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 United States District Court
for the Central District of California
(2:19-cv-09969-CBM-MRW)

BRIEF OF MONTANA AND FIFTEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

AUSTIN KNUDSEN
Montana Attorney General

DAVID M.S. DEWHIRST
Solicitor General

215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
406-444-2026
david.dewhirst@mt.gov

Attorney for the State of Montana

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INTEREST OF AMICI

Amici Curiae States of Montana, Alabama, Arizona, Arkansas, Indiana, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, South Carolina, Texas, Utah, and West Virginia ("the States") seek to preserve religious liberty and protect the rights of conscience for their citizens and institutions of faith. The States are represented by their respective Attorneys General, who bear the duty and authority to represent the States in court. There are hundreds of higher education institutions across the country that bear a religious imprint. These institutions contribute to the vibrant civic life of the States. But they require exemption from Title IX because its current application violates their core religious tenets. The States support a broad application of this religious exemption—it protects these unique schools from religious-based discrimination and prevents the government from interfering in religious matters of theology, membership, and conduct.

SUMMARY OF THE ARGUMENT

The Framers of the Constitution and the Bill of Rights struck an incredible balance—managing to vigorously protect religious liberty and conscience rights, and prevent the government from interfering with religious teachings, all while avoiding the fractious sectarian battles of

the past. Religious education has been an integral part of faith in America since the Founding, often shielding and nurturing minority beliefs from majoritarian coercion.

Fuller Theological Seminary ("Fuller") is a Christian institution that seeks to train the next generation of Christian ministers in a way that comports with its religious tenets. Those tenets include Biblical teaching regarding sexual behavior and marriage. Fuller expects its students to affirm, agree, and adhere to these tenets. Fuller may expel students who violate its code of conduct. That's what happened in this case. Appellants were students at Fuller who entered same-sex marriages in violation of Fuller's code of conduct and were expelled.

For this reason, Fuller sought and has long maintained a religious exemption from Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). The District Court found that Fuller qualified for the religious exemption pursuant to the U.S. Department of Education's newly codified Religious Freedom Rule, 85 Fed. Reg. 59916, 59953–59962 (Sept. 23, 2020). Fuller, the district court concluded, satisfied Title IX's "control test," meaning it was controlled by a religious organization and withholding the exemption would violate its religious

tenets. *Maxon v. Fuller Theological Seminary*, No. 2:19-cv-09969-CBM-MRW, 2020 U.S. Dist. LEXIS 202309, at *20–29 (C.D. Cal. Oct. 7, 2020). The district court was right.

There is, however, another authority that protects the Seminary from the normal application of Title IX: the First Amendment. Denying Fuller or other religious schools an exemption would violate the church autonomy doctrine, which protects the right of "churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quotations omitted).

To avoid discriminating against Fuller and other religious schools, the control test must be interpreted broadly to accommodate all faiths and non-ecclesiastical religious structures. *See Our Lady*, 140 S. Ct. at 2063–64; *Larson v. Valente*, 456 U.S. 228 (1982). Appellants' false dichotomy between "religious educational institutions" and "educational institutions" that are "controlled by a religious organization" (*i.e.*, church-administered schools) would sharply narrow the availability of the exemption. Appellants Br. at 15. They argue the exemption should apply only to schools that fit into the latter category. But this myopic

view ignores the obvious fact that a religious educational institution can be—and often is—a religious organization.

And just like churches, religious schools have a right to select their members, and exclude those who do not believe or abide by their tenets. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Watson v. Jones*, 80 U.S. 679 (1871). These schools' First Amendment religious freedoms are therefore buttressed by their First Amendment associational freedoms. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Religious liberty must be respected, even when it conflicts with another important interest. *Fulton v. Philadelphia*, No. 19-123, slip op. (2021); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Non-discrimination laws are unquestionably valuable, but those interests are not served (and grow markedly less compelling) when used as implements of discrimination against religious groups. And this is particularly true given the vast number of choices in higher education. No one *must* attend Fuller.

These cornerstone First Amendment protections apply regardless of whether a religious school participates in a government program. No

religious school should be forced to choose between their religious convictions and participating in widely available government programs. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The counter-discrimination Appellants peddle violates the First Amendment. If embraced by the Court, this narrow view of religious freedom will sharply curtail these institutions' positive contributions to our States and communities.

