According to Title IX, "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.



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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. Fuller's board is not selected by a church, denomination or other religious organization. Rather, Fuller is an independent institution. Fuller is controlled by its own self-perpetuating board. 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 argues that "[b]ecause the Seminary is itself both an educational institution and a religious organization and is controlled by its religious board of trustees, the requirement of religious control is met." Motion, pp. 6-7. However, Fuller attempts to avoid the requirements of the statute by conflating Fuller's religious identity, which it has, with Fuller's control by a religious organization, which it lacks.

Fuller argues that the Department of Education "has for decades confirmed that an educational institution that is 'a school or department of divinity'….or that requires its faculty or employees to 'espouse a personal belief in' the religion 'by which it claims to be controlled,' meets the standard" for the control test. Motion, p. 7. Fuller exclusively relies on an administrative memorandum written during the



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Reagan administration, and its incorporated administrative instructions on how to fill out a form, for this proposition. *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 principals 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.*



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*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



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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. Fuller has not requested or received a religions exemption**

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. However, in its defense, Fuller points to the Department of Education's website, which currently states that "An institution's exempt status is not dependent upon its submission of a written statement to OCR." Motion, p. 8. Despite the



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Department's current policy, the exemption request procedure is not optional, as evidenced by the use of "**shall** do so" in the text of the regulation. 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, rather than the current statement on the Department's website.

**3. Determining the consistency between Fuller's religious tenets and application of Title IX requires a factual analysis**

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,* 828 F.2d at 561. 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.[2]

**C. Plaintiffs' Title IX claims do not violate the Religion Clauses**

In *Masterpiece Cakeshop v. Colorado Civil Rights Com'n*, Justice Kennedy, writing the majority opinion in which Justices Roberts, Alito and Gorsuch joined, reasoned that:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as

[2] Fuller failed to confer with Plaintiffs regarding their motion to dismiss the individuals from the Title IX claims. Plaintiffs agree to withdraw those claims as to the individual defendants.



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> inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression…Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

138 S.Ct. 1719, 1727 (2018). As demonstrated below, the Religion Clauses permit Congress to attach non-discrimination requirements, like those found in Title IX, to the provision of federal funds to private actors.

**1. The church autonomy doctrine is limited to churches.**

Fuller first argues that Plaintiffs' claims are barred by the church autonomy doctrine. Motion, p. 11. However, Fuller's argument fails for the simple reason that Fuller, while a religious educational institution, is not a church. The church autonomy doctrine prohibits secular courts from interfering in matters of church government, church doctrine and church discipline. *Id.* 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 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



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Church).

All of the Supreme Court and Circuit Court cases cited by Fuller concern churches. Indeed, despite the 150 year history of the church autonomy doctrine, a federal court has never applied the doctrine in the context of a case involving the admissions or disciplinary practices of a federally funded educational institution. Nevertheless, Fuller contends that "[C]ourts have repeatedly applied this constitutional principal in the context of religious school admissions and discipline." Motion, p. 12. However, Fuller's citation to a single district court case from Illinois and handful of state court opinions are inapposite and unpersuasive, as they involve employment claims, which implicate different issues, or concern private elementary or secondary schools that are not subject to Title IX. *See Garrick v. Moody Bible Institute*, 412 F. Supp. 3d (N.D. Ill. 2019) (employment claim by faculty member); *Flynn v. Estevez*, 221 So. 3d. 1241, 1251 (2017) (does not involve a federally funded college or a Title IX claim; involves elementary school owned by Catholic Church); *In re St. Thomas High Sch.*, 495 S.W.3d 500, 512 & n. 1 (Tex. App. 2016) (same); *Calvary Christian Sch. V. Huffstuttler*, 238 S.W.3d 58 (Ark. 2006) (same).

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 merely meddling in the private affairs of a church or seminary, the Court is analyzing whether the federal government may attach non-discrimination requirements to laws that provide federal funding to educational institutions.

**2. The ministerial exception is limited to employment actions involving ministers.**

Fuller also argues that the ministerial exception of the First Amendment prohibits Plaintiffs' Title IX claims. However, the ministerial exception is a doctrine limited to *employment* claims made by individuals considered to be ministers.



