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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

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

Defendants.

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

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

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

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I. INTRODUCTION

1 This case is about whether the government may attach non-discrimination
2 requirements to federal laws that provide funding to private, religious organizations.
3 Our society has long recognized that we must protect religious organizations from
4 majoritarian views that would burden their deeply held religious beliefs. The
5 freedoms of religion, speech and association are fundamental and sacrosanct. We
6 have also come to a place where we recognize that gay people, like racial, gender and
7 other minorities, can no longer be treated as social outcasts. Equality, dignity and
8 civility are revered and celebrated social and constitutional values as well.

9
10 A challenge for our constitutional democracy is how to maintain our
11 commitment to religious liberty while preserving civil rights. This challenge is often
12 presented as a battle between religion and gay rights. However, this perception
13 oversimplifies the reality. The reality is that most gay people are religious, with an
14 abundant diversity of religious practice and belief. Indeed, every religion has gay
15 people within its midst, as sexuality does not discriminate among religions. And
16 many religions affirm the rights of gay people.

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

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

1 we are in the realm of the rules that apply when the government places restrictions
2 on benefits that it makes available to private actors, like Fuller, who carry out public
3 purposes, like education. The law instructs us that government may not deny a
4 generally available benefit to a religious organization merely because it is religious.
5 However, the law also recognizes that the government may impose a non-
6 discrimination requirement on organizations, including religious organizations like
7 Fuller, that choose to receive government funding, like the federal funding made
8 contingent on compliance with 20 U.S.C. § 1681 (“Title IX”), because the
9 government "is dangling the carrot of subsidy, not wielding the stick of prohibition."

10 **II. FACTUAL BACKGROUND**

11 **A. The Plaintiffs’ First Amended Complaint¹**

12 **1. Joanna and Nathan**

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

18 Nathan is a husband and minister licensed by his denomination who financed
19 his education through federal funding from the U.S. Department of Education. FAC
20 ¶¶ 3, 8. Faculty and others within the Fuller community affirmed him as a Christian
21 man who was married to another man. FAC ¶ 8. Nathan enrolled at Fuller and
22 attended some classes but was expelled by Fuller just as he was beginning his studies.
23 FAC ¶¶ 93, 100, 110.

24 **2. Fuller Theological Seminary**

25 Fuller is a religious educational institution. FAC ¶ 4. Fuller also sets
26

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

1 community standards for its students and prohibits “homosexual forms of explicit
2 sexual conduct.” FAC ¶ 191.

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

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

17 Fuller is an independent institution. FAC ¶ 60. Fuller is not affiliated with a
18 denomination or church. FAC ¶ 61. Fuller’s board of trustees is not appointed by a
19 denomination, church or external organization. FAC ¶ 63. The members of Fuller’s
20 board of trustees are not required to belong to a particular denomination or church.
21 Students are not required to adhere to a statement of faith. FAC ¶ 64. While Fuller is
22 a religious educational institution, it is not a church. FAC ¶ 65. As an accredited and
23 federally-funded educational institution, Fuller’s primary purpose is to provide
24 educational courses and to grant certificates, diplomas and degrees in recognition of
25 student completion of graduation requirements. *Id.* Fuller is the largest recipient of
26 federal funding of any seminary in the United States, having received more than
27 \$77,000,000 in federal funding between fiscal years 2015-2018. FAC ¶ 69.

28 //

1 **B. Plaintiffs State a Title IX Claim**

2 **1. Title IX Prohibits Sex Discrimination Based on Sex Stereotypes**
 3 **and Sexual Orientation**

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

10 The Supreme Court has also recognized that same-sex sexual harassment is
 11 actionable as sex discrimination. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75,
 12 82 (1998) (male being harassed physically and verbally by other males with
 13 derogatory language that was homosexual in nature); *see also Nichols v. Azteca Rest.*
 14 *Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (male employee discriminated
 15 against for walking “like a woman” and not having sexual intercourse with female
 16 waitress stated sexual harassment).

