No. 20-56156

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joanna Maxon and Nathan Brittsan,
Plaintiffs-Appellants,
v.
Fuller Theological Seminary, Marianne Meye Thompson, Mari L. Clements and Nicole Boymook,
Defendants-Appellees.

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

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, ASSOCIATION FOR BIBILICAL HIGHER EDUCATION, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, BELMONT ABBEY COLLEGE, BENEDICTINE COLLEGE, CARDINAL NEWMAN SOCIETY, FRANCISCAN UNIVERSITY OF STEUBENVILLE, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, JEWISH COALITION FOR RELIGIOUS LIBERTY, LUMEN CHRISTI CATHOLIC SCHOOL, THE LUTHERAN CHURCH—MISSOURI SYNOD, MARIAN HIGH SCHOOL, THE REGINA ACADEMIES, AND THOMAS MORE COLLEGE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* represent that they have no parent corporations, with the exception of Marian High School which is owned by the Diocese of Fort Wayne South Bend. *Amici curiae* also represent that no publicly held corporation owns 10 percent or more of stock in any *amici curiae*.

Dated: June 21, 2021

s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Counsel for Amici Curiae

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STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

Amici are religious educational institutions, associations of such institutions, and religious bodies. Some of the *amici* educational institutions, and some of the schools that belong to the *amici* associations, are nondenominational and independent of any separate religious body. In other instances, *amici* or their members voluntarily adhere to the beliefs and practices of particular religious denominations, but they too are owned and operated independent of any separate religious body. All *amici* are committed to the proposition that a religious educational institution remains fully entitled to religious freedom protections, including protections under Title IX, when it chooses an organizational form that is independent or nondenominational.

The specific interests of *amici* are set forth in the Addendum.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, two students who had been training for Christian ministry at Fuller Theological Seminary seek to use Title IX to bar the seminary from adhering

[1] Pursuant to FRAP 29(a)(4)(E), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person (other than the *amici curiae,* their members, or their counsel) contributed money that was intended to fund preparing or submitting the brief. Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this brief.

to its policy—grounded in its Christian mission and its understanding of biblical principles—that students should abstain from sexual intimacy outside of marriage between one man and one woman. Title IX protects religious educational institutions from such attempts to use government to coerce changes in their policies. It exempts from liability any "educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). Plaintiffs, however, claim that Fuller Seminary falls outside the protection of the exemption, despite the seminary's unquestioned religious character, because it is an independent and nondenominational institution.

Plaintiffs' bid to strip all independent and nondenominational religious schools of this important religious-freedom protection must be rejected. *Amici* agree with Defendants-Appellees (collectively the "Seminary") that imposing liability on the Seminary would violate the ministerial exception, the freedom of expressive association, and the Religious Freedom Restoration Act. Seminary Br. 34-36, 44-46, 48-58. We also agree that the Title IX exemption protects the Seminary. A school is "controlled by a religious organization" under the exemption when it is "controlled by" its own religiously oriented governing board or by a system of religious beliefs and practices—both of which are true here. The statute nowhere requires that the

controlling religious organization be a separate entity from the school. Seminary Br. 17-28; ER 17-19.

Amici focus here on another key reason to read the Title IX exemption to include independent and nondenominational schools: excluding such schools would create serious constitutional questions under the First Amendment. Many deeply religious schools, including some *amici* on this brief or members of *amici* associations, choose to be independent of any denomination or other separate organization for reasons grounded in their theological beliefs or mission. Other *amici* and members of *amici* associations are independently owned and operated schools, but because of the theological beliefs of certain denominations regarding the nature of "church" and religious education, these schools are recognized as fully denominational institutions as long as they remain committed to certain religious beliefs and practices. Excluding either set of schools from the exemption in Title IX would discriminate against the religious beliefs that justify or necessitate their independence and would thus be unconstitutional; at the very least, it would create serious constitutional problems. Under longstanding Supreme Court and Ninth Circuit precedent, when a statute can be read two ways, courts should avoid reading it to create serious or "grave" constitutional questions. *Jones v. United States*, 526 U.S. 227, 239 (1999). And here the inclusive reading—that a school "controlled by"

its religiously oriented governing body or its religious beliefs and practices may claim the exemption—is fully justified.

