

1 PAUL C. SOUTHWICK (*Pro Hac Vice*)
paulsouthwick@dwt.com
2 ARLEEN FERNANDEZ (State Bar No. 318205)
arleenfernandez@dwt.com
3 DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, 24th Floor
4 Los Angeles, California 90017-2566
Telephone: (213) 633-6800
5 Fax: (213) 633-6899

6 Attorneys for Plaintiffs
JOANNA MAXON and
7 NATHAN BRITTSAN

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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 STAY DISCOVERY
PENDING RESOLUTION OF
DEFENEDANTS' MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT
[DKT. 58]**

DEMAND FOR JURY TRIAL

(Declaration of Paul C. Southwick filed
concurrently)

Date: June 30, 2020
Time: 10:00 am
Dept.: Courtroom 8B
Judge: Hon. Consuelo B. Marshall

1 COME NOW, Plaintiffs Joanna Maxon and Nathan Brittsan submit the
 2 following Memorandum of Points and Authorities and Declaration of Paul C.
 3 Southwick (“Southwick Decl.”) filed concurrently herewith in Opposition to
 4 Defendants’ Motion to Stay Discovery Pending Resolution of Defendants’ Motion
 5 to Dismiss Plaintiffs’ First Amended Complaint. [Dkt. 058]

6 A party seeking a stay of discovery carries a heavy burden. *Blankenship v.*
 7 *Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). The party must make a strong
 8 showing why discovery should be denied. *Id.* The Federal Rules do not provide for
 9 an automatic stay of discovery pending a dispositive motion. Moreover, because the
 10 routine issuance of a stay “would be ‘directly at odds with the need for expeditious
 11 resolution of litigation,’ courts generally disfavor them.” *Quezambra v. United*
 12 *Domestic Workers of Am. AFSCME Local 3390*, No. 8:19-cv-0092, 2019 WL
 13 8108745 (C.D. Cal. Nov. 14, 2019) (internal citation omitted). Moreover, courts
 14 have recognized the “fact that a non-frivolous motion [to dismiss] is pending is
 15 simply not enough to warrant a blanket stay of all discovery.” *Tradebay, LLC v.*
 16 *eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. Dec. 13, 2011).

17 Plaintiffs are mindful, however, that courts are to consider proportionality
 18 under Fed. R. Civ. P. 26(b)(1) at all stages of the proceeding. Consequently,
 19 Plaintiffs currently seek limited discovery as described below.

20 I. ARGUMENT

21 Plaintiffs seek discovery relating to Fuller Theological Seminary’s (“Fuller”)
 22 First Amendment and statutory exemption defenses. To begin, such defenses are
 23 more properly the subject of a summary judgment motion than a motion to dismiss,
 24 particularly where, as here, there are numerous factual issues in dispute relating to
 25 those defenses. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,
 26 556 U.S. 171 (2012) (ministerial exception case decided on summary judgment
 27 motion, not motion to dismiss); *Biel v. St. James School*, 911 F.3d 603 (9th Cir.
 28

1 | 2018) (ministerial exception decided on summary judgment); *Our Lady of*
 2 | *Guadalupe School v. Morrissey-Berru*, 769 Fed.Appx. 460 (9th Cir. 2019) (same).

3 | Additionally, “[a]s an affirmative defense, the ministerial exception can serve
 4 | as the basis for dismissing a complaint at the pleadings stage under Rule 12(b)(6)
 5 | only when the elements of the defense appear on the face of the complaint.” *See*
 6 | *Jones v. Bock*, 549 U.S. 199, 215 (2007) (citing 5B Charles Alan Wright & Arthur
 7 | R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)); *Rivera v. Peri &*
 8 | *Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013). Here, as described more fully
 9 | below and in Plaintiffs’ Opposition to Defendant’s Motion to Dismiss, the elements
 10 | of Defendants’ ministerial exception defense do not appear on the face of the
 11 | complaint.

12 | Second, this case concerns a publicly funded academic institution and the
 13 | question of whether the government is required to subsidize Fuller’s discrimination
 14 | through financial assistance. Fuller argues that Plaintiffs’ claims, and even
 15 | discovery relating to their claims, raises an excessive entanglement concern.
 16 | However, neither the claims nor the discovery raise such a concern, as Fuller has
 17 | willingly entangled itself in governmental regulation.¹ As a federally funded
 18 | institution of higher education, and one accredited by secular accrediting bodies,
 19 | Fuller must not only comply with the many rules and regulations under Title IX, but
 20 | Fuller must also comply with the Family Educational Rights and Privacy Act
 21 | (“FERPA”), the Violence Against Women Act, and the Clery Act, among other
 22 | statutes and regulations. This is not a case where the plaintiff is trying to storm into
 23 | a church and obtain the personnel files of the church’s ministers. This is a case
 24 | where students, who obtained federal student loans to attend a secularly accredited
 25 | _____

26 | ¹ Moreover, Fuller has agreed to provide, and has provided, initial disclosures.
 27 | While Fuller’s current initial disclosures are deficient, *see* Southwick Decl., Ex. 2,
 28 | Fuller has agreed to amend its initial disclosures.

1 academic institution, seek discovery to help them oppose the defendants’
2 affirmative defenses.

