No. 20-56156

United States Court of Appeals for the Ninth Circuit

JOANNA MAXON *et al.*,

Plaintiffs/Appellants,

v.

FULLER THEOLOGICAL SEMINARY,
et al.,

Defendants/Appellees.

Appeal from the U.S. District Court for the Central District of California | No. 2:19-cv-09969 (Hon. Consuelo B. Marshall)

BRIEF OF PROFESSORS ELIZABETH A. CLARK, ROBERT F. COCHRAN, TERESA S. COLLETT, CARL H. ESBECK, DAVID F. FORTE, RICHARD W. GARNETT, DOUGLAS LAYCOCK, MICHAEL P. MORELAND, AND ROBERT J. PUSHAW AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

C. Boyden Gray
Jonathan Berry
Michael Buschbacher*
T. Elliot Gaiser
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006
202-955-0620
michael@boydengrayassociates.com

* *Counsel of Record (application for admission pending)*

CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* hereby certifies that *amici* are not corporations, and that no disclosure statement is therefore required. *See* Fed. R. App. P. 29(a)(4)(A).

Dated: June 21, 2021 *s/ Michael Buschbacher*

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors Elizabeth A. Clark, of the J. Reuben Clark School of Law at Brigham Young University; Robert F. Cochran of the University of Virginia and of the Pepperdine Caruso School of Law; Teresa S. Collett, of the University of Saint Thomas School of Law (Minnesota); Carl H. Esbeck, of the University of Missouri School of Law; David F. Forte, of the Cleveland-Marshall College of Law; Richard W. Garnett, of the Notre Dame Law School; Douglas Laycock, of the University of Virginia School of Law; Michael P. Moreland, of the Charles Widger School of Law at Villanova University; and Robert J. Pushaw of the Pepperdine Caruso School of Law. *Amici* are legal scholars whose research focuses on religious liberty. They represent parties and *amici* in cases regarding the Religion Clauses, and their

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[1] Counsel for *amici curiae* states pursuant to Fed. R. App. P. 29(a)(4)(E) that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person, other than *amici curiae* or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief pursuant to Fed. R. App. 29(a)(2).

amicus submissions have been cited by courts, including in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Decisions about who will, and who will not, be trained to become a religious minister or teacher are—quite literally—sacred. Seminary study involves not only learning doctrine, but also believing and acting on those teachings so that the student will then be able to form others in the same tradition both by teaching and by example. In a modern, pluralistic society, this often means that students at religious institutions will be required to think and act quite differently than their neighbors, sometimes in regard to dress, sometimes in regard to food or drink, and sometimes in regard to sexual morality. That is as it should be. Religious liberty means the liberty to be different. This is good for religion and good for government. Questions of religious doctrine and leadership are outside the competence of secular authorities to review, comment on, or otherwise interfere with, and they are hence protected by both the First Amendment and various statutory protections.

Plaintiffs ask this Court to abandon these fundamental limitations by allowing these two former seminary students to proceed

with a Title IX suit alleging that they were unlawfully expelled from their ministerial degree programs in the School of Theology at Fuller Theological Seminary because they entered into civil marriages with members of the same sex. This Court should decline that invitation.

As Fuller has ably argued, its standards of conduct relating to marriage and sex are rooted in its sincerely held religious beliefs and are therefore fully protected by the religious exemption in Title IX, which provides that its requirements "shall not" apply "to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). That is where this case should begin and end, as there can be no question that Fuller is "an educational institution" and that the Board of Trustees that everyone admits "control[s]" the seminary is a "religious organization."

We submit this *amicus* brief to explain why this is the *only* constitutionally permissible reading of that statute and to highlight the importance—indeed, the necessity—of robust religious toleration to the

functioning of a healthy, pluralistic society, and to the pursuit of religious truth. Our argument proceeds in three parts.