ARGUMENT

I. Religious Education is Protected by the First Amendment

A. The Framers Vigorously Protected Religious Independence and Freedom of Conscience

The Framers of the Bill of Rights understood that religious institutions must remain independent of official control and coercion. Religious liberty in the First Amendment is therefore rooted in two distinct rationales. First, the state should avoid interfering with matters properly entrusted to the authority of the spiritual Sovereign. Michael W. McConnell, *Religion and Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1246 (2000) [hereinafter "McConnell, *Religion and Constitutional Rights*"]. Seeking independence from the state-controlled Church of England, "the Puritans

fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–83 (2012). The Pilgrims similarly believed that the Church of England was irremediably corrupt, so they separated themselves from the Church, both ecclesiastically and geographically. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2121–2122 [hereinafter "McConnell, *Establishment and Disestablishment*"]. Thus, religious liberty at the founding rested upon the proposition that government may not invade "the sovereignty of God over matters spiritual." McConnell, *Religion and Constitutional Rights*, *supra*, at 1246.

Second, the First Amendment's authors aimed to safeguard individual freedom of conscience. *Id.* at 1251. Freedom of conscience assures "each person is free to pursue the good life in the manner and season most agreeable to his or her conscience, which is the voice of God." *Id.* at 1251–52; *see also Hosanna-Tabor*, 565 U.S. at 183–84 (citing 1 Annals of Cong. 730–731 (1789) (remarks of J. Madison) (noting that the

Establishment Clause addressed the fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform")). As Madison wrote, "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." *Everson v. Board of Education*, 330 U.S. 1, 64 (1947) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶1).

Freedom of conscience protects minority and disfavored religious views. *See McGowan v. Maryland*, 366 U.S. 420, 464 (1961) (Frankfurter, J., separate opinion) (Framers were "sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience"). "Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (quotations omitted). After hundreds of years of religious turmoil in England and the colonies, therefore, "[t]he sword of justice which had been bloodied in aid of

religious oppression in Europe was sheathed by the First Amendment[.]" *Zummo v. Zummo*, 574 A.2d 1130, 1135 (Pa. 1990). With God—not the state—as the ultimate arbiter of religious disputes, the First Amendment fostered a pluralistic society where religious convictions and practices were insulated from government intrusion.

B. Religious Institutions Have Played a Key Role in Education Since the Founding

Religious schooling was largely indistinguishable from churches during the Founding era. In the colonial and early-Republic periods, most schools were taught or directed by local ministers. McConnell, *Establishment and Disestablishment*, *supra*, at 2171. Alexis De Tocqueville observed that "the greater part of education [in America] is entrusted to the clergy." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 340 (Henry Reeve ed., 2002). In New England, "[t]he Puritan belief in every person's religious obligation to read and understand the Bible led to an early emphasis on education." McConnell, *Establishment and Disestablishment*, *supra*, at 2172. Even as individual states began moving toward disestablishmentarianism in the early republic, "most schools in the United States were conducted under religious auspices." *Id.* at 2173 (citing BERNARD BAILYN, EDUCATION IN THE FORMING OF

AMERICAN SOCIETY (1960) (discussing the close connection between religion and education)).

According to Tocqueville, America's vibrant religious character in the nineteenth century—including its schools—was its moral anchor and preserved its free and democratic society. He observed that our Republic's civic health depended upon voluntary associations and churches creating and maintaining private schools. *See* TOCQUEVILLE, *supra*, at 756–60. In Europe, activities like schooling that had formerly been administered by churches, guilds, and municipalities were being centralized under the national government. *See id.* at 757–58. This took "the child from the arms of his mother" and turned the child over to "the agents" of the national government—setting the table for soft despotism. *See id.* at 758. Independent control of education in America was key to maintaining our freedoms and national character.

By the Civil War, northern and western states had established their own public or "common" schools. McConnell, *Establishment and Disestablishment*, *supra*, at 2174. But the common school movement was really meant to assimilate Catholic and Jewish immigrants into nondenominational Protestantism. *See* McConnell, *Religion and*

Constitutional Rights, *supra*, at 2174. "Catholic and Jewish schools sprang up because the common schools were not neutral on matters of religion. Faced with public schools that were culturally Protestant and with curricul[a] and textbooks that were, consequently, rife with material that Catholics and Jews found offensive, many Catholics and Orthodox Jews created separate schools." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2272 (2020) (Alito, J., concurring) (quotations omitted); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (open secret that the use of "sectarian" in Blaine Amendments was a code-word for "Catholic"). As for the South, during Reconstruction "[m]ost of the schools for the former slaves … funded by Congress under the Freedman's Bureau Act, were run by Protestant missionary societies." McConnell, *Establishment and Disestablishment*, *supra*, at 2174.

