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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

ELIZABETH HUNTER, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF EDUCATION,
et al.,

Defendants,

v.

COUNCIL FOR CHRISTIAN COLLEGES
& UNIVERSITIES,

Proposed Defendant-Intervenor.

No. 6:21-CV-00474-AA

PROPOSED DEFENDANT-INTERVENOR
CCCU'S MOTION TO INTERVENE AND
MEMORANDUM IN SUPPORT

ORAL ARGUMENT REQUESTED

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LR 7-1(A) CERTIFICATION

The proposed intervenor certifies that, as required by LR 7-1(A), it has conferred with counsel for the parties. The United States take no position currently, and the Plaintiffs oppose this motion.

MOTION AND INTRODUCTION

The Council for Christian Colleges & Universities (“CCCU”) moves to intervene as a defendant as of right under Fed. R. Civ. P. 24(a) or, in the alternative, by permission under Fed. R. Civ. P. 24(b)(1). Although Plaintiffs’ claims are legally frivolous, it is important that CCCU—widely recognized as one of the leading voices of American religious higher education—be permitted to assert and defend its members’ interests in preserving the important provision of Title IX that Plaintiffs challenge here.

The First Amendment’s Religion Clauses protect the right of religious colleges, like other religious institutions, to decide and further their beliefs “without government intrusion.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). This freedom is “essential” to their “central mission” of furthering the “religious education and formation of students.” *Id.* at 2055. Making decisions about teachers, the issue in *Our Lady of Guadalupe*, is only one “component” of religious colleges’ “autonomy with respect to internal management decisions that are essential” to fulfilling that mission. *Id.* at 2060. Another is through setting belief-based conduct codes applicable to students and faculty alike. For nearly 50 years, Congress has protected religious colleges’ right to set such conduct codes, exempting them from Title IX whenever its application would require them to violate religious tenets. 20 U.S.C. § 1681(a)(3).

The member colleges of the CCCU benefit from that exemption. CCCU comprises a wide variety of religious colleges, many of which have core religious tenets that conflict with Plaintiffs’

understanding of Title IX. Thus, to CCCU's member colleges, the Title IX religious exemption has proven indispensable as contemporary notions of sexuality and gender depart, often substantially, from the religious beliefs that animate every aspect of Christian campus life. Because it contests the constitutionality of that exemption, this case presents an existential threat to religious higher education: Removing Title IX's religious exemption, as applied to LGBT students or otherwise, will deprive religious colleges of the oxygen that gives them life by forbidding them, on pain of losing federal assistance for their students, from teaching and expecting adherence to their core religious beliefs.

Moreover, although the Complaint mentions many religious colleges by name—including eighteen of CCCU's members—it included none as defendants. *See* Compl., Dkt. 1, ¶¶ 9–43. Unless this Court grants this motion, many of the very colleges that directly benefit from the exemption and that are the specific subjects of plaintiffs' attacks will go unheard, even as the exemption, if Plaintiffs prevail, is largely eviscerated.

As explained in more detail below, CCCU (by asserting the rights of its member religious colleges) is entitled to intervene under Rule 24(a). CCCU's member schools have a powerful interest in preserving the Title IX exemption in all its applications. Only through intervention can CCCU ensure that this Court fully understands the vital importance of the religious exemption to religious colleges in an ever-changing world. And, because the current Administration has already promised to “reverse” what it calls the “misuse of broad exemptions” to “discriminate against LGBTQ+ people”—a characterization of religious exemptions that the proposed intervenor categorically rejects—it is unlikely that the federal defendants will adequately represent the interests of CCCU's member colleges. *See* Biden Harris, *The Biden Plan To Advance LGBTQ+*

Equality in America and Around the World, <https://joebiden.com/lgbtq-policy/>. Accordingly, CCCU is entitled to intervene to ensure the exemption's continued vitality.

But even if this Court finds that intervention as of right is inappropriate, it should nevertheless allow CCCU to intervene because it could do so without harming any of the parties and because the defenses it will raise are directly related to the underlying challenge to the Title IX religious exemption. Indeed, as shown in the proposed motion to dismiss attached as Exhibit C (which CCCU will formally file after intervention is granted), CCCU intends to move to dismiss all of Plaintiffs' claims on three independent grounds: Plaintiffs lack standing; they failed to join necessary parties; and their legal claims are all frivolous.

In short, because CCCU satisfies all the requirements of Rule 24(a) and, alternatively, Rule 24(b)(1)(B), the motion should be granted.

STATEMENT

A. Legal Background

Section 901 of Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. § 1681(a). This seemingly general prohibition, however, is subject to multiple exceptions, including an exemption for single-sex or military institutions. *Id.* § 1681(a)(4), (5). Most notable here, Congress carved out an exception for religious educational institutions when Title IX’s application would “not be consistent with the religious tenets of such organization.” *Id.* § 1681(a)(3). Whenever the application of Title IX would be inconsistent with a religious school’s core religious beliefs, the exemption applies, whether or not the school has applied for it. 34 C.F.R. § 106.12(b).¹

Educational institutions demonstrate that they are controlled by a religious organization by showing that they satisfy *any* of the following conditions:

- (1) are a divinity school or department;
- (2) require their faculty, students, or employees to have some relationship with the controlling organization, such as formal membership or personal beliefs in the doctrine;

¹ Although not necessary, many schools—including many of the Council for Christian Colleges & Universities’ member colleges, have expressly sought recognition that the exemption belongs to them by submitting in writing an enumerated list of reasons why Title IX’s application would require them to violate their religious beliefs. *See, e.g.*, Office for Civil Rights, *Religious Exemptions Index 2009-2016*, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html>; Office for Civil Rights, *Other Correspondence*, <https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html> (cataloging, among other things, requests from Jan. 1, 2017 to the present); Office for Civil Rights, *Religious Exemptions Index Prior to 2009*, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html>. In response to such letters, presidential administrations since Title IX’s enactment have uniformly acknowledged the exemption’s application to protect religious institutions’ religious practices and beliefs.

- (3) have controlling or official documents expressly mentioning that the institution is controlled by the religious organization, committed to its doctrines, subject to its leadership appointments, and significantly funded by the religious organization or its subparts;
- (4) have a doctrinal statement of religious practices or beliefs, including a requirement that members engage with those practices or espouse the beliefs of the religion itself;
- (5) have a published institutional religious mission that mentions the importance of religious tenets, beliefs, or teachings; or
- (6) are able to demonstrate other indicia of religious control.