First, we provide a brief account of the evolution of the "church autonomy doctrine"—the notion that that secular authority must respect and accommodate not only individual religious conscience, but also the corporate expressions of religious beliefs. As we explain, this is by no means a self-evident truth. Nothing was more natural, and more common historically, than the union of throne and altar. And while the idea of "the freedom of the church" goes back at least to the 11th century, it was not until the American founding that church autonomy became a widespread reality. This protection of religious independence from secular control or second-guessing is a treasure of our legal tradition and one of the most important aspects of First Amendment jurisprudence.

Second, we explain the current state of church autonomy doctrine under the First Amendment. As the Supreme Court has repeatedly affirmed, "First Amendment values are plainly jeopardized" when disputes "turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Mary Elizabeth*

Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("*Hull Church*"). Civil courts are thus barred from deciding whether a denomination has departed from its prior doctrine (*id.* at 442–44), who may hold leadership posts in a church or religious organization (*Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976)), and whether other individuals "holding certain important positions with churches and other religious institutions" may sue their employers (*Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)). The reasoning of these cases applies with full force with respect to the selection, training, and advancement of seminary students, who are, after all, ministers in training. *See Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc).

Third, we explain that Title IX's religious exemption should be understood against this backdrop as honoring the First Amendment's explicit prohibition on "Congress" making laws that establish religion or prohibit free exercise and against that Amendment's ban on discrimination between denominations.

ARGUMENT

I. The Principle of Church Autonomy Is Deeply Rooted in the Anglo-American Legal Tradition.

The religious autonomy doctrine—also known as "the freedom of the church," the religious abstention doctrine, or ecclesiastical abstention—is "best understood as marking a boundary between two separate polities, the secular and the religious, and acknowledging the prerogatives of each in its own sphere." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). That boundary benefits both the secular state and religious people and institutions—it ensures the freedom of people of faith to organize voluntarily and order their internal affairs, and it protects government from entanglement in those affairs. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952).

But as important as this boundary is to the American legal tradition, the separation of secular and sacred authority is of comparatively recent vintage, at least when viewed against the whole of human history. Nothing was more common historically than the union—or at least the close and interdependent allegiance—of secular and sacred authority. This had some advantages, especially for those

who wielded secular authority while claiming divine imprimatur. But it was also destructive, leading secular powers to coopt religion to serve secular ends and trampling on the consciences of those whose convictions differed. These problems were by no means unknown to the Ancients—perhaps the most poignant and compelling piece of classical literature is Plato's account of Socrates' trial for offending the gods of Athens.

Progress was slow in coming, however. A major turning point occurred in the fourth century, when the Roman Empire abandoned its quest to eradicate Christianity, and—in the Edict of Milan (321 A.D.)—officially adopted a posture of tolerance that recognized ecclesiastical independence for all. Lactantius, *De Mortibus Persecutorum* in 7 *The Ante-Nicene Fathers* 320 (A. Cleveland Coxe, ed. 1886). This freedom referred "not simply [to] individuals but [also to] the freedom of Church, the body (*corpus*) of Christians." Robert Louis Wilken, *Liberty in the Things of God: The Christian Origins of Religious Freedom* 23 (2019).

But this liberty was only selectively afforded. And the Empire soon entangled itself in the manifold questions of Christian doctrine and the selection of church leadership—often persecuting those who

disagreed. While church leaders did from time to time confront imperial attempts to control their decisions, it was not until the Investiture Crisis of the 11th century that something like the "freedom of the church" began to emerge in a concrete way. *See, e.g.*, Thomas C. Berg et. al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U.L. Rev. Colloquy 175, 179 (2011).

That dispute began in 1072 because of a disagreement between the Pope and the Holy Roman Emperor about who would get to select bishops. The Catholic Church asserted its freedom to elect its ministers without imperial sanction, a proposition that the Emperor emphatically rejected. The disagreement led to nearly 50 years of civil war in Germany and saw Pope Gregory VII excommunicate Emperor Henry IV on two separate occasions. The eventual resolution in 1122, however, was decisive: Pope Callixtus II and Emperor Henry V agreed on the Concordat of Worms, in which "the emperor guaranteed that bishops and abbots would be freely elected by the church alone," though the emperor retained the right to invest them with their rights of temporal property. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 98 (1983). This was in some ways more of a

formal victory for the Church than an actual triumph—monarchs still were able to exercise *de facto* control of the election process. Nevertheless, it marked a watershed in church–state relations. The Church had taken on the most powerful monarchy in the western world and won, setting the stage for future developments.