17 Moreover, this district court has recognized that, under Title IX, discrimination
 18 based on sex includes sexual orientation discrimination. *Videckis v. Pepperdine*
 19 *Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015) (claims of sexual orientation
 20 discrimination are gender stereotype or sex discrimination claims covered by Title
 21 IX). This court reasoned that “It is impossible to categorically separate ‘sexual
 22 orientation discrimination’ from discrimination on the basis of sex or from gender
 23 stereotypes; to do so would result in a false choice. Simply put, to allege
 24 discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex
 25 or gender.” *Id.* at 1160. *See also Harrington by Harrington v. City of Attleboro*, No.
 26 15-cv-12769-DJC, 2018 WL 475000 (D. Mass. Jan 17, 2018) (“[t]he gender
 27 stereotype at work here is that ‘real’ men should date women, and not other men”)
 28 (citing *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)); *Riccio v. New*

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

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

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

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

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

20 Title IX regulates all educational institutions that receive federal funding.
 21 According to Title IX, “No person in the United States shall, on the basis of sex, be
 22 excluded from participation in, be denied the benefits of, or be subjected to
 23 discrimination under any education program or activity receiving Federal financial
 24 assistance[.]” 20 U.S.C. § 1681(a).

25 Title IX’s coverage is broad and its exemptions are narrow. *Jackson v.*
 26 *Birmingham Bd. Of Educ.*, 544 U.S. 167, 173-75 (2005) (“Title IX is a broadly written
 27 general prohibition on discrimination, followed by specific, narrow exceptions to that
 28 broad prohibition.”); *Goodman v. Archbishop Curley High School, Inc.*, 149 F. Supp.

1 3d 577, 583-86 (D. Maryland 2016) (finding that Title IX’s religious organizations
2 exemption must be viewed narrowly and did not bar plaintiff’s Title IX claim against
3 religious school).

4 Pursuant to 20 U.S.C. § 1681(a)(3), a limited exception applies to “an
5 educational institution which is controlled by a religious organization if the
6 application of this subsection would not be consistent with the religious tenets of such
7 organization.” Here, Fuller fails to qualify for the exemption because it cannot satisfy
8 the “controlled by” test. Fuller is not owned by a church, denomination or other
9 religious organization. Fuller’s board is not selected by a church, denomination or
10 other religious organization. Rather, Fuller is an independent institution. Fuller is
11 controlled by its own self-perpetuating board. Fuller’s control structure differs from
12 many seminaries and other religious educational institutions that are controlled by
13 religious organizations through direct ownership, financial control or the right to
14 appoint board members. For example, numerous Catholic seminaries are owned by
15 the Catholic Church and run by various dioceses. Such institutions would satisfy the
16 control test of Title IX as the seminaries (the educational institutions) are controlled
17 by a religious organization (the Catholic Church).

18 Nonetheless, Fuller argues that “[b]ecause the Seminary is itself both an
19 educational institution and a religious organization and is controlled by its religious
20 board of trustees, the requirement of religious control is met.” Motion, pp. 6-7.
21 However, Fuller attempts to avoid the requirements of the statute by conflating
22 Fuller’s religious identity, which it has, with Fuller’s control by a religious
23 organization, which it lacks.

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

1 Reagan administration, and its incorporated administrative instructions on how to fill
 2 out a form, for this proposition. *See* Memorandum of Harry M. Singleton, Assistant
 3 Secretary for Civil Rights, to Regional Civil Rights Directors, Feb. 19, 1985
 4 (“Singleton Memo”). The control test as described in the Singleton Memo has never
 5 been formalized as a regulation and has only publicly appeared in a government
 6 publication twice over the past thirty years. *Religious Exemptions to Title IX*, Charles
 7 E. Jones, 65 U. KAN. L. REV. 327 (2016). Indeed, the control test as described by
 8 Fuller “began as and has remained an internal administrative agency policy and
 9 practice rather than a formalized statement of law or regulation.” *Id.* at 350.