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*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (recognizing limited application of ministerial exception to context of 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. The ministerial exception has been applied 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, it 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. Motion, p. 14; *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 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 Joanna and Nathan are asserting here. Rather, *Alcazar* concerned a seminary student who was *employed* by the seminary and asserted *employment* claims. The case did not involve Title IX 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,



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Joanna and Nathan 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.

**D. Plaintiffs' Title IX claims are not barred by the freedom of association**

Fuller argues that Plaintiffs' claims are also barred by the freedom of association. Motion, p. 15. 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). Thus, the Boy Scouts, a private, expressive association, may exclude gay scoutmasters.

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 in violation of Title IX. However, Fuller is not a truly private actor, as it 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



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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



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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. *See Christian Legal Soc. Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010) (law school's policy requiring officially recognized religious student groups to comply with school's nondiscrimination policy regarding sexual orientation did not violate First Amendment right to expressive association).

Indeed, in *Grove City College v. Bell*, 465 U.S. 555 (1984), the Supreme Court addressed this very question in the context of Title IX. The Court stated that:

> 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. 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. at 682 (emphasis in original) (citing to *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 to *Grove City College v. Bell* and *Bob Jones University*, 461 U.S. at 682-83).

The Court went on to state that while the Constitution may require toleration of private discrimination in some circumstances it does not require state support for



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such discrimination because the government "is dangling the carrot of subsidy, not wielding the stick of prohibition." *Christian Legal Soc.*, 561 U.S. at 683 (*citing Norwood*, 413 U.S. at 463). In his concurrence, 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[.]" *Christian Legal Soc., 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.

**E. Plaintiffs Title IX claims are not barred by RFRA.**

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



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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. Here too, the government has a compelling interest in providing an equal opportunity to participate in federally funded educational programs and 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 because it provides a religious exemption for educational institutions controlled by a religious organization.

In support of its RFRA argument, Fuller also cites to *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). However, *Trinity Lutheran* did not address RFRA at all, nor did it involve an anti-discrimination statute. Rather, *Trinity Lutheran* held that a state may not deny a government benefit to an organization merely because the organization is a church. *Id*. at 2022 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."). In contrast, under Title IX, federal funds are not denied merely because an educational institution is religious. Rather, federal funds are denied to any educational institution,



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religious or secular, that discriminates on the basis of sex and that does not qualify for the limited exemptions provided by the statute. Consequently, neither RFRA nor *Trinity Lutheran* foreclose Plaintiffs' claims.

**F. Plaintiffs' state-law claims should not be dismissed[3]**

**1. Plaintiffs' Unruh Act claims should not be dismissed**

**a. Fuller is a business establishment for purposes of the Act**

Fuller is a business establishment under the Unruh Act. In *Doe v. California Lutheran High Sch. Ass'n*, 88 Cal. Rptr. 3d 475 (Ct. App. 2009), the Court determined that the Unruh Act did not encompass a small Lutheran high school that primarily served Lutheran congregations. The Court emphasized the "narrow scope" of its holding but determined that the high school was "an expressive social organization whose primary function is the inculcation of values in its youth members." *Id*. at 483, 485 (internal quotations omitted). In contrast, Fuller does not serve youth, nor does it primarily serve youth from a specific denomination. Rather, Fuller serves graduate students from all over the world and from over a hundred different denominations. Fuller has a large campus in California, satellite campuses, online degree programs, a large administration and sizeable budget. While religious in nature, Fuller operates much like a large business enterprise.

Moreover, a seminary qualifies as a business establishment when it sells its services to the public in exchange for tuition and is heavily funded by the federal government. *See Stevens v. Optimum Health Institute,* 810 F. Supp. 2d 1074 (S.D. Cal. 2011) (finding that a church's health spa program was a business establishment even though it claimed that the "Church's ultimate goal is to bring the participants to an understanding of their purpose in life and to get them to affirm or reaffirm the

[3] Plaintiffs' state-law claims should not be dismissed on First Amendment grounds for the same reasons that Plaintiffs' federal claims should not be dismissed on First Amendment grounds. However, if the court dismisses Plaintiffs' federal claims, Plaintiffs request that this Court retain supplemental jurisdiction over their state law claims.