34 C.F.R. § 106.12(c); A.S. Singleton Memo (Feb. 1985), <https://perma.cc/2P9F-W98H>. Any single factor is itself “sufficient to establish that an educational institution is controlled by a religious organization.” *Ibid*.

Currently, the Title IX religious exemption either applies to a religious college—meaning that Title IX’s general prohibition of sex discrimination does not—or it does not apply to the religious college—meaning that the college is subject to the full force of Title IX (unless, of course, another exception to Title IX applies). Congress did not engage in line drawing: If applying Title IX would require a religious college to violate its religious tenets, then Title IX simply does not apply. 20 U.S.C. § 1681(a)(3).

This case, brought by thirty-three named plaintiffs who are or were students at private religious colleges or universities whose students receive federal funding, seeks to narrow that categorical exemption. Compl. ¶1. Plaintiffs concede that the religious exemption currently protects these colleges. *See, e.g.*, Compl., Dkt. 1, ¶¶ 52, 71, 88, 121, 162, 179, 192, 220, 385, 397. They claim this protection is unconstitutional insofar as it allows religious colleges to teach and require compliance with their religious beliefs on gender and human sexuality, including the proper role of marriage. *Id.* ¶ 3; *id.* at 66. Because of this, they seek, among other things, to enjoin

the religious exemption as applied to “sexual and gender minority students” and to revoke the exemption to the extent it affects such students. *Id.* at 66.

B. Religious higher education brings enormous benefits to society.

Congress’s adoption of the Title IX religious exemption reflects the well-settled value and importance of religious higher education in America. In addition to being academically competitive with non-religious schools, religious colleges and universities typically offer advantages that are often not as readily available in non-religious institutions. These include the opportunity to study academic disciplines guided by faith,² and to naturally integrate community service into higher education.³ Religious colleges also often provide greater physical safety to their students⁴ and a broader diversity of philosophical and political perspectives among professors and students.⁵

Since before the Founding, moreover, religious colleges and universities have played a crucial role in educating the next generation of believing citizens and leaders. At such institutions, teachers teach and students learn through the lens of faith. Indeed, that is the distinctive promise a typical religious college makes to students and their families—that all instruction will be shaped by the school’s particular theological understandings. Thus, the social-work course, the math course, and the English literature course are all taught and studied from a faith-based perspective.

² See *Our Lady*, 140 S. Ct. at 2066 (exploring the “close connection that religious institutions draw between their central purpose and educating the young in the faith”).

³ See CCCU, *The Case for Christian Higher Education* 8-10 (2018), https://www.cccu.org/wp-content/uploads/2018/08/2018-Case-for-CHE_WEB_pages.pdf.

⁴ See EDSmart, *College Sexual Assault Statistics of Top Ranked Schools 2015*, <http://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#stats> (last visited May 1, 2021).

⁵ Ellen B. Stolzenberg, et al., Higher Education Research Institute at UCLA, *Undergraduate Teaching Faculty: The HERI Survey, 2016-2017*, at 38 (2019), <https://heri.ucla.edu/monographs/HERI-FAC2017-monograph.pdf>.

Faith is not a mere additive to the educational experience; it is the oxygen that gives it life. To deliver on that promise, many religious colleges believe it is important that all members of the community live the basic precepts taught by that community—including principles related to marriage and sexuality.

C. CCCU represents over one hundred colleges controlled by religious organizations.

Founded in 1976, the Council for Christian Colleges & Universities is the largest association of protestant Christian institutions of higher learning. Exhibit A, Declaration of Shirley Hoogstra ¶ 1. Its 189 member colleges span the globe, and over 140 of them are in the United States. *Id.* Each of its members is accredited and provides the comprehensive educational opportunities to their students, leavened by faith-based instruction and perspectives. *Id.* CCCU’s stated mission is to “advance the cause of Christ-centered higher education” and help its members “transform lives by faithfully relating scholarship and service to biblical truth.” *Id.* ¶ 2. Although CCCU’s member colleges represent more than 30 different Christian denominations, they are united by CCCU’s mission. *Id.* Each of CCCU’s member institutions strives to further the Christian faith by teaching its students, and serving as models of, genuine Christian living. *Id.*

Many of CCCU’s schools have sincere religious beliefs that squarely conflict with contemporary understandings about sex and gender. *Id.* ¶ 3. Those beliefs are grounded in biblical teachings, including the ideas (1) that a person’s biological sex is innate and unchangeable; (2) that marriage, properly understood, is between one man and one woman; (3) that sexual contact is only proper within the confines of such a marriage; and (4) that men and women are different and should be separated in certain situations and in certain facilities. *Id.* Faculty at these member schools teach these doctrines to their students. *Id.* ¶ 4. Consistent with these beliefs, and guided by the further belief that biblical teachings can be instilled through righteous living, many of CCCU’s

member schools have enacted codes of conduct for their students, staff, and faculty. *Id.* Those codes often require that students live according to the biblical principles described above, including forbidding sexual intimacy outside of marriage or between members of the same sex, forbidding gender transitioning, and forbidding same-sex marriages. *Id.*

If, as Plaintiffs allege (Compl. ¶ 3), Title IX’s definition of “sex” does include “sexual orientation” and “gender identity,” then CCCU’s member schools have core religious tenets on gender and sexually that directly conflict with Title IX. Hoogstra Decl. ¶ 5. Moreover, the vast majority of CCCU schools have students that receive federal funding. *Id.* ¶ 6. Several of CCCU’s member colleges—though certainly not all—have reached out to the Department of Education expressly to guarantee that Title IX’s religious exemption protects them and their students. *Id.* If not for the Title IX religious exemption, their students would be subject to severe sanctions and burdens on their religious exercise, simply for adhering to their codes of conduct and for teaching their students biblical concepts about sex and gender. *Id.*

ARGUMENT

I. CCCU Has Associational Standing To Protect The Interests Of Its Member Colleges.

Preliminarily, proposed intervenor CCCU has associational standing to intervene on behalf of its member colleges, many of which were mentioned by name in the Complaint. An organization has standing to assert its members interests if “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Am. Diabetes Ass’n v. U.S. Dep’t of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 344–45 (1977). Moreover, at least one court in the Ninth Circuit has held that proposed intervenor defendants have standing to sue on behalf of their members if the requirements for associational standing are met. *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, 2018 WL 6338740, at *3 (E.D. Cal. Dec. 5, 2018).