A similar vision of church autonomy was guaranteed at Runnymede in 1215, when English barons demanded, and the king accepted, that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182 (2012) (quoting J. Holt, Magna Carta App. IV, p. 317, cl. 1 (1965)). As the Supreme Court recognized, "[t]he King in particular accepted the 'freedom of elections,' a right 'thought to be of the greatest necessity and importance to the English church.'" *Id.*

But like the Concordat at Worms, the autonomy guaranteed by Magna Carta was ephemeral, and the English church soon faced renewed interference from the Crown in religious decision-making. Things came to a head during the reign of King Henry VIII after his ministers failed to secure a papal annulment of his marriage to Queen

Catherine of Aragon so that the King could marry Anne Boleyn (and thus, at last, beget a male heir).[2]

The disagreement was—like this case—about what the Bible teaches about sexual morality. Henry (apparently quite sincerely) believed that he had been cursed by God because Queen Catherine was the widow of his late elder brother, in violation of Leviticus 20:21 ("And if a man shall take his brother's wife, it is an unclean thing: he hath uncovered his brother's nakedness; they shall be childless."). Those who supported Catherine disagreed, pointing to Deuteronomy 25:5, which required the brother of a deceased man to marry his brother's widow if the brother had died without an heir.

Faced with a politically fraught, no-win decision, Rome delayed and delayed giving an answer. An enraged Henry eventually took matters into his own hands, and with the aid of Parliament and his ecclesial allies, was declared supreme head of the English church in

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[2] The already advanced state of entanglement of secular and sacred authority was personified in Cardinal Wolsey (1473–1530), who served simultaneously as papal legate (the chief cleric in England) and as Lord Chancellor (the 15th-century equivalent of Prime Minister). It was Wolsey's failure to secure an annulment that eventually led to the English Church's break from Rome.

1535, with full authority to appoint church officials. *See* The Act of Supremacy of 1534, 26 Hen. 8, ch. 1; The Act in Absolute Restraint of Annates, 25 Hen. 8, ch. 20.

Subsequent English monarchs continued to wield this increased authority, often stifling both religious exercise and church autonomy in service of their own secular power. For example, James I proclaimed it "the chiefest of all kingly duties . . . to settle the affairs of religion." Documents Illustrative of English Church History 513 (Henry Gee & William John Hardy eds., 1896). Charles I went further by requiring all clergy to swear an oath of allegiance, "bind[ing] themselves never to consent 'to alter the government of th[e] church by archbishops, bishops, deans and archdeacons, etcetera, as it stands now established.'" Felix Makower, *The Constitutional History and Constitution of the Church of England* 76 (1895). Charles I's heavy-handed antipathy toward reformed Protestantism was one of the major causes of the English Civil War and his own trial and execution. Though Charles I lost his head for this, his son and heir, Charles II, nevertheless took the same tack following the restoration of the monarchy in 1660, ordering all ministers to pledge their allegiance or

face being labeled seditious and removed from their positions. *See* Act of Uniformity, 1662, 14 Car. 2, ch. 4. Similarly, "all schoolmasters, private tutors, and university professors were required to 'conforme to the Liturgy of the Church of England' and not 'to endeavour any change or alteration' of the church." *Our Lady,* 140 S. Ct. 2049, 2061 (2020) (quoting Act of Uniformity, 1662, 14 Car. 2, ch. 4.). The practical effects were profound. Following the restoration, England imprisoned, exiled, or otherwise suppressed thousands of Catholics and protestant non-conformists, including Baptist minister John Bunyan, who wrote *Pilgrim's Progress* while in prison for preaching without a license.