The first constitutional problem with the constricted reading of the exemption is that it would create an official preference for religious schools that are owned and operated by religious denominations over those that are independent or nondenominational. Such an "explicit and deliberate distinction[ ] between different religious organizations" triggers strict judicial scrutiny. *Larson v. Valente,* 456 U.S. 228, 246-47 n.23, 254 (1982). Although government has broad power to accommodate religious practices and to draw the boundaries of exemptions, it may not facially discriminate among religious organizations on a ground that bears no relation to whether they have a substantial religious character. In various contexts, this Court and others have refused to disqualify an organization from a statutory religious exemption simply because it lacks a formal relationship to a church, denomination, or other separate religious organization. Moreover, disqualifying independent and nondenominational institutions violates the Constitution's original meaning. Many of the founding-era dissenting sects that led challenges to religious establishments were organizationally independent of any denomination; thus, excluding independent and nondenominational schools from the exemption creates "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *Larson*, 456 U.S. at 255.

Plaintiffs' constricted reading of the exemption also brings on other constitutional problems, in this case and in others. The First Amendment's ministerial exception, which prohibits government interference in religious organizations' selection and oversight of leaders, should prohibit interference with a religious institution's faith-based standards for ministerial job training. A school's First Amendment freedom of expressive association will often be burdened when a law prevents it from upholding moral expectations—especially for those who are training for ministry positions—derived from the school's religious tenets. And because Title IX contains exemptions broadly permitting sex discrimination in many other educational contexts—for example, discrimination by single-sex social fraternities and sororities—a narrow interpretation of the religious exemption would make the statute neither neutral toward religion nor generally applicable and thus would trigger strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

This Court can and should avoid these constitutional issues, by holding that the Title IX exemption includes independent and nondenominational schools controlled by a governing board with a religious character or by a system of religious beliefs and practices. Fuller Seminary unquestionably meets that standard.

ARGUMENT

I. Under Title IX's Exemption, An Educational Institution Is "Controlled by a Religious Organization" If It Is Controlled By Its Own Religious Governing Board.

The district court correctly held that Title IX's exemption for educational institutions "controlled by a religious organization" applied to Fuller Seminary, because the Seminary is controlled by its board of trustees, which unquestionably has a religious character by its commitment to Christian beliefs and to ensuring that the institution upholds those beliefs.[2] As the court observed, "the ordinary meaning of the term 'organization' is sufficiently broad to include the board of directors" (ER 18), since the dictionary defines "organization" to include "any 'organized body, system, or society.'" *Id.* at 17 (*quoting* OXFORD ENGLISH DICTIONARY (2d ed. 1989)). Those terms easily encompass a school's governing board, and the statute nowhere says that the "control[ing]" religious organization must be institutionally separate from the school itself. See ER 18-19. *Amici* agree with the arguments of the Seminary on this point. See Seminary Br. 21-28.

If the phrase "controlled by a religious organization" has any ambiguity—if it could be read to require control by a separate institution—then that ambiguity should

[2] Fuller's mission is to "prepare men and women for the manifold ministries of Christ and his Church." ER 60. Plaintiffs, in particular, enrolled in Fuller's School of Theology to prepare for the ministry. Seminary Br. 53-54. *Amici* agree that "[t]he Seminary is at the core of Title IX's religious exemption." *Id.* at 17.

be resolved by holding that the governing board can be the controlling organization. *Amici* agree with Fuller and the district court, that any ambiguity should be resolved in favor of the U.S. Department of Education's longstanding interpretation allowing independent and nondenominational religious schools to qualify for the exemption. Seminary Br. 36-44; ER 19.

Amici file this brief to emphasize another compelling reason to read the exemption to include independent and nondenominational religious schools. Many deeply religious schools, including some *amici* on this brief or members of *amici* organizations, choose to be independent of any denomination or other separate organization for reasons grounded in their theological beliefs or mission. Other *amici* and members of *amici* associations are independently owned and operated schools, but because of the theological beliefs of certain denominations regarding the nature of "church" and religious education, these schools are recognized as fully denominational institutions as long as they remain committed to certain religious beliefs and practices. Excluding either set of schools from the exemption would discriminate against the religious beliefs that justify or necessitate their independence and would create a variety of constitutional infirmities, and at the very least, serious constitutional questions. This Court should avoid the problems by adopting the broader reading of the exemption—a reading that, as just noted, is fully justified.

II. Plaintiffs' Reading—Disqualifying All Independent and Non-denominational Religious Schools from the Exemption—Should Be Rejected Because It Would Create Serious Constitutional Problems.

The doctrine of "constitutional doubt" or "constitutional avoidance" provides that "'[a]statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (quotation omitted). When statutory language is ambiguous, and in "the absence of a clear expression of Congress' intent," courts should decline to construe the statute "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the [Constitution]." *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979). In fact, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," it is the court's duty "to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999) (quotation omitted).