CCCU satisfies each requirement, and it therefore has standing to represent its institutions’ interests. *First*, its member institutions would otherwise have standing to intervene. It is well established that, when Congress enacts statutes “creating legal rights, the invasion of [those rights] creates standing, even though no injury would exist without the statute.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). Here, CCCU’s member colleges, eighteen⁶ of which are mentioned

⁶ Baylor University, Nyack College, Lipscomb University, Dordt University, Fuller Theological Seminary, York College-Nebraska, Clarks Summit University, Oklahoma Baptist University, Toccoa Falls College, Messiah University, Indiana Wesleyan University, Azusa Pacific University, George Fox University, Seattle Pacific University, Moody Bible Institute, Colorado Christian University, Eastern University, and Westmont College—all of which are listed in the Complaint (at ¶¶ 49–471)—are all CCCU institutions. CCCU, *List of CCCU Institutions*, https://www.cccu.org/members_and_affiliates/. Because these eighteen named institutions will suffer direct harm if Plaintiffs are successful, CCCU meets the standing requirement. *See generally Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

by name in the Complaint, are religious colleges that have sincere religious beliefs—enshrined in campus policies—about the proper role of sexuality and gender. Hoogstra Decl. ¶ 7. CCCU’s member schools—whether expressly named or not— are currently protected by a categorical exemption from Title IX’s reach if its application would violate their religious tenets. 20 U.S.C. § 1681(a)(3). If this Court grants plaintiffs the relief they seek, then that categorical exemption will be narrowed in a way that would make students’ ability to receive federal funding conditional on their schools’ agreement to abandon their beliefs about sexuality and gender. Hoogstra Decl. ¶ 6. CCCU’s member institutions have standing, therefore, to defend their legal interests in the continued constitutionality of the categorical Title IX religious exemption.

Second, the interests that CCCU seeks to protect are germane to its mission. The “germaneness test” is so “undemanding” that some courts have found it satisfied when there is “mere pertinence between litigation subject and organizational purpose.” *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (quoting *Humane Soc’y of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir.1988)). CCCU, comprised of more than 140 U.S. religious colleges, is the “leading national voice of Christian higher education.” Hoogstra Decl. ¶ 8. Its stated mission is to “advance the cause of Christ-centered higher education” and help its members “transform lives by faithfully relating scholarship and service to biblical truth.” *Id.* ¶ 8. CCCU’s member colleges are cognizant of that goal and have joined CCCU because of their shared commitment to it. *Id.* This case directly threatens that goal—if successful, CCCU’s member colleges will be forced to either (1) refuse student’s federal aid, forcing those students to withdraw or find alternative funding, or (2) abandon their Christian beliefs on sexuality and gender because of the risk of Title IX liability. Regardless of which option they choose, the cause of Christ-centered higher education will be hindered. *Id.* ¶ 8.

Third, CCCU's members are not required to participate here. This prong of associational standing is prudential and focuses not on the Constitution's case or controversy requirement, but rather on "matters of administrative convenience and efficiency." *United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996). Because the interests "asserted in this lawsuit" are "undifferentiated among members and similar to the interests and claims" of CCCU, it would be more efficient to allow CCCU to assert the standing of its members than require each individual member to intervene. *Presidio Golf Club*, 155 F.3d at 1159.

For these reasons, CCCU has standing to represent its members' interests in this case.

II. CCCU Is Entitled To Intervene As Of Right.

Moreover, because this case challenges the constitutionality of a key statutory protection that CCCU's member schools have enjoyed for nearly 50 years and that is unlikely to be adequately defended by the defendants, CCCU is entitled to intervene, as of right.⁷

Under Rule 24(a)(2), a person seeking to intervene as of right must show (1) that their motion is timely; (2) that they have a "significantly protectable interest" in the action's subject; (3) that the "disposition of the action may as a practical matter impair or impede" their ability to protect that interest; and (4) that the current parties will not adequately represent that interest. Because a "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts," *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc), the Ninth Circuit has "repeatedly instructed" its courts to interpret these factors "broadly" to favor intervention, *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). Given that this motion is being filed before any responsible pleading, timeliness is obviously not an issue.⁸ As explained below, moreover, CCCU readily meets each of the other requirements for intervention as of right, particularly when viewed through the Ninth Circuit's pro-intervention lens. The motion should be therefore granted.

⁷ A proposed answer is included with this motion solely to comply with the technical requirements of Rule 24(c). Should this Court grant the motion to intervene, CCCU will first file a motion under Rule 12(b) to comply with its requirement that a motion come before a responsive pleading.

⁸ Courts reviewing the timing of a motion to intervene consider the stage of the proceedings, prejudice to the parties, and the reason for and length of any delay. *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). Here, CCCU is moving to intervene before the defendants have filed either an answer or a Rule 12 dispositive motion, meaning that there has been no delay whatsoever. Nor will the parties be prejudiced by the timing of this motion because the case is still in its infancy. *See, e.g., United States v. Brooks*, 164 F.R.D. 501, 503 (D. Or. 1995) (motion filed seven months after the complaint was timely when little had happened in the case). Accordingly, there can be no serious question that the motion is timely.

A. CCCU’s member colleges have a significantly protectable interest in Title IX’s religious exemption because it directly protects them from claims that would interfere with their ability to live according to their religious doctrines.

CCCU’s member colleges have a “significant protectable interest” in ensuring the continued vitality of the Title IX religious exemption. The first prong of the intervention-as-of-right inquiry is satisfied if (1) an intervenor “asserts an interest that is protected under some law,” and (2) “there is a relationship between its legally protected interest and the plaintiff’s claims.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (cleaned up). There is “[n]o specific legal or equitable interest” that need[s] be established” to show that an intervenor has an interest in the law. *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Instead, courts make a “practical, threshold inquiry,” *id.*, to allow as many “concerned persons” as possible to be involved in a case so that claims can be disposed of efficiently and consistent with due process. *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir.1980). Once an interest has been established, there is a relationship between that interest and the plaintiffs’ claims “if the resolution of the plaintiff’s claims actually will affect the applicant.” *Arizona v. Jewell*, 2016 WL 3475333, at *1 (D. Ariz. 2016) (quoting *Donnelly*, 159 F.3d at 410) (granting Utah’s motion to intervene when the resolution of a case could hinder its ability to protect wildlife in its boundaries). CCCU satisfies each point.