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reality of God); *Pines v. Tomson*, 160 Cal. App. 3d 370, 383 (1984) (Christian Yellow Pages a business establishment notwithstanding the fact that CYP was incorporated as a nonprofit religious corporation and the owners' belief that their work was a ministry). In *California Lutheran*, the court noted that as long as a private organization's "funding comes from members, it should not matter whether it is called a tithe, dues, fees, tuition, or something else." *Doe v. California Lutheran High Sch. Ass'n.*, 88 Cal. Rptr. 3d at 484. Here, however, Fuller receives a large amount of revenue ($77 million in three fiscal years) from the federal government. For these reasons, Fuller is a business establishment under the Unruh Act. At the very least, this issue should be resolved later on summary judgment after examining the facts relevant to Fuller's nature and operations.

**b. The Unruh Act applies extraterritorially**

Fuller argues that the Unruh Act does not apply to Joanna because she is a Texas resident who did not physically attend classes in California. Motion, p. 20. Fuller relies on *Loving v. Princess Cruise Lines, Ltd.*, No. CV-08-2898-JFW, 2009 WL 7236419 (C.D. Cal. Mar. 5, 2009) and *Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083 (C.D. Cal. 2015) in support of this proposition. However, *Princess Cruise Lines* merely held that the Unruh Act does "not apply to claims of nonresidents of California injured by conduct occurring beyond California's borders." *Loving v. Princess Cruise Lines, Ltd*. 2009 WL 7236419 at *8. Here, while Joanna is a Texas resident, she was harmed by Fuller's conduct occurring within California's borders. Consequently, this Court may properly exercise its power over Fuller's conduct towards Joanna. Moreover, while the court in *Tinder* determined that it was irrelevant that the alleged discrimination was approved by defendants' employees in California, that case does not account for the circumstance in which a California business sells its online educational services to a customer in another state. Consequently, this Court may properly exercise its power over Fuller's online operations.

**2. Nathan's statutory claims are not time-barred.**



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Plaintiffs agree that the statute of limitations on Nathan's Title IX and state statutory claims is two years. Some of Nathan's allegations go beyond the two-year mark. FAC ¶¶ 76, 108. However, other allegations of sex discrimination are within the two-year mark. FAC ¶¶ 152-160. At the very least, the allegations of sex discrimination within the two-year mark are not time-barred.

Moreover, pursuant to the continuing violation doctrine, the Court may consider discriminatory acts beyond the two-year limitations period if they were part of pattern of discrimination. *See Cavalier v. Catholic University of America*, 306 F. Supp. 3d 9 (D.D.C. 2018) (applying continuing violation doctrine in Title IX case); *Doe v. Brown University*, 327 F. Supp. 3d 397, 408 (D.R.I. 2018) (same). Here, Fuller's acts in January and February of 2018 were a continuation of a pattern of discrimination that began the fall of 2017. FAC, ¶¶ 76-160.

**3. Plaintiffs' remaining state law claims should not be dismissed.**

Fuller also argues that Plaintiffs' IIED, breach of contract, fraud and EHEA claims must be dismissed. However, each of those claims involve numerous fact issues that require discovery. Moreover, at the motion to dismiss stage, this Court must make all reasonable inferences in favor of Plaintiffs as to these claims. Fuller's arguments regarding Plaintiffs' state law claims merit only brief additional attention.

Regarding the IIED claim, Joanna's allegations that (1) Fuller's Title IX officer, the one meant to protect students' rights under Title IX, misused Joanna's confidential tax return in order to establish a purported breach of Fuller's community standards, (2) that the purported breach was Joanna's constitutionally protected same-sex marriage, which she had disclosed to professors and peers, and (3) that Fuller then expelled Joanna after three years of studying and nearly completing her degree program, are sufficient for a reasonable person to conclude that Fuller engaged in outrageous conduct towards Joanna that was extreme and should not be tolerated. *Hughes v. Pair*, 209 P.3d 963, 976 (Cal. 2009). Nathan was exposed to similar conduct and his claim should be upheld as well.



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Regarding Plaintiffs' breach of contract claim, Plaintiffs have sufficiently alleged their performance and/or excuse for non-performance. They allege that the sole basis for their expulsion was their same-sex marriages. FAC, 1 ("This is a civil rights case about two students who were expelled from their graduate program for one reason: they married someone of the same sex."). To the extent that their same-sex marriages would violate their contracts with Fuller, such a contractual provision is not enforceable as it violates federal and state law. *Cook v. King Manor and Convalescent Hospital*, 40 Cal. App. 3d 782, 794 (1974) (contractual clause "void as against public policy"). Moreover, to the extent their same-sex marriage constitutes a breach of an enforceable contract provision, it is not a material breach sufficient to terminate their contract with Fuller. Contract termination is frowned upon as a remedy and will only be permitted where the breach is material. *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (2011) ("When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract.").