As this Court has put it, "courts should interpret statutes in a manner that avoids deciding substantial constitutional questions." *See, e.g., Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1106 (9th Cir. 2001). Indeed, this Court calls the constitutional avoidance rule "'a paramount principle of judicial restraint.'" *Id.* (*quoting United States v. Restrepo,* 946 F.2d 654, 673 (9th Cir.1991)).

Plaintiffs' narrow interpretation of the Title IX exemption would exclude from protection all religious schools that make the choice to be independent or nondenominational—a choice that is familiar and often reflects a school's deep religious beliefs or its understanding of its mission. Therefore, plaintiffs' reading would raise a variety of "grave" constitutional questions. The Court should avoid these questions by reading the Title IX exemption to encompass schools that are controlled by their own religiously grounded governing board or by a system of religious beliefs and practices.

A. Choosing to Maintain a Religious School Independent of Any Denomination or Other Religious Organization is a Common Religious Practice, Frequently Adopted for Reasons of Theology or Religious Mission.

Many educational institutions with vigorous religious purposes and character choose to operate independent of any denomination or other separate religious organization. A landmark 1966 study on religiously grounded higher education stated that a significant number of colleges "cannot be classified technically as church-related but do have a definite religious orientation." Manning M. Pattillo and Donald M. Mackenzie, CHURCH-SPONSORED HIGHER EDUCATION IN THE UNITED STATES: REPORT OF THE DANFORTH COMMISSION 19 (1966). That pattern, which existed at the time Title IX and its religious exemption were enacted in 1972, still holds true today.

Religious educational institutions may choose an independent or nondenominational status as their "polity," which is defined as "the mode of governance of a religious organization": "the organizing principle by which individual believers form a religious body." Martin E. Marty and James A. Serritella, *Religious Polity*, in James A. Serritella *et al.*, RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 85, 85 (James A. Serritella *et al.* eds., 2006). A religious organization's polity often derives from its understanding of its theology or its religious mission. In such cases, the choice of organizational structure is "usually tied to the [religious organization's] beliefs as set forth in its doctrine and scripture." *Id.* at 86.

Religious organizations commonly must decide which organizational structure will best embody their religious beliefs and mission in a particular context. The First Amendment's guarantee of freedom of religion protects an organization's freedom to make these decisions. The Supreme Court has said that the Constitution "'radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 186 (2012) (*quoting Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

A religious entity's freedom to choose its organizational structure includes the freedom to choose to be independent of other religious bodies. The Supreme Court has long recognized two polar, if oversimplified, categories of religious polity. In a hierarchical polity, an individual congregation is "but a member of a much larger and more important religious organization, and is under its government and control." *Watson v. Jones*, 80 U.S. 679, 726-27 (1872); *see also Kedroff*, 344 U.S. at 110. But from *Watson* forward, the Court has recognized that other religious bodies choose a congregational polity, in which each local entity "is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." *Id.* at 722. For congregational religious organizations, independence is necessary to maintain congruence between their organizational form and their religious beliefs and their understanding of their mission.

The Supreme Court's cases speak of religious congregations. But other religious organizations make the same decision to be independent of other bodies, while maintaining strong religious beliefs and mission. Educational institutions commonly make this decision, as a few examples show:

- *Amicus* the Association for Biblical Higher Education (ABHE) has 135 member institutions in the United States, serving more than 60,000 students. All member institutions are committed to ABHE's purpose—

"develop[ing students'] critical thinking skills and leading them in the formation of a biblically grounded Christian worldview"—and its "biblical convictions." ABHE, *About ABHE*, https://www.abhe.org/about-abhe/. Many of ABHE's member institutions are independent of any denomination or other religious organization.

- The Council for Christian Colleges and Universities (CCCU), the nation's largest association of evangelical Protestant higher education institutions, has 141 governing members, associate members, or "collaborative partners" located in the United States. See CCCU, *List of CCCU Institutions*, https://www.cccu.org/members_and_affiliates/ (search functions available, including "location" and membership-category filters). Of those 141 institutions, about 28 percent (39 in total) list no affiliation with a denomination. Ten institutions are "interdenominational," 17 "nondenominational," 5 "multi-denominational," and 7 "no description given." See *id.* ("denomination" search filter).