It was in response to these coercive policies that John Locke famously argued in favor of religious tolerance. John Locke, *A Letter Concerning Toleration* 3 (1690) (Bennett ed. 2010). As he explained, it was "utterly necessary" to "draw a precise boundary-line between (1) the affairs of civil government and (2) the affairs of religion." *Id.* Failure to recognize this distinction, he warned, would result in endless "controversies arising between those who have ... a concern for men's souls and those who have . . . a care for the commonwealth." *Id.* Because government is "constituted only for the purpose of preserving and

promoting" life, liberty, and property, while the church "care[s] for the salvation of men's souls," *id.*, they need different laws. And since members of a church "joined it freely without coercion . . . it follows that the right of making its laws must belong to the [church] itself." *Id.* at 5.

Locke's argument made a lasting impact. Following the Glorious Revolution of 1688, England moderated its approach somewhat by passing the Act of Toleration, 1 Will. & Mary ch. 18, which granted non-conforming Protestants limited freedom of worship so long as they swore allegiance to the Crown. This was only a half-way reform, however. Protestant non-conformists were still prohibited from holding public office, and the Act completely excluded Catholics and non-trinitarians from its protections. Thus, many who disagreed with the state on matters of religion continued to face state interference with church government as well as other forms of persecution and suppression. *See, e.g.*, 4 W. Blackstone, Commentaries on the Laws of England 55 (8th ed. 1778).

Beginning with the departure of the Pilgrims for New England in 1620, many religious British dissenters chose to leave for the new world rather than contend with the power of the King. In the ensuing decades,

thousands of other "Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." *Hosanna-Tabor*, 565 U.S. at 182. Thereafter, "William Penn, the Quaker proprietor of what would eventually become Pennsylvania and Delaware, also sought independence from the Church of England," and "[t]he charter creating the province of Pennsylvania [in 1681] contained no clause establishing a religion." *Id.* at 183.

Yet even in colonial America the government continued to exercise, in varying degree, some "control over doctrine, governance, and personnel of the church." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). And before the War for Independence, many American colonists were subject to laws giving government authorities "the power to appoint prelates and clergy," resulting—predictably—in "continual conflicts between clergymen, royal governors, local gentry, towns, and congregants over the qualifications and discipline of ministers." *Id.* at 2132, 2137. In light of these problems, "the founding generation sought to prevent a repetition of these practices in our country," and following Virginia's example a

few years earlier, set a firm boundary in the form of the First Amendment's categorical prohibition on laws "respecting an establishment of religion or abridging the free exercise thereof." *Our Lady*, 140 S. Ct. at 2061.

As James Madison explained, in his typically striking style, the idea that a "Civil Magistrate is a competent Judge of Religious truth" is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world." James Madison, *Memorial and Remonstrance Against Religious Assessments, in* 8 *The Papers of James Madison* 295, 301 (Robert A. Rutland et al eds., 1973). This was not mere rhetoric either. When the first Roman Catholic Bishop in the United States, John Carroll, asked then-Secretary of State Madison for advice on who should be appointed to head the Catholic Church in New Orleans, Madison refused, responding that he should not be involved in the decision, as the "selection of [religious] functionaries . . . is entirely ecclesiastical." Letter from James Madison to John Carroll (Nov. 20, 1806), The Records of the Am. Catholic Historical Soc. of Phila., 20:63, 63–64 (1909); *see also* Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J. L. & Pub. Pol'y 821, 830 (2012). This was not because

Madison had no opinion on the subject, but because he did not believe that his opinions should be shared in his official capacity as U.S. Secretary of State. In fact, he later wrote a letter offering his personal opinion as a private citizen on the subject. *See* Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories*, in *Disestablishment and Religious Dissent: Church-State Relations in the New American States*, 1776–1833, at 273, 283–85 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019).

Madison was consistent in his views on the freedom of the church as president. In 1811, Congress passed a bill incorporating the Protestant Episcopal Church in Alexandria. *Hosanna-Tabor*, 565 U.S. at 184–85. Incorporation was a sparingly granted privilege at the time, and it was afforded only for some public purpose. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–49 (1933) (Brandeis, J., dissenting). President Madison vetoed the bill "on the ground that it 'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates . . . the article of the Constitution of the United States, which declares, that "Congress shall make no law respecting a religious establishment."'"