First, although under *Greene* no such interest is required, CCCU’s member colleges have a legal interest protected by Title IX and its implementing regulations. 20 U.S.C. § 1681(a)(3) expressly exempts religious educational institutions from the general prohibition against sex discrimination if its application “would not be consistent with the religious [institutions’] tenets.” By its terms and by regulation, that exemption applies regardless of whether a religious educational institution has affirmatively sought it. *See* 85 Fed. Reg. 30026, 30031 (2020); 34 C.F.R. 106.12(b) (“An institution is not required to seek assurance from the Assistant Secretary ... to assert such an exemption.”); Office for Civil Rights, *Exemptions from Title IX*,

<https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (“An institution’s exempt status is not dependent upon its submission of a written statement to OCR.”). Thus, although there are plenty of schools who have affirmatively sought the exemption,⁹ every religious school in the country—including, of course, CCCU’s member colleges—is currently protected by it.

The Title IX religious exemption allows CCCU’s member colleges to both (1) accept students who rely on federal funding and (2) continue to uphold their religious beliefs on sexuality, gender, and marriage. Specifically, because of the exemption, CCCU’s member colleges are able to teach their students key religious doctrines, including the importance of keeping sexual activity between a lawfully wedded husband and wife, *see* Exodus 20:14 (NIV) (“You shall not commit adultery.”); Mark 10:7 (NIV) (“For this reason a man will leave his father and mother and be united to his wife[.]”), and the importance and divine nature of gender, *see* Genesis 5:1–2 (NIV) (“When God created mankind, he made them in the likeness of God. He created them male and female and blessed them.”), without their students losing access to federal funding. Hoogstra Decl. ¶ 6. Many of CCCU’s member colleges require their students to live consistently with those divinely inspired truths. *Id.* ¶ 4. This requires them to avoid pre-marital sexual activity, avoid same-sex marriage, and accept their gender as determined at birth by their bodies, which are gifts from a benevolent God. *Id.* ¶ 4.

Second, the relationship between that interest and the Plaintiffs’ claims is clear from the Complaint’s face. Plaintiffs seek (1) a “judgment declaring that the religious exemption to Title IX, as applied to the class of sexual and gender minority students, is unconstitutional as it violates

⁹ *See, e.g.,* Kif Augustine Adams, *Religious Exemptions to Title IX*, 65 U. Kan. L. Rev. 327, 327 (2016) (“More than forty years after the passage of Title IX, the score is 285 to 0, religious exemptions recognized versus those denied.”).

the First, Fifth and Fourteenth Amendments of the U.S. Constitution,” and (2) a permanent injunction (a) prohibiting religious exemptions as applied to such students; (b) rescinding all prior exemptions granted as applied to that group; (c) mandating the federal government to treat the Title IX complaints of LGBT students the same as other complaints at all taxpayer-funded religious colleges; and (d) requiring the government to respect the sexual orientations and gender identities of all students at all federally funded institutions. Compl., Dkt. 1, at 66. Granting that relief would have an irreparable and permanent effect on the legal rights that CCCU’s member colleges currently enjoy under Title IX. CCCU’s member colleges, therefore, have a significant protectable interest in a right threatened by this case.

B. If this Court found Title IX’s religious exception unconstitutional, even in part, those protections would be lost or compromised.

The next prong of the intervention inquiry is “[c]losely related to the second prong.” *Wedgewood Ltd. P’ship v. Twp. of Liberty*, 2005 WL 1211305, at *2 (S.D. Ohio 2005) (unpublished). In the Ninth Circuit, the “relevant inquiry” is not whether a case’s resolution will necessarily impair the proposed intervenor’s rights, but rather whether it *may* impair those rights. *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002).

Here, Plaintiffs are seeking to enjoin the application of Title IX’s religious exemption in cases involving sexual and gender minorities. The exemption currently protects CCCU’s member colleges categorically if Title IX’s application would violate their core religious tenets, including tenets concerning human sexuality and gender identity. Hoogstra Decl. ¶¶ 3–4. Because plaintiffs are seeking to narrow that categorical exemption, there is at least the possibility that this case will impair rights that CCCU’s member colleges currently enjoy. Indeed, if this Court agrees with Plaintiffs that the Title IX religious exemption is unconstitutional as applied to sexual or gender minorities, CCCU’s member colleges will lose key elements of a foundational statutory

right and be forced to choose between their students having access to federal funding and their religious beliefs. Hoogstra Decl. ¶ 6.

C. Defendants are unlikely to represent CCCU's interests adequately.

As to the last prong of the mandatory intervention analysis: The Ninth Circuit imposes a “minimal” burden on proposed intervenors, requiring only that the intervenor “show that representation of its interests by existing parties *may be* inadequate.” *Sw. Ctr. for Biological Diversity*, 268 F.3d 810, 823 (9th Cir. 2001) (emphasis added; cleaned up); *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (same). In determining whether would-be intervenors satisfy this minimal burden, courts in the Ninth Circuit “consider[s] (1) whether the interest of a present party is such that it will *undoubtedly* make *all* the intervenor's arguments; (2) whether the present party is capable and *willing* to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.” *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (emphasis added), *as amended on denial of reh'g* (May 30, 1996). If the proposed intervenor shares the same “ultimate objective” with one of the parties, then there is a presumption that its representation will be adequate. *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 951 (9th Cir. 2009). Here, there are three independent reasons to think the defendants will not adequately represent the interests of either CCCU.

First, in asserting the rights of its members, CCCU is asserting a personal interest in the religious exemption that is not shared with the public. It is seeking to defend its member schools' right to continue teaching and living out their religious beliefs without abandoning the right of their students to access federal funding. Hoogstra Decl. ¶ 6. In such circumstances, the Ninth Circuit has emphasized that inadequate representation is “likely to be found.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (citations omitted); *see also Citizens*

for *Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 899 (9th Cir. 2011) (explaining that the “public interest” differs from the “individual parochial interest”).