10 Moreover, the Singleton Memo merely states that “[A]n applicant or recipient
 11 will *normally* be considered to be controlled by a religious organization if one or
 12 more of the following conditions prevail:

- 13 (1) It is a school or department of divinity; or
- 14 (2) It requires its faculty, students or employees to be
 15 members of, or otherwise espouse a personal belief in,
 16 the *religion of the organization by which it claims to be*
 17 *controlled*;
- 18 (3) Its charter and catalog, or other official publication,
 19 contains explicit statement that it is *controlled by a*
 20 *religious organization* or an organ thereof or is
 21 committed to the doctrines of a particular religion, and
 22 the members of its governing body are appointed *by the*
 23 *controlling religious organization or an organ thereof*,
 24 and it receives significant amount of financial support
 25 from the *controlling religious organization or an organ*
 26 *thereof.* (emphasis added)

27 Consequently, even the Singleton Memo recognizes that there must be an
 28 external religious organization that controls the educational institution. While Fuller
 might normally be considered a “school or department of divinity” in the common
 sense of those terms, to conform to the text of the statutory exemption, the school or
 department of divinity must be one that is controlled by a religious organization.

In any event, to the extent that the Singleton memo contradicts the express
 terms of the statute, courts must reject its interpretation. Under principals of
 administrative deference, courts defer to agency interpretations of statutes, as well as
 their own regulations, but only if the regulations or statutes are ambiguous. *Kisor v.*

1 | *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (as to ambiguous agency regulations); *Chevron*
 2 | *U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (as to
 3 | ambiguous statutes). Moreover, before concluding that a regulation or statute is truly
 4 | ambiguous, “a court must exhaust all the ‘traditional tools’ of construction.” *Kisor*,
 5 | 139 S. Ct. at 2415; *Chevron*, 467 U.S. at 843, n. 9. Here, the text of the statute is
 6 | unambiguous. The statute calls out two separate entities: the educational institution
 7 | and the controlling religious organization

8 | As is the case with any statute, courts begin with the statutory text and interpret
 9 | “statutory terms in accordance with their ordinary meaning, unless the statute clearly
 10 | expresses an intention to the contrary.” *I.R. ex rel. E.N. v. L.A. Unified Sch. Dist.*, 805
 11 | F.3d 1164, 1167 (9th Cir. 2015) (citation omitted). Courts will generally give a statute
 12 | “its most natural grammatical meaning....” *United States v. Price*, 921 F.3d 777 (9th
 13 | Cir. 2019). The most natural grammatical meaning for Title IX’s religious exemption
 14 | is to recognize that two distinct entities must be involved, an educational institution
 15 | and a controlling religious organization. 20 U.S.C. § 1681(a)(3) (exempting “an
 16 | educational institution which is controlled by a religious organization”). Indeed,
 17 | “[t]he language of the statute, regulations, and control test all suggest by their
 18 | grammatical structure that two different entities must be involved to manifest the
 19 | required control for religious exemption to Title IX: a religious organization that
 20 | exerts control and an educational institution that receives it.” 65. U. Kan. L. Rev. 327,
 21 | 367.

22 | This interpretation of the control test for the Title IX exemption is further
 23 | supported by a comparison to the religious exemption from Title VII, which exempts
 24 | an educational institution that is “in whole or substantial part, owned, supported,
 25 | controlled, or managed by a particular religion or religious corporation, association,
 26 | or society[.]” 42 U.S.C. § 2000e–2(e). This exemption is much broader than the
 27 | exemption in Title IX. Of note, the religious exemption in Title VII provides that
 28 | control by a *religion* or a religious organization satisfies the statute, while the

1 religious exemption in Title IX provides that only control by a religious organization,
 2 not by a religion, satisfies the statute. Congress knew how to craft a broader religious
 3 exemption when it enacted Title VII in 1964 but it chose to craft a narrower religious
 4 exemption when it enacted Title IX in 1973.