Entering into a civil same-sex marriage, or engaging in private off-campus homosexual conduct with one's spouse, even if forbidden by Plaintiffs' contract with Fuller, is not a material breach because Fuller would still benefit from Plaintiffs' substantial performance under the contract. *See* 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 813, 814, 852, pp. 906, 938–940. Indeed, Plaintiffs' purported breaches do not concern their academic integrity or performance, physical harm to anyone who is part of the Fuller community, or Plaintiffs' payment for Fuller's services. Moreover, unless Plaintiffs committed a material breach, Fuller would still be required to give Plaintiffs the procedural process and non-discrimination protections established by their contracts with Fuller, even if Fuller could have lawfully disciplined or expelled Plaintiffs because of their same-sex marriages. In any event, material breach, particularly under these circumstances and at this stage of the proceedings, is a question of fact left for a later time. *Brown*, 192 Cal. App. 4th at



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277 ("Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact.").

Plaintiffs' fraud claims should not be dismissed because Fuller represented that it would comply with Title IX and would not expel students for entering into same-sex marriages. Plaintiffs allege that Fuller made these representations intentionally for the purpose of inducing them to attend Fuller. *See e.g.* FAC ¶ 264 ("Fuller committed the misrepresentations described above with knowledge of their falsity as applied to students who legally marry a same-sex spouse), FAC ¶ 266 ("Fuller intended for Joanna and Nathan to rely on its representations to induce them to select Fuller for their studies and pay tuition to Fuller"). Plaintiffs bring the fraud claim only against Fuller, so there is no confusion as to whether certain allegations relate to one or more defendants. Moreover, the fraud allegations mainly concern Fuller's policies made available on its website. The standard of Rule 9(b) is not so high as to require Plaintiffs to know which particular administrator at Fuller placed the policies on Fuller's website. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (Rule 9(b) "may be relaxed as to matters within the opposing party's knowledge."); *Semegen v. Weidner*, 780 F. 2d 727, 735 (9th Cir.1985) ("pleading is sufficient under Rule 9(b) if it identifies 'the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.'").

As to the EHEA claims, the statute applies to Fuller because Fuller receives, *or benefits from*, state financial assistance as that term is defined by the statute. Pursuant to California Education Code, Section 213.

> (a) 'State financial assistance' means any funds or other form of financial aid appropriated or authorized pursuant to state law, or pursuant to federal law administered by any state agency, for the purpose of providing assistance to any educational institution for its own benefit or for the benefit of any pupils admitted to the educational institution.
> (b) State financial assistance shall include, but not be limited to, all of the following:
> (1) Grants of state property, or any interest therein.
> (2) Provision of the services of state personnel.
> (3) Funds provided by contract, tax rebate,



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appropriation, allocation, or formula.

Pursuant to California Education Code, Section 66270, the statue applies to "any postsecondary educational institution that receives, *or benefits from*, state financial assistance or enrolls students who receive state student financial aid." (emphasis added). Plaintiffs allege two specific forms of state financial assistance. One of these, the reimbursement provided to Fuller students under California's Student Tuition Recovery Fund, clearly benefits Fuller, as it relieves Fuller of a financial obligation, even if Fuller is not the recipient of the funds. Beyond the two specific examples, Plaintiffs also allege generally that "Fuller receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." FAC, ¶ 275. In its Motion, Fuller argues that "it does not receive state financial assistance or enroll students who receive state student financial aid." Motion, pp. 23-24. However, Fuller may not merely assert this in a motion to dismiss and will have to prove this through discovery. As for the notification allegations, California Education Code Sections 66290.1 and 66290.2 clearly require Fuller to provide the state with notification of its claimed exemption. Fuller's Motion admits that it has failed to do so but claims that a notification requirement would violate the First Amendment's speech and religious freedom protections. However, the statute does not compel Fuller to speak a particular message.

## IV. CONCLUSION

For the reasons set forth above, Plaintiffs Joanna Maxon and Nathan Brittsan respectfully request that Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint be denied.

Respectfully submitted,

DATED March 24, 2020

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