At the elementary and secondary level, a large percentage of the US-located members of *amici* American Association of Christian Schools (AACS) and Association of Christian Schools International (ACSI) are independent or nondenominational. A few examples of member schools located in this Circuit show

the ways in which decisions to be independent or nondenominational are tied to theology and mission:

- Providence Academy is an independent, Christian elementary school that maintains an explicit "non-denominational stance." Providence Academy, *Mission and Beliefs*, https://www.providence-academy.com/about/mission-and-beliefs/. Providence states that its mission of providing "service to the body of Christ" is best accomplished independently and nondenominationally, because it allows the school to "remain united in the salvation and love of Christ, avoiding the dissension which may be caused by denominational distinctives." *Id.*
- Arizona Christian University is a "private, non-profit Christian liberal arts university" whose ministry is to "prepar[e] graduates to take the hope of Jesus Christ and the Gospel into all the world…" Arizona Christian University, *History*, https://www.arizonachristian.edu/about/history/. In 2007, Arizona Christian chose to become non-denominational, severing its formal Baptist affiliation, so that it could "serve the broader evangelical community." *Id.*
- Grace Christian School is an independent K-8 Christian school whose mission "is to inspire children to learn, inspire them to live, and inspire them to love God." Grace Christian School, *Mission Statement*,

https://www.gcsrr.org/. In 2010, "[u]nder a mutual understanding with SeaCoast Grace Church, Grace Christian School [became] an independent Christian School" which allows it to "actively work with all of the churches in South Orange County." *Id.* at *School History.*

Moreover, many schools have a connection with a denomination or its beliefs and practices but are independently owned and operated:

- For example, *amicus* Thomas More College of Liberal Arts is "a participant in the Catholic Church's educational mission" and voluntarily "binds itself to the magisterial teachings of the Church, communion with Her authentic hierarchy, and fidelity to Petrine authority" over what constitutes Catholic beliefs and practices. Thomas More College of Liberal Arts, *The Mission*, https://thomasmorecollege.edu/about/mission/. But the college is owned and operated by an independent board of trustees and not by the Catholic Church or any of its religious orders. Thomas More College of Liberal Arts, *Leadership*, https://thomasmorecollege.edu/about/leadership/.
- Many Catholic elementary and secondary schools are also independently owned and operated, outside the Church's parochial and diocesan school systems but with the recognition of the Catholic bishops. Such independent schools include the *amici* Regina Academies, which are four independent

> Catholic schools in the Philadelphia area that provide "a rigorous Catholic education firmly rooted in the Magisterium of the Catholic Church, and a curriculum designed to strengthen students in wisdom and virtue." They have "the blessing of the Archbishop of Philadelphia." The Regina Academies, *About Our Schools*, https://reginaacademies.org/our-schools/.

For a religious educational institution to choose to be independent or nondenominational is thus a common, familiar, and longstanding practice. But plaintiffs' interpretation of the Title IX exemption would categorically disqualify all such institutions from protection. As the next two sections show, that exclusion would create multiple constitutional problems.

B. Excluding Independent and Nondenominational Schools from Protection Would Create an Impermissible Preference Among Denominations—and At the Least, Would Raise a Serious Constitutional Question.

As already noted, the Department of Education has long interpreted the Title IX exemption to encompass independent and nondenominational schools, "controlled by" their governing boards. The Department has explained that "[this] view of the religious organization exemption … avoids unconstitutional discrimination against faith-based entities that would otherwise occur if OCR required that educational institutions fit one specific organizational structure before they can become eligible for a religious exemption."). Dept. of Education, *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities Final*

Rule, 85 Fed. Reg. 59916, 59946 (Sept. 23, 2020). The Department "is constitutionally obligated to broadly interpret 'controlled by a religious organization' to avoid religious discrimination among institutions of varying denominations." *Id.* at 59918 (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982)). That conclusion is correct as a matter of judicial precedent and original understanding.

1. Excluding independent and nondenominational religious schools is impermissible denominational preference under precedents of the Supreme Court, this Court, and other courts.

a. The Department is correct that *Larson* mandates the broader interpretation of the exemption. *Larson* involved a Minnesota charitable-solicitation statute "imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers," *Larson*, 456 U.S. at 230. The statute exempted religious organizations but "only those … that received more than half of their total contributions from members or affiliated organizations." *Id.* at 232. The Court held that this distinction among different religious organizations constituted an "official denominational preference" in violation of the First Amendment and therefore that the Unification Church, which did not meet the "fifty percent rule," could not be subject to regulation under the provision. *Id.* at 255.

"The clearest command of the Establishment Clause," the Court held in *Larson*, "is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. That principle not only follows from the Establishment Clause but is also "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Equality among religions is crucial, the Court said, because "[f]ree exercise [as a principle] can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* The Court found that the Minnesota statute "clearly grants denominational preferences" on its face because it "effects the *selective* legislative imposition of burdens and advantages upon particular denominations." *Id.* at 247, 254 (emphasis in original).