5 Moreover, the legislative history of Title IX supports a narrow reading of the
 6 control test for the religious exemption. *See* S. Rep. 100-64 (1987), 1987 WL 61447,
 7 S. Rep. No. 64, 100th Cong., 1st Sess. 1987 (rejecting amendment “to loosen the
 8 standard for the religious exemption in Title IX from ‘controlled by a religious
 9 organization’ to ‘closely identified with the tenets of a religious organization.’”),
 10 (“The committee is concerned that any loosening of the standard for application of
 11 the religious exemption could open a giant loophole and lead to widespread sex
 12 discrimination in education.”); 134 Cong. Rec. H565-02 (1988), 1988 WL 1083034
 13 (“It is critical that the control test remain in effect, and enforced severely for that
 14 aspect of the test is the linchpin for assuring that only a limited number of institutions
 15 may discriminate with Federal funds.”).

16 Consequently, merely being a religious educational institution, or one aligned
 17 with certain aspects of the Christian religion, does not qualify Fuller for the religious
 18 exemption to Title IX. This Court should decline Fuller’s invitation to dramatically
 19 expand the scope of the narrow religious exemption.

20 **b. Fuller has not requested or received a religious exemption**

21 The regulation requires that “[a]n educational institution which wishes to claim
 22 the exemption set forth in paragraph (a) of this section, shall do so by submitting in
 23 writing to the Assistant Secretary a statement by the highest ranking official of the
 24 institution, identifying the provisions of this part which conflict with a specific tenet
 25 of the religious organization.” 34 C.F.R. § 106.12(b). Fuller has not gone through this
 26 process. However, in its defense, Fuller points to the Department of Education’s
 27 website, which currently states that “An institution’s exempt status is not dependent
 28 upon its submission of a written statement to OCR.” Motion, p. 8. Despite the

1 Department’s current policy, the exemption request procedure is not optional, as
2 evidenced by the use of “**shall** do so” in the text of the regulation. Moreover, the
3 procedural process of requesting an exemption provides some notice and
4 transparency to the Department of Education, and to consumers like Nathan and
5 Joanna, concerning an institution’s intention to comply with Title IX. Consequently,
6 this Court should enforce the unambiguous requirements of the regulation, rather than
7 the current statement on the Department’s website.

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

10 Fuller relies on inferences in its favor and documents outside the complaint to
11 argue that its religious tenets are inconsistent with application of Title IX. Motion,
12 pp. 8-9. Such an analysis is inappropriate on a motion to dismiss, where all inferences
13 must be drawn in favor of Plaintiffs. *Usher*, 828 F.2d at 561. While a court should
14 not second-guess the sincerity of Fuller’s religious beliefs, discovery may show that
15 Title IX’s prohibition on expelling Joanna and Nathan because of their civil same-
16 sex marriages would not violate Fuller’s religious beliefs. Indeed, in light of Fuller’s
17 seemingly contradictory policies and practices on non-discrimination, Title IX, the
18 admission of LGBTQ students and sexual conduct, discovery may demonstrate that
19 Joanna and Nathan’s expulsions were based on the personal animus of a couple of
20 administrators, rather than on Fuller’s religious beliefs.²

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

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

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

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

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

14 138 S.Ct. 1719, 1727 (2018). As demonstrated below, the Religion Clauses permit
15 Congress to attach non-discrimination requirements, like those found in Title IX, to
16 the provision of federal funds to private actors.