Second, the defendants are unlikely to fully understand the importance of the religious exemption to religious colleges. Indeed, CCCU is uniquely situated to address that importance and the consequences of abolishing it. As the Supreme Court has recognized, the “determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task” because “religious beliefs” may not be “acceptable, logical, consistent, or comprehensible to others.” *Thomas v. Rev. Bd. of Indiana Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).¹⁰ Secular government organizations, such as defendants here, are ill-equipped to understand the religious implications of narrowing Title IX’s religious exemption. CCCU will fill that gap and explain—in a way that a federal department cannot—the practical ways in which the loss of Title IX’s religious exemption would harm its members’ educational operations and impact their students. It will thus be able to assist the Court with the resolution of the legal issues before it.

Third, statements from President Biden and his administration demonstrate that, even if defendants *could* understand the importance of the religious exemption to CCCU’s members, the current administration is unlikely to make those arguments. In any event, there is at a minimum a “doubt” as to whether the administration will make the same arguments as CCCU—and that is sufficient under the Ninth Circuit precedent cited above.

If anything, there is ample evidence that the current administration will not only *fail* to make the points necessary to defend Title IX’s religious exemptions as applied to sexual and gender minorities, but it may also instead be openly hostile to them. The Biden Administration

¹⁰ This point is also well born out in scripture. *See also* 1 Corinthians 1:18 (NIV) (teaching that the “message of the cross” is, to unbelievers, “foolishness”).

has already announced its intent to ensure that *Bostock* is fully implemented in the Title IX context,¹¹ and President Biden has argued that “[u]sing religion ... to license discrimination” against “LGBT individuals” or to “score political points” is unjustifiable.¹² Consistent with this belief, his website promises to end what he calls the “misuse of broad exemptions” to, as he puts it, “discriminate” in the name of religious freedom.¹³ His open support for the Equality Act, a bill that “makes explicit that existing Federal statutes prohibiting sex discrimination in ... education also prohibit sexual orientation and gender identity discrimination,” Equality Act, H.R. 5, 117th Cong. § 2(a)(14) (2021), is thus nothing more than the culmination of a campaign promise.¹⁴ These statements indicate that the Biden Administration will have different “ultimate objectives” than CCCU, and will more than clear the minimal hurdle of showing that it is unlikely to represent CCCU’s interests. These facts thus provide an independent reason to believe that the rights of CCCU’s member colleges will go unrepresented and, thus, unprotected.

¹¹ Principal Deputy Assistant Attorney General Pamela S. Karlan, *Memorandum, Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download> (concluding that Title IX “prohibit[s] discrimination on the basis of gender identity and sexual orientation”); The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

¹² Joe Biden, *Joe Biden: Americans must stand with LGBT people around the world*, The Washington Post (May 16, 2017), https://www.washingtonpost.com/opinions/joe-biden-americans-must-stand-with-lgbt-people-around-the-world/2017/05/16/3d42d360-3a51-11e7-8854-21f359183e8c_story.html.

¹³ Biden Harris, *The Biden Plan to Advance LGBTQ+ Equality In America and Around the World*, <https://joebiden.com/lgbtq-policy/>.

¹⁴ See The White House, *Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress* (Feb. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph-r-biden-jr-on-the-introduction-of-the-equality-act-in-congress/>.

CCCU's member colleges will only be able to further their religious missions if they are able to teach and adhere to their doctrines without interference from the government. Because this litigation threatens their ability to do that whenever doing so would affect a sexual or gender minority, it threatens to suffocate religious higher education in America. For these reasons, combined with the fact that only religious colleges can fully understand the importance of the exemption and the current Administration's open hostility to the arguments necessary to fully defend the Title IX religious exemption, CCCU is entitled to intervene as of right. Its timely motion should therefore be granted.

III. Alternatively, CCCU Should Be Allowed Permissive Intervention.

If this Court nevertheless denies intervention as of right, it should permit CCCU to intervene under Rule 24(b). Rule 24(b) requires “(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir.1992)). Rule 24(b)’s purpose is to vest “discretion in the district court to determine the fairest and most efficient method of handling a case.” *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989), *aff'd sub nom. Venegas v. Mitchell*, 495 U.S. 82 (1990).

Here, CCCU is seeking to intervene as a defendant and is not raising any new claims in this federal-question case. In such instances, the Ninth Circuit has held that proposed intervenors need not establish the independent-ground prong. *Freedom from Religion Found., Inc.*, 644 F.3d at 844. Nor can there be any question that this motion is timely, for the reasons expressed in detail in Part II. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (holding that the Rule 24(b) timeliness inquiry is the same as the Rule 24(a) inquiry). The only remaining question is whether CCCU’s defenses share a common question of law and fact with the main action. For the reasons addressed below, CCCU readily satisfies that requirement.

A. CCCU’s member colleges—many of which were mentioned by name in the Complaint—are currently entitled to the Title IX exception.

First, CCCU’s members are currently entitled to assert the Title IX religious exemption as a defense to any suits brought under that Title. As described above in Section II(A), through that exception, they can teach their religious beliefs on sex, gender, and sexuality without their students having to abandon federal funding. *See also* Hoogstra Decl. ¶¶ 3–6. Equally important, they can require their students to live according to those beliefs by abstaining from sex outside of marriage between one man and one woman and by cherishing the gender that corresponds to their God-given bodies. Hoogstra Decl. ¶ 4.

Indeed, the Complaint mentioned many of these schools by name precisely because they have previously benefited from the religious exemption, as applied to sexual and gender minorities. Accordingly, the relevant questions of fact raised by CCCU’s defenses will be the same as those raised by the plaintiffs’ claims.

B. The constitutional defenses that CCCU will raise share common issues of law with the main action because they will respond directly to plaintiffs’ constitutional attacks on the Title IX exemption.