Accordingly, the Court analyzed the statute under strict scrutiny. *Id.* at 246. The Court assumed, for the sake of argument, that transparency in charitable solicitations was a compelling governmental interest. *Id.* at 248. But it held that the "fifty percent rule" violated the First Amendment because the explicit distinction it made among religious organizations was not closely fitted to the statute's purpose. *Id.* at 248-51.

Plaintiffs' interpretation of the Title IX exemption would create what the Court invalidated in *Larson*: their interpretation would set up "precisely the sort of official denominational preference that the Framers of the First Amendment

forbade." 456 U.S. at 255. Plaintiffs seek to reinterpret the exemption to create an official preference for those religious organizations that are controlled by a separate religious body rather than by their own religious governing board. This Court must reject that interpretation in order to avoid an organizational preference that is unconstitutional, and at the very least, raises "grave," "sensitive," and "substantial" constitutional questions. *Jones*, 526 U.S. at 239; *Catholic Bishop*, 440 U.S. at 507; *Kim Ho Ma*, 257 F.3d at 1106.

The government has broad power to "accommodate religious practices … without violating the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (internal quotation marks omitted); *accord Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987). That includes substantial power to draw the boundaries of statutory exemptions. But an exemption must be "neutral[ ] among different faiths" affected by the statute in question; it must not "single[ ] out [a] bona fide faith for disadvantageous treatment." *Cutter*, 544 U.S. at 720, 724. Thus, *Larson* held that there is a difference between "a facially neutral statute … which happen[s] to have a 'disparate impact'" and a statute that "makes explicit and deliberate distinctions between different religious organizations." *Larson*, 456 U.S. at 246-47 n.23. Strict scrutiny applies when a statute "focuses precisely and solely upon religious organizations" and draws an explicit distinction among them. *Id.* As other

circuits have held, if a statute "facially regulate[s] religious issues," it must treat various religious institutions "'without discrimination or preference.'" *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) (quotation omitted). For example, "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002); *accord Colorado Christian*, 534 F.3d 1245.

Under these principles, discrimination against institutions that are independent or nondenominational—that are controlled by their own governing bodies rather than by separate entities—is an impermissible denominational preference. Plaintiffs' interpretation would create "an explicit and deliberate distinction[ ] between different religious organizations" based on the organizational form they choose, even though independent religious schools often have just as substantial a religious character as those controlled by a separate entity. *Larson*, 456 U.S. at 246-47 n.23.

Larson makes clear that the prohibition on "denominational preferences" goes beyond preferences naming denominations (for example, a law that protected only Presbyterians, or Protestants, or Christians). If excluding religious organizations from an exemption when they solicit primarily from members is an impermissible preference, then so is excluding religious educational institutions when they are

nondenominational or are formally independent of a denomination or other religious organization. The exclusion here is just as arbitrary as that in *Larson*: just as unrelated to the organization's religious interest and religious character.

b. This Court has rejected conditioning religious exemptions on an organization's showing of affiliation with or control by a separate religious organization. In *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam), this Court held that a faith-based humanitarian organization was exempt from Title VII's prohibition against religious discrimination on the basis of the statute's exemption for a "religious corporation, association, … or society." 42 U.S.C. § 2000e-1(a). The two members of the panel majority did not agree on a precise definition of "religious association," but they did agree on rejecting one criterion: whether the organization was "owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue." *Id.* at 732-33 (O'Scannlain, J., joined by Kleinfeld, J.).

The panel majority found that considering affiliation or control by a separate entity "contains the potential for discrimination amongst religious institutions," "favor[ing] institutions which claim a denominational affiliation over those who do not." *Id.* at 732. Considering affiliation or control "could raise serious constitutional questions by discriminating in favor of houses of worship and against independent, 'parachurch' groups like World Vision, which are organized for religious purposes

and have religious tenets, but are not affiliated with any particular congregation or sect." *Id.* Thus, the Court gave control by a separate entity little or no weight in defining the exemption, *id.* at 733, and it held that World Vision was exempt.