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

18 Fuller first argues that Plaintiffs’ claims are barred by the church autonomy
19 doctrine. Motion, p. 11. However, Fuller’s argument fails for the simple reason that
20 Fuller, while a religious educational institution, is not a church. The church autonomy
21 doctrine prohibits secular courts from interfering in matters of church government,
22 church doctrine and church discipline. *Id.* The U.S. Supreme Court and federal
23 appellate courts apply this doctrine exclusively in the context of disputes over church
24 property, church membership and church leadership positions within hierarchical
25 churches. *See Watson v. Jones*, 80 U.S. 679 (1871) (church property dispute); *Kedroff*
26 *v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (determination of which prelate was
27 entitled to use and occupancy of cathedral); *Serbian E. Orthodox Diocese v.*
28 *Milivojevich*, 426 U.S. 696 (1976) (review of validity of Serbian Orthodox Church’s
reorganization of the American-Canadian Diocese); *Paul v. Watchtower Bible Tract*
Society of New York, Inc., 819 F.2d 875 (9th Cir. 1987) (shunning of dissociated
member of Jehovah’s Witness Church); *Maktab Tarighe Oveyssi Shah Maghsoudi v.*
Kianfar, 179 F.3d 1244, 1247-48 (9th Cir. 1999) (succession of religious office);
Ammons v. N. Pac. Union Conf. of Seventh-Day Adventists, 139 F.3d 903 (9th Cir.
1998) (unpublished opinion) (censorship of member of Seventh-Day-Adventist

1 Church).

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

17 Because Fuller is not a church, Fuller may not benefit from the church
 18 autonomy doctrine. This Court should not expand a doctrine that has been limited to
 19 churches for over a century. In any event, the doctrine is irrelevant in the context of
 20 Plaintiffs’ claims against Fuller, where, rather than merely meddling in the private
 21 affairs of a church or seminary, the Court is analyzing whether the federal government
 22 may attach non-discrimination requirements to laws that provide federal funding to
 23 educational institutions.

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

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

1 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196
2 (2012) (recognizing limited application of ministerial exception to context of
3 employment claims by ministers).

4 The Court noted that the “exception is not limited to the head of a religious
5 congregation” but limited application of the ministerial exception to those, who on
6 balance, qualified as a minister after examining four factors: (1) whether the church
7 held the person out as a minister “with a role distinct from that of most of its
8 members”; (2) whether the person has the title of minister reflected by a formal
9 commissioning process; (3) whether the person held themselves out as a minister in
10 the employment position at issue; and (4) whether the person’s “job duties” reflected
11 a religious leadership role. *Id.* at 191-92. The ministerial exception has been applied
12 beyond churches to cover other religious organizations, including educational
13 institutions. *See Petruska v. Gannon Univ.*, No. 1:04-cv-80, 2008 WL 2789260 (W.D.
14 Pa. Mar. 31, 2008) (dismissing employment claim by chaplain of Catholic diocesan
15 college). However, it has always been limited to employment claims by those who
16 are ministers.

17 Fuller relies on *Alcazar v. Corporation of Catholic Archbishop of Seattle*, in
18 support of its position that the ministerial exception should apply to a Title IX claim
19 brought by seminary students. Motion, p. 14; *Alcazar v. Corp. of Catholic Archbishop*
20 *of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2011). However, *Alcazar* did not address
21 whether the ministerial exception applied to a seminary student who was asserting a
22 Title IX claim *as a student* (regarding admissions, discipline, etc.), like Joanna and
23 Nathan are asserting here. Rather, *Alcazar* concerned a seminary student who was
24 *employed* by the seminary and asserted *employment* claims. The case did not involve
25 Title IX claims. The Court recognized that “Churches, like all other institutions, must
26 adhere to state and federal employment laws” but that courts have “recognized a
27 ‘ministerial exception’ to that general rule” for plaintiffs like *Alcazar*, who were hired
28 to perform religious duties, such as assisting with Mass. *Id.* at 1289, 1292-93. Here,

1 Joanna and Nathan assert claims as students, not as employees. Finally, *Alcazar* did
 2 not analyze whether the government may attach non-discrimination requirements
 3 when providing federal funding to a seminary. Consequently, *Alcazar* is not
 4 controlling.