In addition, CCCU will establish that the Title IX exemption is constitutionally *required* to avoid violating the core principles articulated in cases such as *Espinoza v. Montana Department of Revenue*, holding that the government may not deny “otherwise eligible recipients from a public benefit solely because of their religious character” without satisfying the “most exacting scrutiny.” 140 S. Ct. 2246, 2255 (2020); *see also* *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717–18 (1981) (holding that the Free Exercise Clause forbids the government from “condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith, or ... den[ying] such a benefit because of conduct mandated by religious belief”). If permitted to intervene, CCCU will raise this and other defenses to the constitutionality of the religious

exemption. *See* Exhibit B (containing the responsive pleading required by Rule 24(c)). These are the same issues that the Court will have to consider in resolving the claims in the Complaint, and CCCU is uniquely situated to assist the Court in resolving them.

For these reasons, should the Court disagree that intervention as of right is appropriate, it should nevertheless grant the motion for permissive intervention.

CONCLUSION

If this Court agrees with the plaintiffs that the Title IX religious exemption, as applied to LGBT students, is unconstitutional, then many of CCCU's members could lose the benefit of a protection that they have enjoyed—and that has allowed them to survive—for nearly 50 years. Only through CCCU's intervention will these colleges be able to defend that protection as to Plaintiffs' facial challenge. CCCU is therefore entitled to intervene as of right under Rule 24(a)(2), or, at the very least, should be permitted to intervene under Rule 24(b)(1)(B). The motion to intervene should be granted.

DATED this 12th day of May 2021.

Respectfully submitted,

/s/ Herbert G. Grey

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing motion to intervene and memorandum in support was served on the following via the indicated method(s) of service:

_____ **MAILING** certified full, true, and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

 x **ELECTRONIC FILING** utilizing the Court's electronic filing system

 x **EMAILING** certified full, true, and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

_____ **HAND DELIVERING** certified full, true, and correct copies thereof to the attorney(s) shown above at their last known office address(es), on the date set forth below.

_____ **OVERNIGHT COURIER** mailing of certified full, true, and correct copies thereof in a sealed, prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), on the date set forth below.

DATED this 12th day of May 2021.

/s/ Herbert G. Grey
Herbert G. Grey
OSB #810250

*Counsel for Defendant-Intervenor Council
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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains 6145 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

EXHIBIT A

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Counsel for Proposed Defendant-Intervenor

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

ELIZABETH HUNTER, et al.,

Plaintiffs,

v.

No. 6:21-CV-00474-AA

U.S. DEPARTMENT OF EDUCATION, et
al.,

Defendants,

Declaration of Shirley Hoogstra

v.

COUNCIL FOR CHRISTIAN COLLEGES
& UNIVERSITIES,

Proposed Defendant-Intervenor.

1. My name is Shirley Hoogstra, and I am the President of the Council for Christian Colleges & Universities, the largest association of protestant Christian institutions of higher learning. Founded in 1976, CCCU's 189 member colleges span the globe, and over 140 of them are located in the United States. Each of CCCU's members is accredited and provides comprehensive educational opportunities to their students, leavened by faith-based instruction and perspectives.

2. CCCU's stated mission is to "advance the cause of Christ-centered higher education" and help its members "transform lives by faithfully relating scholarship and service to biblical truth." Although CCCU's member colleges represent more than 30 different Christian denominations, they are united by CCCU's mission. Each of CCCU's member institutions strives to further the Christian faith by teaching its students, and serving as models of, genuine Christian living.

3. Many of CCCU's schools have sincere religious beliefs that squarely conflict with contemporary understandings about sex and gender. Those beliefs are grounded in biblical teachings, including the ideas (1) that a person's biological sex is innate and unchangeable; (2) that marriage, properly understood, is between one man and one woman; (3) that sexual contact is only proper within the confines of such a marriage; and (4) that men and women are equal, yet different, and function best when separated in certain situations and facilities, like college dorms, changing rooms, and restrooms.

4. Faculty at these member schools are expected to uphold and teach these principles to their students. Guided by the further belief that these biblical teachings should direct Christians living in a community such as a Christian college or university, many of CCCU's member schools

have enacted related codes of conduct for their students, staff, and faculty. Those codes typically require that students live according to the biblical principles described above, including forbidding sexual intimacy outside of marriage or between members of the same sex, forbid or discourage gender transitioning, and forbidding same-sex marriages.

5. If, as Plaintiffs allege (Plaintiffs' Compl. ¶ 3), Title IX's definition of "sex" does include "sexual orientation" and "gender identity," then many of CCCU's member schools have core religious tenets on gender and sexuality that could be subject to challenge or enforcement proceedings under Title IX's substantive requirements. Although CCCU does not agree with Plaintiffs' interpretation, it recognizes the risk that a court or the Department of Education might agree with Plaintiffs on that point.

6. Moreover, the vast majority of CCCU schools have students that receive federal funding. Several of CCCU's member colleges—though certainly not all—have reached out to the Department of Education expressly to guarantee that Title IX's religious exemption applies to them. If not for the Title IX religious exemption, their students might be unable to receive funding in light of the codes of conduct and what religious college professors teach their students about biblical concepts of sex and gender.

7. CCCU's member colleges, eighteen of which are mentioned by name in the Complaint, are religious colleges that have sincere religious beliefs—enshrined in campus policies—about sexuality and gender. CCCU's member schools—whether expressly named or not—are currently protected by a statutory categorical exemption from Title IX's reach, if its application would violate their religious tenets. 20 U.S.C. §1681(a)(3). Specifically, because of the exemption, the proposed intervenors are able to teach their students, without them losing access to federal funding, key religious doctrines, including (1) the importance of keeping sexual activity

between a husband and wife, *see* Exodus 20:14 (New International Version) (“You shall not commit adultery.”); Mark 10:7 (NIV) (“For this reason a man will leave his father and mother and be united to his wife.”), Genesis 2:24 (NIV) (“That is why a man leaves his father and mother and is united to his wife, and they become one flesh.”); and (2) the importance and divine nature of gender, *see* Genesis 5:1–2 (NIV) (“When God created mankind, he made them in the likeness of God. He created them male and female and blessed them.”) If this Court grants plaintiffs the relief they seek, then that categorical exemption will be either abolished altogether or narrowed in a way that would condition student federal funding on those schools’ abandoning their beliefs and practices about sexuality and gender.