c. Other courts have reached similar conclusions. For example, the Sixth Circuit has held that the availability of the First Amendment ministerial exception "does not turn on its being tied to a specific denominational faith; it applies to multidenominational and nondenominational religious organizations as well." *Conlon v. InterVarsity Christian Fellowship,* 777 F.3d 829, 834 (6th Cir. 2015). And in *Christian School Association v. Commonwealth*, 423 A.2d 1340 (Pa. Commw. Ct. 1980), the court extended a statutory exemption from state unemployment compensation laws to a religious school that was "independent of and unaffiliated with any specific church" and was controlled by a board of directors. *Id.* at 1343, 1346. By its text the exemption protected only organizations "operated, supervised, controlled, or principally supported" by a church or association of churches. *Id.* at 1343 (internal quotation marks omitted). But that criterion, the court said, caused "substantially similar religious schools, all operated for a primarily religious purpose, [to] receive different tax treatment solely because some are tied to the organizational structure of a church." *Id.* at 1346-47. The organizational-tie criterion was "constitutionally offensive" because it "create[d] governmental preference for the organizational hierarchy of one form of worship over another"; the court

therefore ignored that criterion and held that an independent school could claim the exemption. *Id*. at 1347.

Plaintiffs' interpretation of the Title IX exemption would create the same "constitutionally offensive" distinction (*id.*). It would discriminate against "independent [schools], which are organized for religious purposes and have religious tenets, but are not affiliated with any particular congregation or sect." *Spencer*, 633 F.3d at 732.

2. Excluding independent and nondenominational religious schools violates the First Amendment's original understanding.

Discrimination against independent or nondenominational religious organizations also violates the First Amendment's original meaning: it is "the sort of official denominational preference that the Framers of the First Amendment forbade." *Larson*, 456 U.S. at 255. For example, one feature of the state religious establishment in Massachusetts—the kind of establishment the First Amendment forbade Congress to adopt—was discrimination against preachers of unincorporated and independent religious groups. In a leading case enforcing the state's system of taxes for the support of clergy, the Supreme Judicial Court held that a religious teacher who "demands the taxes paid by his hearers for the support of public worship … must be the teacher of an incorporated society." *Barnes v. First Parish in Falmouth*, 6 Mass. 401, 401 (1810) (denying claim for public support brought by a teacher of an unincorporated voluntary society).

Similarly, founding-era establishments displayed hostility to new, unorganized, and independent religious groups. Ministers of established churches preached "inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Everson v. Board of Education,* 330 U.S. 1, 10 (1947). For example, Virginia punished independent and itinerant Baptist and Presbyterian preachers, and even in the milder establishment of New England, the state still "regulated ministerial tenure (hence ministerial independence) and itineracy." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1438, 1439 (1990). "The newer, more enthusiastic sects had the most to gain from breaking the monopoly of the old established church" (*id.*): that is, precisely those sects most likely to be independent of or unaffiliated with any established denomination. Thus, discrimination against independent or nondenominational institutions implicates the key principle identified in *Larson*: Free exercise of religion "can be guaranteed only when" the government gives all religious organizations "the very same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245.

3. Excluding independent and nondenominational schools from the exemption fails strict scrutiny.

A law that creates an explicit denominational preference among organizations is subject to strict scrutiny: it "must be invalidated unless it is justified by a compelling governmental interest" and "is closely fitted to further that interest." *Larson*, 456 U.S. at 247. Excluding all independent and nondenominational schools from the Title IX exemption is not closely fitted to the relevant interests. Congress enacted Title IX "to avoid using federal resources to support discriminatory practices" (ER 11); but the practices of independent and nondenominational schools do not undercut that interest any more than do the practices of denominational schools owned and controlled by church entities. Congress also provided the religious exemption to protect religious organizations' ability to follow their sincere religious tenets. 20 U.S.C. § 1681(a)(3). But independent or nondenominational religious schools, controlled by their religious governing boards, are often guided just as much by their sincere religious tenets as are schools controlled by a separate organization. Fuller itself is a prime example: it is an independent seminary that is undisputedly "'religious in nature.'" ER 4; *see, e.g.*, Seminary Br. 22. There are many other examples—among the *amici* here, including member schools of *amici* associations—that are just as religious as their denominationally affiliated counterparts.

C. Excluding Independent and Nondenominational Schools Brings On Several Other Constitutional Problems.

Excluding all independent and nondenominational institutions from the Title IX exemptions brings on multiple other constitutional problems as well. We note several of them briefly; the brief of the Seminary discusses them in more detail.