5 The ministerial exception is a narrow exception that federal courts have never
 6 applied to claims like those before this Court. In order to preserve the broad mandate
 7 of Title IX's prohibition on sex discrimination in federally-funded education, this
 8 Court should decline Fuller's invitation to drastically expand the ministerial
 9 exception.

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

11 Fuller argues that Plaintiffs' claims are also barred by the freedom of
 12 association. Motion, p. 15. Plaintiffs agree that the freedom of association protects a
 13 religious organization's right not to associate and to be insulated from being forced
 14 to accept members it does not desire. *See Boy Scouts v. Dale*, 530 U.S. 640 (2000)
 15 (exclusion of gay scoutmaster). Fuller is correct that the "exercise of these
 16 constitutional rights is not deprived of protection if the exercise is not politically
 17 correct and even if it is discriminatory against others." *AHDC v. City of Fresno*, 433
 18 F.3d 1182 (9th Cir. 2006). Thus, the Boy Scouts, a private, expressive association,
 19 may exclude gay scoutmasters.

20 Here, Plaintiffs acknowledge that Fuller is an expressive association with
 21 associational rights protected by the First Amendment. If Fuller were a truly private
 22 actor, the Constitution might permit Fuller to discriminate based on sex in violation
 23 of Title IX. However, Fuller is not a truly private actor, as it is heavily subsidized by
 24 the federal government. The Constitution does not compel the government to
 25 subsidize discrimination through federal funding.

26 In *Norwood v. Harrison*, 413 U.S. 455, 468–469 (1973), the Court reasoned
 27 that "a private school—even one that discriminates—fulfills an important educational
 28 function; however, ... [that] legitimate educational function cannot be isolated from

1 discriminatory practices ... *discriminatory treatment exerts a pervasive influence on*
2 *the entire educational process.*” (emphasis added). Consequently, the Court has
3 upheld statutes prohibiting discrimination by private educational institutions. *See*
4 *Runyon v. McCrary*, 427 U.S. 160 (1976) (statute requiring private schools to admit
5 black students does not violate associational rights). In *Runyon*, the Court noted that
6 “it may be assumed that parents have a First Amendment right to send their children
7 to educational institutions that promote the belief that racial segregation is desirable,
8 and that the children have an equal right to attend such institutions. But it does not
9 follow that the Practice of excluding racial minorities from such institutions is also
10 protected by the same principle.” *Id.* at 176.

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

20 The Court recognized that Bob Jones University, as a religious educational
21 institution, possessed rights under the First Amendment. *Id.* However, the Court
22 determined that the government’s compelling interest in eradicating racial
23 discrimination in education outweighed the university’s interest in maintaining
24 racially discriminatory policies based on its sincerely held religious beliefs. *Id.* at 604.
25 Much like Bob Jones University’s sincerely held religious beliefs regarding marriage
26 and sexuality, which gave rise to its community standards prohibiting interracial
27 dating, Fuller claims that its religious beliefs have given rise to its community
28 standards prohibiting same-sex marriage. However, the community standards at both

1 institutions violate federal laws that prohibit discrimination when the government
 2 provides financial benefits. The First Amendment does not require the federal
 3 government to subsidize such discriminatory practices. *See Christian Legal Soc.*
 4 *Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010) (law
 5 school’s policy requiring officially recognized religious student groups to comply
 6 with school’s nondiscrimination policy regarding sexual orientation did not violate
 7 First Amendment right to expressive association).

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

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

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

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

1 such discrimination because the government “is dangling the carrot of subsidy, not
 2 wielding the stick of prohibition.” *Christian Legal Soc.*, 561 U.S. at 683 (citing
 3 *Norwood*, 413 U.S. at 463). In his concurrence, Justice Stevens noted that the
 4 religious group at issues excluded students who engage in “unrepentant homosexual
 5 conduct” but went on to note that the group’s expressive association argument “is
 6 hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and
 7 women...A free society must tolerate such groups. It need not subsidize them[.]”
 8 *Christian Legal Soc.*, 561 U.S. at 702-03.