8. CCCU is the leading national voice of Christian higher education. CCCU’s member colleges join the organization in order to “advance the cause of Christ-centered higher education” and help its members “transform lives by faithfully relating scholarship and service to biblical truth.” This case directly threatens those goals—if successful, CCCU’s member colleges will be forced to either (1) require their students to abandon all federal funding, or (2) continue to accept the funding without the ability to advance their Christian beliefs on sexuality and gender because of the risk of Title IX liability. Regardless of which option they choose, the choices of Christian students will be dramatically narrowed, and the cause of Christ-centered higher education will be hindered.

I solemnly swear and/or affirm under the penalty of perjury that the above is true to the best of my knowledge and belief.



Shirley Hoogstra
President

Council of Christian Colleges & Universities

05/12/21
Date

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

ELIZABETH HUNTER, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF EDUCATION,
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Defendants,

v.

COUNCIL FOR CHRISTIAN COLLEGES
& UNIVERSITIES,

Proposed Defendant-Intervenor.

No. 6:21-CV-00474-AA

INTERVENOR CCCU'S PROPOSED
ANSWER TO PLAINTIFFS' CLASS
ACTION COMPLAINT

Defendant-Intervenor Applicant Council for Christian Colleges & Universities (“CCCU”) hereby answers the Class Action Complaint filed by Plaintiffs as follows.

1. Some of the allegations in the first sentence of Paragraph 1 are Plaintiffs’ characterization of its Class Action Complaint and conclusions of law to which no response is required; CCCU denies that any of its Christian College or University members abuse or provide unsafe conditions to thousands of LGBTQ+ students, or injure them mind, body, or soul, but rather seek to minister, support, and care for them physically, emotionally, socially, and spiritually. Plaintiffs cite no evidence to support their allegations of abuse and harm, but likely have in mind a non-peer-reviewed survey commissioned by the Religious Exemption Accountability Project (REAP), the organization sponsoring their lawsuit.¹

Given its partisan genesis, unknown design authors, and non-peer-reviewed status, there are many reasons to question the validity and results of the REAP study. But even if its findings are taken at face value, many of them undermine and refute the very claims that Plaintiffs bring in this case. Plaintiffs Counsel’s study did not compare the experience of LGBTQ+ persons on religious colleges as opposed to secular schools. But when their results are compared with the results of studies carried out by professors and researchers at major academic institutions, they show that LGBTQ+ students face very similar challenges at secular universities as they do at religious ones. Indeed, in some important categories, LGBTQ+ persons at religious colleges appear to do *better* than their peers at secular universities.

These conclusions are revealed in seven national studies of public college campuses, conducted in 2016 and 2017, which were analyzed in the aggregate by researchers at Rutgers

¹ College Pulse, *The LGBTQ+ Student Divide: The State of Sexual and Gender Minority Students at Taxpayer-Funded Christian Colleges* (Mar. 15, 2021), <https://collegepulse.com/blog/the-lgbtq-student-divide> [hereinafter, “REAP Report”].

University, in collaboration with those at Indiana University, University of Minnesota, and UCLA.²

The two reports cannot be absolutely compared, as the research questions and design are not identical. But there are questions that are similar enough to allow meaningful comparison. The REAP Report highlights the fact that “four in ten” sexual or gender minority students are “uncomfortable with their sexual identity” at religious college campus.³ But the Rutgers report indicates that *five* in ten queer-spectrum students and *seven* in ten trans-spectrum students do not feel “respected” on their secular, public campus.⁴ Similarly, REAP asserts that about 64% of “gender minority students” at religious colleges report isolation and loneliness, about 18% more than “straight/cis” students.⁵ What the Rutgers study reveals, however, is that just over 79%% of queer-spectrum students on public campuses experiences report loneliness, which is 20% more than their straight/cis peers on public campuses, and 15% more than their sexual minority peers on religious campuses.⁶

On more serious questions of personal security, such as sexual harassment, and physical and sexual assault, sexual minority students were considerably *more* likely to suffer such affronts on secular/public campuses than on religious campuses. Sexual minority students were more than

² Maren Greathouse *et al.*, *Queer-Spectrum and Trans-Spectrum Student Experiences in American Higher Education: The Analyses of National Survey Findings*, Rutgers, Tyler Clementi Center (Aug. 2018), <https://rucore.libraries.rutgers.edu/rutgers-lib/60802/> [hereinafter, “Rutgers Study”].

³ REAP Report, *supra* note 1 at 7.

⁴ Rutgers Study, *supra* note 2 at 14.

⁵ REAP Report, *supra* note 1 at 9.

⁶ Rutgers Study, *supra* note 2 at 23.

three times as likely to be physically assaulted (3% versus 1%) or sexually assaulted (16.6% versus 5%) on secular versus religious campuses.⁷

Once the larger picture is seen, it becomes apparent that our society has a whole has not learned to adequately support and care for our LGBTQ+ friends, students, and sons and daughters. The Rutgers study reveals that the self-rated emotional health for incoming freshman at public universities already shows huge disparities: LGBTQ+ persons were half as likely as straight/cis students to rate themselves as above average in mental health (23% to 48%), and more than three times as likely to rate themselves as below average (42.8% to 13.4%). The situation became even bleaker for certain subsets of LGBTQ+ persons, such as queer and transgender, where only 14% viewed themselves as above average, and 57% as below average in emotional health.⁸

At every level of education, including primary and secondary schools, as well as colleges and universities, whether they be public/secular or religious schools, we all have a lot to learn in better serving and supporting our LGBTQ+ community. But it is problematic and discriminatory, in light of these statistics, to single out and accuse religious colleges of being the primary contributor to the challenges faced by this community. The reality is that the religious campuses, on a number of very important criteria, are providing safer, more welcoming, and more supportive environments than their secular/public counterparts. To single them out for special criticism and punishment is itself discriminatory, the very kind of religious discrimination that both Title IX and our Constitution were designed to protect against.

⁷ REAP Report, *supra* note 1, at 13; Rutgers Study, *supra* note 2, at 25.

⁸ *Id.*

2. CCCU denies that any of its members leave LGBTQ+ students unprotected from the harms outlined, nor that they take actions causing shame, fear, anxiety, or loneliness. Rather, they seek to minister to all such persons and alleviate the conditions described.

3. Insofar as the allegations in the first sentence of Paragraph 3 are Plaintiffs' characterization of its Class Action Complaint and conclusions of law, then no response is required; to the extent they may be deemed to be factual allegations, they are denied.