3 Relatedly, Defendants argue that Defendants’ Motion to Dismiss, based
4 largely on First Amendment and statutory exemption defenses, is likely to succeed.
5 Dkt. 58-1, p. 5. Plaintiffs disagree and incorporate their arguments from their
6 Opposition to Defendants’ Motion to Dismiss. Plaintiffs’ claims fit comfortably
7 within a long line of Supreme Court precedent. This precedent has granted the
8 government broad latitude to regulate the conduct of private religious actors when
9 the regulation is tied to public funding. The First Amendment does not compel the
10 government to subsidize discriminatory practices. *See, e.g. Grove City College v.*
11 *Bell*, 465 U.S. 555 (1984) (Congress is free to attach non-discrimination conditions
12 to federal financial assistance); *Christian Legal Soc. Chapter of the University of*
13 *California v. Martinez*, 561 U.S. 661 (2010) (“our decisions have distinguished
14 between policies that require action and those that withhold benefits”); *Bob Jones*
15 *University v. United States*, 461 U.S. 574 (1983) (IRS permitted to deny tax-exempt
16 status to religious university with racially discriminatory policies).

17 Defendants also raise the specter of the two pending Supreme Court cases
18 referenced by Defendants. Dkt. 58-1, pp. 8-9. However, the resolution of those
19 cases will have little or no bearing on the First Amendment and statutory exemption
20 defenses they assert. To begin, *Our Lady of Guadalupe School v. Morrissey-Berru*,
21 No. 19-267 (U.S. filed Aug. 28, 2019), and its companion case *St. James School v.*
22 *Biel*, No. 19-348 (U.S. filed May 29, 2018), concern employment claims by
23 teachers at private K-8 schools owned by the Catholic Church. Moreover, neither
24 case (1) involves public funding, (2) addresses whether the government may attach
25 nondiscrimination requirements to public funding, or (3) involves a Title IX claim
26 by students. Consequently, *Morrissey-Berru* and *Biel* are likely to have minimal, if
27 any, effect on Defendants’ defenses.

28

1 The other case Defendants reference that is currently before the Supreme
2 Court, *Bostock v. Clayton County, Georgia*, No. 17-1618 (U.S. filed May 25, 2018),
3 and its companion case *Altitude Express Inc. v. Zarda*, No. 17-1623 (U.S. filed May
4 29, 2018), relate to the scope of protections available to plaintiffs asserting Title VII
5 employment claims based on sex discrimination. The plaintiffs in those cases were
6 not married to same-sex partners and did not experience an adverse employment
7 action because of their same-sex marriages. Moreover, neither case involves a
8 defendant religious organization or a Title IX claim by a student. Consequently,
9 *Bostock* and *Altitude Express* will have no bearing on Defendants' First
10 Amendment and religious exemption defenses and are only likely to have an
11 indirect impact on the scope of protections available to plaintiffs under Title IX. In
12 any event, a stay of discovery to wait for a ruling from the Supreme Court is
13 unnecessary because Plaintiffs are not currently seeking discovery on issues that
14 could be impacted by the Court's decision in those cases.

15 Defendants also argue that this case can be disposed of without discovery.
16 Dkt. 58-1, pp. 2-4. Plaintiffs disagree. While the parties Joint Rule 26(f) Report and
17 Discovery Plan recognized that the "core factual issues are not in dispute at this
18 stage of the litigation," that recognition was explicitly limited by the language in the
19 remainder of sentence, which states that the "parties agree that Fuller dismissed
20 Plaintiffs because of their same-sex marriages." Dkt. 57, p. 2. The purpose of that
21 statement from the Joint Rule 26(f) Report, was to inform the Court that this case is
22 not about whether Fuller had a different, non-discriminatory reason for expelling
23 Plaintiffs and that the Parties would not need to engage in substantial discovery
24 about the who, what, where and why of Plaintiffs' expulsions. Rather, the factual
25 disputes in this case principally relate to the facts surrounding Defendants' defenses
26 based on the First Amendment and statutory exemptions.

27 Plaintiffs' First Set of Requests for Production of Documents seeks evidence
28 to help resolve a number of factual issues relevant to analyzing Defendants' First

1 Amendment and statutory exemption defenses. *See* Southwick Decl., Ex. 1. **First**,
2 while the parties agree that Fuller is a religious organization, and that it possess
3 certain First Amendment rights, the parties have not agreed as to the type or nature
4 of the religious organization. Is Fuller controlled by a church or religious
5 denomination? If so, what is that church or denomination? Who does that church
6 consider to be one of its ministers? What are the church’s governing documents and
7 what do they say about marriage and sexuality?

8 **Second**, if Fuller is not controlled by a church or religious denomination, but
9 is nevertheless a religious nonprofit organization possessing First Amendment
10 rights, will the U.S. Department of Education and the State of California’s
11 religiously neutral non-discrimination statutes substantially burden Fuller’s
12 religious or associational rights? If Fuller enrolls students who are atheists or from
13 non-Christian traditions can Fuller still claim a substantial burden would be caused
14 by admitting students who marry someone of the same sex?

15 **Third**, while the parties agree that Fuller receives financial assistance from
16 the federal government, they disagree as to whether Fuller receives financial
17 assistance from the State of California, whether through the Student Tuition
18 Recovery Fund or otherwise.

19 **Fourth**, questions of fact remain as to whether Fuller has applied for or
20 received a religious exemption from the requirements of Title IX or from the
21 requirements of California’s Equity in Higher Education Act.

22 Other question of fact remain, as reflected by the requests in Plaintiffs’ First
23 RFP. Consequently, a number of factual issues relating to Defendants’ First
24 Amendment and statutory exemption defenses are unresolved.

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II. CONCLUSION

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

Respectfully submitted,

DATED June 9, 2020

DAVIS WRIGHT TREMAINE LLP

By: /s/ Paul Southwick
Paul C. Southwick (*Pro Hac Vice*)

Attorneys for Plaintiffs
Joanna Maxon and Nathan Brittsan