9 Congress, in enacting Title IX, clearly expressed its agreement that sex
 10 discrimination in education violates a fundamental public policy. Moreover,
 11 numerous Supreme Court decisions have preserved Congress’s ability to further its
 12 public policy goals by mandating non-discrimination requirements when extending
 13 public benefits to private religious organizations. This Court should not accept
 14 Fuller’s invitation to upend decades of Supreme Court precedent.

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

16 This suit involves claims by private parties against a private party. RFRA does
 17 not bar Plaintiffs’ claims because RFRA applies only to suits in which the
 18 government is a party. 42 U.S.C. § 2000bb–1(b) (the “*government*” must
 19 “demonstrate...that application of the burden” is the least restrictive means of
 20 furthering a compelling governmental interest); § 2000bb–1(c) (“A person whose
 21 religious exercise has been burdened in violation of this section may assert that
 22 violation as a claim or defense in a judicial proceeding and obtain appropriate relief
 23 *against a government.*”) (emphasis added); *see also Tomic v. Catholic Diocese of*
 24 *Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (RFRA not applicable to suits between
 25 private parties); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617
 26 F.3d 402, 410 (6th Cir. 2010) (“The text of the statute makes quite clear that Congress
 27 intended RFRA to apply only to suits in which the government is a party.”); *Hankins*
 28 *v. Lyght*, 441 F.3d 96, 114-15 (2d Cir. 2006 (Sotomayor, J., dissenting)) (“this

1 provision strongly suggests that Congress did not intend RFRA to apply in suits
2 between private parties.”); *Rweyemamu v. Cote*, 520 F.3d 198, 203-204, n. 2 (2d Cir.
3 2008) (the “text of RFRA is plain” and “we do not understand how [RFRA] can apply
4 to a suit between private parties”).

5 Moreover, even if RFRA were to apply to suits between private parties, it
6 would not bar Plaintiffs’ claims because RFRA cannot act as a shield to
7 discrimination claims. In *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), the
8 Court addressed “the possibility that discrimination in hiring, for example on the basis
9 of race, might be cloaked as religious practice to escape legal sanction” and clearly
10 stated that “[o]ur decision today provides no such shield. The Government has a
11 compelling interest in providing an equal opportunity to participate in the workforce
12 without regard to race, and prohibitions on racial discrimination are precisely tailored
13 to achieve that critical goal.” *Id.* at 733. Here too, the government has a compelling
14 interest in providing an equal opportunity to participate in federally funded
15 educational programs and prohibitions on sex discrimination are precisely tailored to
16 achieve that critical goal. Indeed, Title IX is narrowly tailored because it only applies
17 to educational institutions that receive federal funding and because it provides a
18 religious exemption for educational institutions controlled by a religious
19 organization.

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

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

4 **F. Plaintiffs’ state-law claims should not be dismissed³**

5 **1. Plaintiffs’ Unruh Act claims should not be dismissed**

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

7 Fuller is a business establishment under the Unruh Act. In *Doe v. California*
8 *Lutheran High Sch. Ass’n*, 88 Cal. Rptr. 3d 475 (Ct. App. 2009), the Court determined
9 that the Unruh Act did not encompass a small Lutheran high school that primarily
10 served Lutheran congregations. The Court emphasized the “narrow scope” of its
11 holding but determined that the high school was “an expressive social organization
12 whose primary function is the inculcation of values in its youth members.” *Id.* at 483,
13 485 (internal quotations omitted). In contrast, Fuller does not serve youth, nor does it
14 primarily serve youth from a specific denomination. Rather, Fuller serves graduate
15 students from all over the world and from over a hundred different denominations.
16 Fuller has a large campus in California, satellite campuses, online degree programs,
17 a large administration and sizeable budget. While religious in nature, Fuller operates
18 much like a large business enterprise.