Religious schooling is wound tightly into our national fabric. These institutions have provided refuge to religious minorities and the character and academic training necessary for the maintenance of the republic.

C. The Church Autonomy Doctrine Protects Religious Education

For 150 years, the Supreme Court has recognized that courts should not wade into religious disputes. *See Watson v. Jones*, 80 U.S. 679, 733 (1871) (matters "concern[ing] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" were not for the courts to resolve). The church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity. *Our Lady*, 140 S. Ct. at 2060–61; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116–17 (1952).

One fundamental aspect of church autonomy is the prerogative to select those who play key roles. *Our Lady*, 140 S. Ct. at 2060 ("The independence of religious institutions in matters of faith and doctrine is closely linked to independence in … matters of church government.") (quotations and citations omitted). The "ministerial exception," precludes courts from wading into employment disputes involving certain important positions within churches and other religious institutions. *Id.* at 2060.

The ministerial exception's history and rationale support the same independence for religious schools when it comes to student conduct. As the Court explained in *Our Lady*, "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." *Id.* at 2060 (quotations omitted). Without the ministerial exception, a church's leadership would be powerless to discipline or remove a wayward minister whose behavior violates the church's core beliefs. *Id.* at 2060–61 (citing McConnell, *Establishment and Disestablishment*, *supra*, at 2141 (politically appointed ministers in colonial Virginia were often "less than zealous in their spiritual responsibilities and less than irreproachable in their personal morals")).

The First Amendment must be understood as a response to the English Crown's meddling in ecclesiastical affairs. *See id.* at 2061. More specifically, *Our Lady* recognized that the Crown's interference in religious *educational* matters was a major factor underlying the Religion Clauses. *See id.* at 2061 ("British law continued to impose religious restrictions on education in the 18th century and past the time of the adoption of the First Amendment."). For example, the Reformation

Parliament enacted a law requiring "all schoolmasters, private tutors, and university professors" to "conforme to the Liturgy of the Church of England" and not "to endeavour any change or alteration of the church." *Id.* at 2061 (quoting Act of Uniformity, 1662, 14 Car. 2, ch. 4.). Blackstone discussed an 18th Century law requiring schoolmasters and tutors to be licensed by a bishop, preventing Catholics from teaching, and imposing penalties on anyone who sent someone abroad to be educated in Catholicism. *Id.* 2061–62 (citing 4 W. Blackstone, Commentaries on the Laws of England 55–56 (8th ed. 1778)).

In the American colonies, similar religious restrictions on education persisted. A Maryland law "'prohibited any Catholic priest or lay person from keeping school, or taking upon himself the education of youth.'" *Id.* at 2062 (quoting 2 T. HUGHES, HISTORY OF THE SOCIETY OF JESUS IN NORTH AMERICA: COLONIAL AND FEDERAL 443–444 (1917)). "In 1771, the Governor of New York was instructed to require that all schoolmasters arriving from England obtain a license from the Bishop of London." *Id.* (citing 3 C. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 485, 745 (1906)).

Although the ministerial exception governs ministers, the rationale applies with equal force to students (and faculty) at Fuller and other religious schools because they educate the next generation of clergy and members of their faiths. These schools require the ability to select, supervise, and remove individuals who do not comport with their beliefs. *See Our Lady*, 140 S. Ct. at 2060. Without that prerogative, religious schools would be forced to matriculate nonconforming members and thereby submit to official dictates contrary to the schools' conceptions of the faith and orthodoxy. *See id.* at 2060–61; *Milivojevich*, 426 U.S. at 713–14.