First, if a seminary, college, or Bible college with substantial religious character is disqualified from the Title IX exemption because it is independent or nondenominational, it will likely be able to assert the First Amendment's ministerial exception in a significant number of cases involving lawsuits challenging standards for student conduct. The ministerial exception bars actions that intrude on the important "interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. As the Seminary explains, the ministerial exception, under this Court's precedent, extends to ban lawsuits by students studying in "'a seminary program to become a minister.'" Seminary Br. 53 (*quoting Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.2d 1288, 1292 (9th Cir. 2010) (en banc)). The exception would likewise ban lawsuits by students training for various forms of ministry in Bible colleges (institutions that make up a substantial share of *amicus* ABHE's membership) or other institutions.

Second, lawsuits challenging religious standards of student conduct may violate the First Amendment rights of assembly and expressive association, interfering with a school's ability to express the views it wishes—including views on sexuality or marriage. *See* Seminary Br. 54-58. Since religious educational institutions seek to offer education in line with their particular religious beliefs, they regularly adopt standards of student conduct—sexual conduct or otherwise—that comply with those beliefs. If the law bars a school from adopting and enforcing such a standard of conduct, that will frequently interfere with the school's ability to communicate the importance of the religious principle underlying the standard.

Finally, if independent and nondenominational religious schools lose the protection of the Title IX exemption, they will have serious constitutional claims under the Free Exercise Clause as set forth in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam). *Tandon* holds that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). Title IX exempts numerous other institutions and activities, including educational institutions training persons for military service, single-sex youth service organizations, boys-girls conferences, and single-sex social fraternities and sororities. 20 U.S.C. § 1681(a)(4)-(9). Any one of these entities or activities could be considered "comparable" to religious schools

in the sense defined by *Tandon*: they undercut "the asserted government interest that justifies the regulation at issue," in this case the interest in preventing sex discrimination in federally funded programs. *Tandon*, 141 S. Ct. at 1296. Therefore, the exclusion of independent and nondenominational religious schools from protection must satisfy strict scrutiny; and for the reasons given (*supra* p. 24), excluding those schools is very unlikely to satisfy that standard.

In sum, religious liberty must mean that a seminary is free to discharge seminarians who disregard or knowingly violate the seminary's explicit religious beliefs and conduct standards based on those beliefs. This is no less true for independent seminaries than for those tied to denominations; and it is no less true for Bible colleges and other institutions training students for the ministry. More broadly, religious educational institutions, independent as well as denominational, have a significant interest in being able to discipline students who violate the institution's religious beliefs. And independent as well as denominationally affiliated institutions have a strong interest in being free to structure themselves consistent with their theological beliefs and mission, without fearing potential liability for their choice of structure. *Amos,* 483 U.S. at 336 ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.").

D. The Court Should Avoid These Grave Constitutional Problems by Reading Title IX's Exemption to Include Schools Controlled by Their Governing Boards.

The means of avoiding these constitutional difficulties is simple: This Court should read the Title IX exemption to apply when an educational institution is "controlled by" its religiously oriented governing board or by its religious "system" of beliefs and practices. See *supra* pp. 6-15. That interpretation is consistent with the dictionary meaning of the term "organization." See *id.* at 6. And nothing in the provision's text or legislative history provides the "clear expression of Congress's intent" (*Catholic Bishop*, 440 U.S. 507) that would be required to justify excluding all independent and nondenominational schools from the exemption's protection.

Plaintiffs claim that including independent and nondenominational religious schools "dramatically expand[s] the scope of the narrow religious exemption." Maxon Br. 19. But independent and nondenominational schools have been protected under Title IX for more than three decades without the slightest indication that they meaningfully restrict educational opportunity. Indeed, they increase the diversity of educational offerings. What would be "dramatic"—and irreconcilable with basic religious freedom principles—would be to bar an irrefutably religious school from protection under Title IX because it chooses to exercise its religious beliefs independent of any other religious organization.

Reading the Title IX exemption to include independent and nondenominational schools will not, as plaintiffs imply, "open a giant loophole and lead to widespread sex discrimination in education." Maxon Br. 19 (quotation omitted). To qualify for the exemption, an independent or nondenominational school must be "controlled by" a governing board that maintains the school's religious character, or by a "system" that is religious: that is, a set of religious beliefs and principles that guide the school's mission and activities.