19 Moreover, a seminary qualifies as a business establishment when it sells its
20 services to the public in exchange for tuition and is heavily funded by the federal
21 government. *See Stevens v. Optimum Health Institute*, 810 F. Supp. 2d 1074 (S.D.
22 Cal. 2011) (finding that a church’s health spa program was a business establishment
23 even though it claimed that the “Church’s ultimate goal is to bring the participants to
24 an understanding of their purpose in life and to get them to affirm or reaffirm the
25

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

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

12 **b. The Unruh Act applies extraterritorially**

13 Fuller argues that the Unruh Act does not apply to Joanna because she is a
 14 Texas resident who did not physically attend classes in California. Motion, p. 20.
 15 Fuller relies on *Loving v. Princess Cruise Lines, Ltd.*, No. CV-08-2898-JFW, 2009
 16 WL 7236419 (C.D. Cal. Mar. 5, 2009) and *Warner v. Tinder Inc.*, 105 F. Supp. 3d
 17 1083 (C.D. Cal. 2015) in support of this proposition. However, *Princess Cruise Lines*
 18 merely held that the Unruh Act does "not apply to claims of nonresidents of California
 19 injured by conduct occurring beyond California's borders." *Loving v. Princess Cruise*
 20 *Lines, Ltd.* 2009 WL 7236419 at *8. Here, while Joanna is a Texas resident, she was
 21 harmed by Fuller's conduct occurring within California's borders. Consequently, this
 22 Court may properly exercise its power over Fuller's conduct towards Joanna.
 23 Moreover, while the court in *Tinder* determined that it was irrelevant that the alleged
 24 discrimination was approved by defendants' employees in California, that case does
 25 not account for the circumstance in which a California business sells its online
 26 educational services to a customer in another state. Consequently, this Court may
 27 properly exercise its power over Fuller's online operations.

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

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

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

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

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

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

1 Regarding Plaintiffs’ breach of contract claim, Plaintiffs have sufficiently
2 alleged their performance and/or excuse for non-performance. They allege that the
3 sole basis for their expulsion was their same-sex marriages. FAC, 1 (“This is a civil
4 rights case about two students who were expelled from their graduate program for
5 one reason: they married someone of the same sex.”). To the extent that their same-
6 sex marriages would violate their contracts with Fuller, such a contractual provision
7 is not enforceable as it violates federal and state law. *Cook v. King Manor and*
8 *Convalescent Hospital*, 40 Cal. App. 3d 782, 794 (1974) (contractual clause “void as
9 against public policy”). Moreover, to the extent their same-sex marriage constitutes
10 a breach of an enforceable contract provision, it is not a material breach sufficient to
11 terminate their contract with Fuller. Contract termination is frowned upon as a
12 remedy and will only be permitted where the breach is material. *Brown v. Grimes*,
13 192 Cal. App. 4th 265, 277 (2011) (“When a party’s failure to perform a contractual
14 obligation constitutes a material breach of the contract, the other party may be
15 discharged from its duty to perform under the contract.”).

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

1 277 (“Normally the question of whether a breach of an obligation is a material breach,
2 so as to excuse performance by the other party, is a question of fact.”).

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

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

23 (a) ‘State financial assistance’ means any funds or other
24 form of financial aid appropriated or authorized
25 pursuant to state law, or pursuant to federal law
26 administered by any state agency, for the purpose of
27 providing assistance to any educational institution for its
28 own benefit or for the benefit of any pupils admitted to
the educational institution.

(b) State financial assistance shall include, but not be
limited to, all of the following:

- (1) Grants of state property, or any interest therein.
- (2) Provision of the services of state personnel.
- (3) Funds provided by contract, tax rebate,

1 appropriation, allocation, or formula.

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

20 **IV. CONCLUSION**

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

24 Respectfully submitted,

25 DATED March 24, 2020

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