II. Denying Fuller and Other Religious Schools A Religious Exemption from Title IX Violates the First Amendment

The First Amendment broadly protects the right of religious schools to teach students in a manner that conforms with their religious beliefs, regardless of organizational structure or whether the students are training to become clergy. *See Hosanna-Tabor*, 565 U.S. at 189 (First Amendment gives "special solicitude to the rights of religious organizations"); *Our Lady*, 140 S. Ct. at 2060–61. Because religious schools are themselves religious institutions, the First Amendment prevents the government from interfering with their regulation of

conduct on matters of religious doctrine. The First Amendment ensures churches may select and govern their ministers and members pursuant to their religious beliefs; so too with religious schools and their students. *See Watson*, 80 U.S. at 733 (courts exercise no jurisdiction over matters concerning "the conformity of the members of the church to the standard of morals required of them"); *Milivojevich*, 426 U.S. at 714 (quoting *Watson*, 80 U.S. at 733–34); *Bouldin v. Alexander*, 82 U.S. 131, 139–40 (1872); *see also Obergefell*, 576 U.S. at 679–80 ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to *teach* the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.") (emphasis added).

A. The First Amendment Requires This Court to Broadly Construe the Control Test

Title IX does not apply to educational institutions that are "controlled by a religious organization," to the extent that application of Title IX "would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). Notably, the statute does not directly address how educational institutions demonstrate whether they are controlled by a religious organization. But any interpretation of the

control test must recognize that a recipient of federal financial assistance *can itself be* a religious organization. To do otherwise would impermissibly favor certain church-controlled religious schools and disfavor others, at the expense of their Free Exercise rights.

The Religion Clauses prohibit the government from favoring one religion over another or discriminating against a particular religion due to its beliefs. The Department of Education amended 34 C.F.R. § 106.12 to expressly acknowledge that a religious school can itself be a religious organization that controls its own operations, curriculum, or other decisions. The amended rule recognized that it was constitutionally obligated to interpret the control test broadly to avoid discriminating *between* religions. 85 Fed. Reg. 59916, 59958 (Sept. 23, 2020) (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")).

Appellants argue that Fuller fails to satisfy the control test because its "control structure differs from many seminaries and other religious educational institutions." Appellants Br. at 14. Besides being obviously discriminatory, this argument fails to account for the fact that Fuller and

other religious schools are themselves religious organizations. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 703 (2014) (closely held corporation exercised religion because its statement of purpose proclaimed that the company was committed to "[h]onoring the Lord in all we do by operating in a manner consistent with Biblical principles."); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989) ("we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization"). As the Final Rule recognizes, the structures of religious entities differ widely. 85 Fed. Reg. at 59918. "Some educational institutions are controlled by a board of trustees that includes ecclesiastical leaders from a particular religion or religious organization who have ultimate decision-making authority for the educational institutions. Other educational institutions are effectively controlled by religious organizations that have a non-hierarchical structure, such as a congregational structure." *Id.*

Appellants' superficial characterization of religious organizations was expressly rejected as discriminatory by the Supreme Court in *Our Lady*. In determining whether an employee satisfied the ministerial

exception, the Court made clear that "since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement" and, moreover, "[r]equiring the use of the title would constitute impermissible discrimination." *Id.* at 2063–64. The Court, importantly, concluded, "attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal." *Id.* at 2064. Similarly, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court rejected a proposal to permit students to use buildings at a public university for all religious activities except those constituting "religious worship." The Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* at 269 n.6. To even draw such a distinction would impermissibly "require the [State]—and ultimately the Courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith." *Id.*

The Supreme Court has consistently rejected the overly-formalistic approach to religious protections that Appellants take here—and for good reason. Appellants' view that only institutions like, e.g., the Catholic University of America—directly controlled by the Catholic Church—can satisfy the rigors of the control test actually advances the government-sectarian bent the First Amendment was crafted to eliminate. *See* Appellants Br. at 14; Part I, *supra*. Protecting minority, non-traditional, or non-hierarchical religious entities is precisely the purpose of the First Amendment. The government can no more judge a religious school's structure than it can a church's beliefs or practices. *See Lukumi*, 508 U.S. at 531 (religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to receive protection).

Finally, due to these constitutional parameters, any ambiguity in the statutory or regulatory language of the Title IX exemption must be interpreted in favor of Fuller and other religious schools. *See Jennings v. Rodriguez* 138 S. Ct. 830, 836 (2018).

B. Non-discrimination Provisions Do Not Trump First Amendment Freedoms

In our pluralistic society, there is at times inevitable conflict between free exercise and competing values. *See Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting) ("Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples …."). Title IX's religious exemption, however, reinforces what the Supreme Court has made clear: religious liberty is a *sui generis* value that does not take a back seat to other constitutional or statutory mandates. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (values underling the First Amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance").