Hosanna-Tabor, 565 U.S. at 184–85 (quoting 22 Annals of Cong. 982–983 (1811)).

Madison detailed his reasoning for the veto:

> The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises.

Id. at 185 (emphasis omitted) (quoting 22 Annals of Cong. 983 (1811)).

Thomas Jefferson shared Madison's religious autonomy principles. For example, when he was informed in 1804 that local authorities had barred entry into a Catholic parish in the Orleans Territory "in response to a conflict between two priests concerning who was the rightful leader of the congregation," he complained that

> it was an error in our officer to shut the doors of the church . . . . The priests must settle their differences in their own way, provided they commit no breach of the peace. . . . On our principles all church-discipline is voluntary; and never to be enforced by the public authority.

Kevin Pybas, *supra*, at 273, 281–82.

Jefferson penned another letter a few days later in response to a letter from the Ursuline Nuns of New Orleans, who ran an orphanage

and Catholic school in that city. Jefferson assured the nuns that the Louisiana Purchase would not undermine their "broad right of self-governance and religious liberty," despite Catholic France ceding control over the territory to the non-Catholic United States. Pybas, *supra,* at 281; *see also* 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950). Jefferson explained that "[t]he principles of the constitution . . . are a sure guaranty to you that [your property and rights] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority." Pybas, *supra,* at 281. Like Madison, "Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations," which included their freedom to "select [their] own leaders." Berg, *supra,* at 182–83.

"Given this understanding of the Religion Clauses . . . it was some time before questions about government interference with a church's ability to select its own ministers came before the courts." *Hosanna-Tabor*, 565 U.S. at 185. As explained below, however, the case law that

eventually emerged has uniformly followed the early First Amendment interpretations of the founders.

II. The First Amendment Prohibits Government Intrusion into the Training of Seminary Students.

American history reflects "the rich diversity of religious education in this country." *Our Lady*, 140 S. Ct. at 2066. And, from the founding onward, this diversity has been a powerful demonstration of our freedom "to organize voluntary religious associations to assist in the expression and dissemination of . . . religious doctrine." *Watson v. Jones*, 80 U.S. 679, 728–29 (1871). Though *Watson* was not formally based on the Religion Clauses (it was pre-incorporation), that seminal religious autonomy decision upheld the dual pillars of religious liberty—no establishment of religion and the guarantee of free exercise. As the Supreme Court later recognized, *Watson* had "a clear constitutional ring." *Milivojevich*, 426 U.S. 696, 710 (1976) (quoting *Hull Church*, 393 U.S. at 446). Thus, in the words of Justice Brennan, "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to[] 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" *Corp. of Presiding Bishop of Church of Jesus Christ of*

Latter-Day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1372, 1389 (1981)).

The First Amendment's Free Exercise Clause requires that religious organizations have the "power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. And when courts interfere in matters of church governance and doctrine, they also run afoul of "the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188–89. "[T]here is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Milivojevich*, 426 U.S. at 709.

Religious education is inextricable from the leadership and doctrines of religious organizations. As the Supreme Court explained just last year: "[t]he religious education and formation of students is the very reason for the existence of most private religious schools." *Our*

Lady, 140 S. Ct. at 2055. Thus, "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.*

In upholding the immunity of Catholic schools from suit over decisions to hire and fire teachers who instruct students in matters of faith and morals, the Supreme Court articulated the unbroken thread connecting religious education and the free exercise of religion:

> The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what we have termed matters of church government. This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

Id. at 2060 (quotation marks and citation omitted). While "[t]eaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students," both enjoy the protection of the First Amendment's religious autonomy doctrine because "[r]eligious education is vital to many faiths practiced in the United States." *Id.* at 2064.

Thus, just as the First Amendment requires autonomy for religious schools' hiring decisions for those who will provide instruction in the faith, it also protects the code of conduct established by a seminary that will train students who may eventually teach the faith. As this Court has held in the employment context, "the First Amendment considerations relevant to an ordained minister apply equally to a person who, though not yet ordained, has entered into a church-recognized seminary program." *Alcazar*, 627 F.3d at 1292. That is because, for many religious traditions, a "[s]eminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith." *Equal Emp. Opportunity Comm'n v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981).