Various criteria can ensure this religious character. Department of Education regulations list several sorts of evidence, including evidence that the institution "is a school or department of divinity"; that it requires its students, faculty, or staff to be members of the religion in question or follow its beliefs and practices; that it "has a doctrinal statement or statement of religious practices" and states that members of its community must engage in those practices or espouse belief in the statement of doctrine or practices; and that it has "a published institutional mission," adopted by its governing board, that "includes, refers to, or is predicated upon," religious teachings. 34 C.F.R. § 106.12(c)(1)-(5). Likewise, it is a meaningful limit to require that an organization seeking a religious exemption must explicitly "hold[ ] itself out as providing a religious educational environment, even if its principal academic focus is on 'secular' subjects." *Univ. of Great Falls*, 278 F.3d at 1344; *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400 (1st Cir. 1986) (Breyer, J.). The

requirement to "hold itself out" as religious, the D.C. Circuit explained, "will help to ensure that the exemption is not given to wholly secular institutions that attempt to invoke it solely to avoid [regulation]." *Univ. of Great Falls*, 278 F.3d at 1344 (reasoning that "[w]hile public religious identification will no doubt attract some students and faculty to the institution, it will dissuade others. In other words, it comes at a cost.").

The precise definition of a controlling "religious organization" under Title IX is not in question in this case. Fuller Seminary qualifies under any meaning of that phrase because of its religious board of trustees and the system of religious principles that guide the institution.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Date: June 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on June 21, 2021, the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Kimberlee Wood Colby
Kimberlee Wood Colby
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Addendum: Statements of Interest of *Amici Curiae*

American Association of Christian Schools serves Christian schools through a network of thirty-eight state affiliate organizations and two international organizations. AACS represents more than 750 schools nationally.

Association for Biblical Higher Education comprises a network of over 150 institutions of biblical higher education enrolling over 65,000 students. With diverse histories, ethnicity, and doctrinal/denominational affiliations, ABHE institutions are committed to education that challenges students to develop critical thinking skills and leads them in the formation of a biblically grounded Christian worldview.

Association of Christian Schools International serves Protestant Christian schools in over 100 countries worldwide, including over 2,000 member preschools, elementary and secondary schools, and 65 post-secondary institutions, educating over 500,000 students, in the United States. Its members combine strong academic programs with spiritual formation and must agree to abide by ACSI's Statement of Faith and Code of Conduct.

Belmont Abbey College in Belmont, North Carolina, was founded by a Benedictine order whose monastery remains at the center of campus. Obedience to the teachings of the Catholic Church is central to the College's identity and mission of training the next generation of Catholic leaders.

Benedictine College in Atchison, Kansas, is a Catholic, Benedictine institution of higher education committed to specific matters of faith of the Roman Catholic tradition, as revealed in the person of Jesus Christ and handed down in the teachings of the Church. The College embraces students and faculty from all faiths who accept its goals. Sponsored by the monks of St. Benedict's Abbey and the sisters of Mount St. Scholastica, the College is governed by a board of directors that includes lay persons and religious.

Cardinal Newman Society promotes and defends faithful Catholic education. It recognizes and sponsors working groups of faithful Catholic schools and colleges and works for the success of educators who are committed to faithful Catholic education by teaching with Catholic ideals, principles, and attitudes.

Christian Legal Society is an association of Christian attorneys, law students, and law professors that defends all Americans' religious freedom.

Franciscan University of Steubenville, Ohio, with 2,400 on-campus students and 800-plus online students, educates and forms men and women empowered by the Holy Spirit to transform the Church and the world in Jesus Christ. A Catholic and Franciscan institution, it is independent of control by any denomination or other separate religious body.

General Conference of Seventh-day Adventists is the Church's highest administrative level and represents 6,300 congregations and over 1.2 million members in the United States. The Church has primary and secondary schools and institutions of higher learning within this Court's jurisdiction.

Jewish Coalition for Religious Liberty is a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. It seeks to ensure that Jewish schools, many of which are not controlled by an external religious organization, are included within Title IX's religious exemption.

Lumen Christi Catholic School in Indianapolis, Indiana, is an independent Catholic school controlled by a governing board under by-laws that clearly state a religious mission. Faithful to the Archbishop of Indianapolis, it maintains independence for many reasons discussed in this brief.

Lutheran Church—Missouri Synod has approximately 6,000 member congregations and two seminaries, nine universities, and the largest Protestant parochial school system in America.

Marian High School in Mishawaka, Indiana, is a Catholic high school under the direction of the Diocese of Fort Wayne South Bend, preparing 650 students to serve and lead the Church, local, and global communities.

Regina Academies are four independent Catholic schools in the Philadelphia area that provide a rigorous Catholic education firmly rooted in the Magisterium of the Catholic Church with the blessing of the Archbishop of Philadelphia.

Thomas More College of Liberal Arts in Merrimack, New Hampshire, provides a Catholic education for students of all faiths. Its Board of Trustees supports the moral and intellectual life of the College, which binds itself to the magisterial teachings of the Church, communion with Her authentic hierarchy, and fidelity to Petrine authority.