1. Applying Title IX to Fuller and Other Religious Schools Does Not Survive Strict Scrutiny

Laws which burden the Free Exercise of Religion are subject to strict scrutiny unless they are "neutral and generally applicable." *Fulton v. Philadelphia*, No. 19-123, slip op. at 5 (2021) (citing *Emp't Div. v.*

Smith, 494 U.S. 872, 878–82 (1990)). Just days ago, the Supreme Court reaffirmed that statutes with individualized exemptions—such as Title IX—are not "generally applicable" and are therefore subject to strict scrutiny. *See id.* at 10 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable … because it invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude ...."') (quotations omitted); *see also id.* at 6–7 (citing *e.g., Sherbert v. Verner*, 374 U. S. 398 (1963)). Title IX applies to Fuller's religious practices "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, slip op. at 13 (quoting *Lukumi*, 508 U.S. at 546). The burden on Fuller's Free Exercise rights is significant while the government's interest is minimal.

Forcing religious schools like Fuller to compromise on issues of marriage and sexuality substantially burdens their sincere religious beliefs. These issues implicate central tenets of faith for Christians and many other religious adherents. *See Obergefell*, 576 U.S. at 656–57 (majority opinion) ("Marriage is sacred to those who live by their religions"); *Lukumi*, 508 U.S. at 531 (looking to "the historical association between animal sacrifice and religious worship" to find that animal

sacrifice is an integral part of a religion). The Protestant Reformation spiritually elevated the role of marriage and family over the traditional celibacy of the clergy in Catholicism. And it was, of course, the issue of marriage that served as the catalyst for the English Reformation in 1534 when Henry VIII was denied an annulment of his marriage to Catherine of Aragon. As the Court said in *Obergefell*, "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." 576 U.S. at 679. These religious voices may have fallen from cultural favor, but if we take seriously our commitment to a pluralistic society, they must be protected and respected.

Fuller's articles of incorporation are based on a Statement of Faith. *Cf. Hobby Lobby*, 573 U.S. at 703. Its religious training includes developing students' "moral character" for "Christian service." Fuller's Board of Trustees has established Community Standards for all enrolled students and employees. These standards are public and are "guided by an understanding of Scripture and a commitment to its authority in all matters of Christian faith and living" and are part of its "core mission, values, and identity." *See Hosanna-Tabor*, 565 U.S. at 185–86

("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.") (quotations omitted). Students must agree to continual adherence to these standards as a continuing condition of enrollment. The Community Standards identify the Seminary's belief that marriage "is the covenant union between one man and one woman," that "sexual union must be reserved for marriage," that all members of its community must abstain from what the Seminary holds to be "unbiblical sexual practices," and that homosexual conduct is among practices which it considers to be "inconsistent with the teachings of Scripture." Students, like members of churches, give direct or implied consent to abide by church doctrine. *See Watson*, 80 U.S. at 729 (members of religious groups give "implied consent to [church] government, and are bound to submit to it").

The government's interest in withholding religious exemptions to Title IX, by contrast, is minimal. Non-discrimination protections often advance important societal values, but the Court made clear in *Fulton* that high-level generalities such as "equal treatment" don't cut it.

Fulton, slip. op. at 14. The government must show not only that it "has a compelling interest in enforcing non-discrimination policies generally" but also that "it has such an interest in denying an exemption" to *Fuller*. *Id*. at 14. It cannot meet this burden.

First, the availability of a statutory exemption for some religious schools is significant. *See id*. at 14–15. There is "no compelling reason why [the government] has a particular interest in denying an exception to [one party] while making them available to others." *Id*. at 15. The only possible rationale offered by Appellants is Fuller's religious structure, which would be an impermissible rationale. *See* Part II(A), *supra*.