Here, Fuller is "not intended to foster social or secular programs that may entertain the faithful or evangelize the unbelieving." *Id.* Rather, like other seminaries, its "purpose is to indoctrinate those who already believe, who have received a divine call," including those "who have expressed an intent to enter . . . ministry." *Id.* Thus, seminaries

have been held by courts to be "entitled to the status of 'church'" for First Amendment purposes. *Id.*

Such a conclusion is consistent with the Supreme Court's long line of cases in the religious autonomy doctrine. In *Kedroff*, the Court invalidated a New York law that attempted to give an archbishop elected by a convention of American churches "affiliated with the Russian Orthodox Church" control of St. Nicholas cathedral, over and against the claim of another archbishop appointed by the Patriarch of the Russian Orthodox Church in the Soviet Union. 344 U.S. at 95–97. That case was thus actually about who was the true archbishop. The Court held the state law ran afoul of the First Amendment because it "displace[d] one church administrator with another" and "pass[ed] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119. "Freedom to select the clergy," the Court explained, "must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116. Indeed, "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities," because

"[w]ithout that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith." *Our Lady*, 140 S. Ct. at 2060.

The independence of a religious congregation to remove clergy and ministers must necessarily include the independence for seminaries to dismiss seminary students who violate the seminary's religious standards of conduct. Seminary students are often, if not predominantly, ministers in training. If a seminary did not have First Amendment autonomy to dismiss students—if a court could involve itself in matters of seminarian conduct and instruction and force seminaries to continue educating students who contradict their seminaries' religious tenets—courts would risk severely chilling the free exercise of religion. *See Hull Church*, 393 U.S. at 449 ("If civil courts undertake to resolve such controversies . . . , the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concerns.").

* * *

The import of these principles to this case is straightforward: even if there were no religious exemption provision in Title IX, Fuller's decision to expel Plaintiffs for violating its community standards would be protected by the First Amendment. This Court is forbidden from adjudicating whether Fuller's decision is in fact a correct application of its religious beliefs about marriage and sex. Thus, regardless of whether the district court rightly parsed Title IX and the Education Department's interpretations of that statute, its judgment of dismissal should be affirmed. *See In re Leavitt*, 171 F.3d 1219, 1223 (9th Cir. 1999) ("The appellate court may affirm the lower court on any ground fairly supported by the record.").

III. Title IX's Religious Exemption Prohibits Petitioner's Claims.

In our view, this Court does not need to reach these constitutional questions. Title IX provides that its requirements "shall not" apply "to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). Fuller falls comfortably within this exception because (1) it is "an

educational institution" and (2) the Board of Trustees that "control[s]" it is a "religious organization."

But even if the Court were to find some ambiguity here, it should construe the statute in a manner that is consonant with the well-established constitutional principles discussed above. This point is ably explained at length in Fuller's brief, and we will not rehash it here. Simply put, Plaintiffs' atextual reading would not only bring Title IX into conflict with the First Amendment's prohibition on state interference with church autonomy, but would also impermissibly discriminate between different denominations. As Plaintiffs themselves acknowledge, their reading of the statute would subject non-denominational seminaries like Fuller to Title IX liability but would exempt "Catholic seminaries . . . owned by the Catholic Church and run by various dioceses." Opening Br. 14. This would constitute a separate violation of the First Amendment, the "clearest command of [which] is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

CONCLUSION

This Court should affirm the judgment below.

June 21, 2021

Respectfully submitted,

s/ Michael Buschbacher

C. Boyden Gray
Jonathan Berry
Michael Buschbacher
T. Elliot Gaiser
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006
202-955-0620
berry@boydengrayassociates.com

Counsel for Amici Curiae

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Dated: June 21, 2021 *s/ Michael Buschbacher*

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I am the attorney or self-represented party.

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[ ] complies with the length limit designated by court order dated _____.
[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *s/ Michael Buschbacher* **Date** June 21, 2021