Second, Congress recognized by adding a statutory exemption that "sex" and religion have a unique relationship. Religious schools may have legitimate theological reasons for different treatment of the sexes (as opposed to different treatment based on race or other characteristics). Look at the Catholic church's deeply enshrined teaching and tradition that determines clerical eligibility based—in part—on sex. Title IX and its implementing regulations, after all, permit—and may require—consideration of a person's biological sex. *See, e.g.*, 20 U.S.C. §§ 1681(a),

1686; 34 C.F.R. §§ 106.32(b), 106.33. Now that the definition of "sex" in Title VII has been interpreted to cover sexual orientation and gender identity, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020), and the Biden Administration has indicated its intent to follow suit as to Title IX, see *Notice of Interpretation, The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of* Bostock v. Clayton County (issued June 16, 2021), many religious schools will require exemptions from Title IX for the first time to continue their longstanding religious practices.[1]

The tension between religious freedom and non-discrimination arose in *Bostock*, where the Court decided that sex discrimination prohibited by Title VII included discrimination based on sexual orientation or transgender status. But the majority explained that it was

[1] Amici only respond *arguendo* that sexual orientation and gender identity are included in the definition of "sex" in Title IX. Although the District Court concluded that *Bostock* applied to Title IX, *Maxon*, 2020 U.S. Dist. LEXIS 202309 at *16, amici believe that—for good reason—the Supreme Court did not apply the *Bostock* holding to other statutes such as Title IX. Title IX has different operative text than Title VII, is subject to different statutory exceptions, and is rooted in a different Congressional power. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275, 286–87 (1998).

"deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." *Id.* at 1754. The Court noted that Title VII contains an exemption for religious employers. *Id.* at 1754 (citing 42 U.S.C. § 2000e-1(a)). Although Title VII's exemption only applies to religious discrimination, the *Bostock* Court also pointed to the ministerial exception as additional protection for religious entities. *Id.* (citing *Hosanna-Tabor*, 565 U. S. at 188).

Although Title VII is a different statute than Title IX, its religious exemption highlights a key point for religious liberty. It is widely accepted that "discrimination" on the basis religion is wrong in most settings. It is, however, also widely accepted that religious organizations necessarily may "discriminate" on the basis of religion when choosing their ministers and members. There is no moral stigma associated with limiting a church's membership to people who share its essential beliefs. Buddhist temples need not extend membership to Evangelical Christians. Synagogues need not hire Shiite Muslims as rabbis. Catholic universities may deny admission to non-Catholics. But what does it mean to "be Catholic" or to "be Hindu"? Unlike other protected classes

like race, religion itself calls for complicated and personal assessments of faith and conscience.

And therein lies the heart of the matter. Fuller has the right to define what it means by "Christian." Disputes over marriage and sexuality are fundamental theological questions. Religious schools should be able to admit and exclude students based upon their religious beliefs and resultant codes of conduct. *See Hosanna-Tabor*, 565 U.S. at 187 (First Amendment allows '"religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters."') (quoting *Milivojevich*, 426 U.S. at 724); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.").

Perhaps most notably, students who attend these religious institutions do so voluntarily and have adequate notice of the schools' religious tenets and codes of conduct when they apply. *See Watson*, 80 U.S. at 728–29. Students have myriad choices when it comes to higher

education and are not forced to attend institutions where the codes of conduct conflict with their own religious or moral beliefs. There are approximately 5,300 colleges and universities in the United States and most are not religiously affiliated. Secular schools also have codes of conduct that students must follow to remain enrolled. Religious schools simply add a religious component to those codes. In fact, it is much more likely that religious students on secular campuses are forced to condone or be associated with behavior that violates their religious beliefs. Religious students may choose to attend religious schools and learn in an environment more aligned with their moral and religious compasses.

2. Schools' Religious Liberty Claims are Bolstered by Freedom of Association

Religious schools are entitled to the same First Amendment freedom of association protections as secular organizations, even if the exercise of that right conflicts with other important interests. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("freedom of association receives protection as a fundamental element of personal liberty" and as "a right to associate for the purpose of engaging in those activities protected by the First Amendment"); s*ee also Smith*, 494 U.S. at 882 (noting that the constitutional interest in freedom of association may be

"reinforced by Free Exercise Clause concerns"). In fact, "[t]he Constitution guarantees freedom of association … as an indispensable means of preserving other individual liberties." *Roberts*, 468 U.S. at 618.

For example, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court dealt with the conflict between freedom of association and a state public accommodation statute when the Boy Scouts dismissed a homosexual scout leader. Despite acknowledging that the state had a compelling interest in eliminating discrimination, *see id.* at 657, it was outweighed by the Boy Scouts' First Amendment right to associate with those of its choosing and to communicate its moral beliefs. *Id.* at 661 ("[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."). The Free Exercise Clause, similarly, allows religious institutions, including schools, to select members that abide by their beliefs and moral codes. As the Court said in *Hosanna-Tabor*, "[r]equiring a church to accept or retain an unwanted minister"—or an unwanted teacher of religion—would "interfere[] with the internal governance of the church" by "depriving the church of control over the

selection of those who will personify its beliefs." *See* 565 U.S. at 188; *see also id.* at 200 (Alito, J. and Kagan, J., concurring) (free expression principle from *Dale* "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals").

Freedom of association also encompasses the right to not be associated publicly with symbols or messaging with which one disagrees. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). Just as the government may not sanction individuals for refusing to salute the flag, *id.* at 632, it may not force religious schools to affirm conduct that violates their religious principles. *See Dale* at 648 ("forced inclusion of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints").

The Court resolutely affirmed this principle when it unanimously decided in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), that a Massachusetts public accommodation statute could not force a private organization to allow a gay rights

organization to participate in its parade. *Id.* at 569. A religious institution likewise must have the ability to remove students who do not abide by its theological and moral standards. Otherwise, the school would be forced to be associated publicly with members who do not represent its values. *See Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

Fuller's free association rights, together with its free exercise rights, will not tolerate the unexempted application of Title IX, because its associational activities advance its protected religious mission and character. *See* Part II(B)(1), *supra*.

C. The Spending Clause Does Not Limit Fuller's First Amendment Rights

Trinity Lutheran Church of Columbia, Inc. v. Comer made clear that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." 137 S. Ct. 2012, 2024 (2017). And "[g]enerally the government may not force people to choose between participation in a public program and their right to free

exercise of religion." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring) *see also Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 449, (1988) (Free Exercise Clause protects against laws that "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."); *Everson*, 330 U.S. at 16 (a State "cannot exclude … members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"). Fuller here is "not claiming any entitlement to a subsidy," but "instead assert[ing] a right to participate in a government benefit program without having to disavow its religious character." *Trinity Lutheran*, 137 S. Ct. at 2022 (majority opinion); *cf. Fulton*, slip op. at 8 ("We have never suggested that the government may discriminate against religion when acting in its managerial role."). Fuller's religious character *is* its moral character, as espoused by its Articles of Incorporation, Statement of Faith, and Community Standards.

The Court has long grappled with the conflict between religious beliefs and public programs. In *Thomas v. Review Bd. of Indiana Employment Security Division*, for instance, it held that a state violated

the Free Exercise Clause by denying unemployment compensation to an employee who quit his job producing tank turrets because the job conflicted with the pacifist teachings of his church. 450 U. S. 707, 716 (1981). The Court laid out an important marker:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Id. at 717–18.

The Court has similarly forbidden government from coercing individuals into giving up First Amendment rights. In *Perry v. Sindermann*, the Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597 (1972) (quotations and citations omitted). To do so would impermissibly allow the government to produce a result which it could not command directly. *Id.*; *see also Connick v. Myers*, 461 U.S. 138, 142 (1983) (government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."). As discussed, the right of religious schools to dictate the

values and activities of their members implicates not only the Religion Clauses, but also the freedom of association. *See* Part II(B)(2), *supra*.

CONCLUSION

Freedom of conscience is one of the bedrock guarantees of the First Amendment. Without it, our pluralistic society is imperiled. Even as the Supreme Court has blazed new trails in the areas of sex and marriage, it has reaffirmed that sincere religious beliefs must be respected and protected. *See Fulton*, slip. op at 13–15; *Bostock*, 140 S. Ct. at 1754; *Obergefell*, 576 U.S. at 679. Any ruling from this Court must recognize that the First Amendment protects the autonomy of religious schools to govern their students in a way that is consistent with their sincerely held religious tenets.

Respectfully submitted,

AUSTIN KNUDSEN
Attorney General of Montana

DAVID. M.S. DEWHIRST
Solicitor General

Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
David.Dewhirst@mt.gov
Counsel for the State of Montana

Additional Counsel for Amici Curiae:

STEVE MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

CHRIS CARR
Attorney General of Georgia

THEODORE E. ROKITA
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

DANIEL CAMERON
Attorney General of Kentucky

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

DOUG J. PETERSON
Attorney General of Nebraska

ALAN WILSON
Attorney General of
South Carolina

KEN PAXTON
Attorney General of Texas

SEAN REYES
Attorney General of Utah

PATRICK MORRISEY
Attorney General of
West Virginia

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