4. Insofar as the allegations in the first sentence of Paragraph 4 are Plaintiffs' characterization of its Class Action Complaint and conclusions of law, then no response is required; to the extent they may be deemed to be factual allegations, they are denied.

5. Insofar as the allegations in the first sentence of Paragraph 5 are Plaintiffs' characterization of its Class Action Complaint and conclusions of law, then no response is required; to the extent they may be deemed to be factual allegations, they are denied.

6. Insofar as the allegations in the first sentence of Paragraph 6 are Plaintiffs' characterization of its Class Action Complaint and conclusions of law, no response is required; to the extent they may be deemed to be factual allegations, they are denied.

JURISDICTION AND VENUE

7. The allegations in Paragraph 7 are conclusions of law to which no response is required; to the extent they may be deemed to be factual allegations, they are denied.

8. The allegations in Paragraph 8 are conclusions of law to which no response is required; to the extent they may be deemed to be factual allegations, they are denied.

9. The allegations in Paragraph 9 are conclusions of law to which no response is required; to the extent they may be deemed to be factual allegations, they are denied.

10. The allegations in Paragraph 10 are conclusions of law to which no response is required; to the extent they may be deemed to be factual allegations, they are denied.

PARTIES

11. – 45. The CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraphs 11 to 45 regarding the residency, student status, tax and borrowing status, and validity of the declarations of the Plaintiffs. It denies that it or any of its members has participated in unlawful or injurious discrimination against any of the Plaintiffs, but rather has sought to protect and advance their physical, mental, social, and spiritual well-being.

46. The CCCU admits the description of the U.S. Department of Education as generally accurate.

47. The CCCU admits the description of the U.S. Department of Education's Office of Civil Rights as generally accurate, but the remainder of the allegations in the paragraph address legal rather than factual matters and characterize Title IX of the Education Amendments of 1972, and its implementing regulations, which speak for themselves and are the best evidence of their content; to the extent the allegations are inconsistent with the statute and the regulations, they are denied.

48. CCCU acknowledges, upon information and belief, that Suzanne Goldberg is the Acting Assistant Secretary, Office of Civil Rights, at the Department of Education, as alleged in paragraph 48.

FACTUAL ALLEGATIONS

PLAINTIFFS AND THEIR COLLEGES OR UNIVERSITIES

49. – 471. CCCU lacks sufficient knowledge or information to form a belief as to the truth of most of the allegations in Paragraphs 49 to 471, as these are claims about the personal

backgrounds, experiences, and perspectives of the thirty plaintiffs in this case. Many of the allegations have to do with personal stories about which Intervenor have no knowledge. Insofar as the allegations are about homophobia, discrimination, harassment, and mistreatment by CCCU member colleges and universities, CCCU denies these allegations. It affirms, rather, that its member schools seek to minister and support LGBTQ+ persons as persons made in the image and likeness of God, respecting their human dignity. It asserts that all students that apply to these schools, including Plaintiffs, are informed of these teachings as well as the lifestyle standards that flow from them and that are expressed in students code of conduct. As a matter of policy and practice, students that attend these schools sign statements acknowledging the receipt of these codes of conduct and their willingness to abide by them.

CLASS ACTION ALLEGATIONS

472. The allegations in Paragraph 472 are conclusions of law to which no response is required; to the extent they may be deemed to be factual allegations, they are denied.

473. The allegations in Paragraph 473 are conclusions of law to which no response is required; to the extent they may be deemed to be factual allegations, they are denied.

474. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first part of Paragraph 474, but denies that its members unlawfully discriminate against LGBTQ+ students.

475. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of Paragraph 475, it denies that its members unlawfully discriminate against LGBTQ+ students or allow harassment and bullying of them. It acknowledges that there are higher levels of anxiety, eating disorders, alcohol abuse and sexual

and physical violence among the LGBTQ+ communities than in the heterosexual and cisgender communities, but denies that these realities have to do with the actions of its member schools.

476. CCCU denies that many LGBTQ+ students are expelled, disciplined, or punished, and denies that its member schools use conversion therapy.

477. CCCU acknowledges that its member schools are religiously exempt from the Title IX guidelines regarding sexuality and gender, insofar as these guidelines are contrary to their Christian beliefs regarding gender and sexuality.

478. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 478, and on that basis they are denied.

The Title IX Religious Exemption

479. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 479, and on that basis they are denied; it further denies that its member institutions unlawfully discriminate against LGBTQ+ students.

480. The allegations in Paragraph 480 are conclusions of law to which no response is required.

481. The allegations in Paragraph 481 are conclusions of law to which no response is required.

482. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 482, and on that basis they are denied.

483. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 483, and on that basis they are denied.

484. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 484, and on that basis they are denied.

485. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 485, and on that basis they are denied.

486. The allegations in Paragraph 486 are conclusions of law to which no response is required.

487. The allegations in Paragraph 487 are conclusions of law to which no response is required.

488. The allegations in Paragraph 488 are conclusions of law to which no response is required.

489. The allegations in Paragraph 489 are conclusions of law to which no response is required.

490. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 490, and on that basis they are denied.

491. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 491, and on that basis they are denied.

CAUSE OF ACTION

First Cause of Action

(42 U.S.C. Sect. 1983 – Substantive Due Process/Equal Protection)

492. Intervenor CCCU re-alleges and incorporates the preceding paragraphs.

493. The allegations in Paragraph 493 are conclusions of law to which no response is required.

494. The allegations in Paragraph 494 are conclusions of law to which no response is required.

495. The allegations in Paragraph 495 are conclusions of law to which no response is required.

496. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 496, and on that basis they are denied.

497. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 497, and on that basis they are denied.

498. CCCU acknowledges that LGBTQ+ youth suffer from significant mental and physical health disparities, but denies that this primarily or even significantly relates to bullying and harassment at school.

499. The allegations in Paragraph 499 are conclusions of law to which no response is required.

500. The allegations in Paragraph 500 are conclusions of law to which no response is required, except CCCU denies that any of its members have policies or practices that harm an unpopular group.

501. CCCU denies that either the Department of Education or the CCCU members schools either desire to, or indeed act to, harm sexual and gender minority students, but rather that they seek the physical, emotional, social and spiritual well-being of such students.

502. The allegations in Paragraph 502 are conclusions of law to which no response is required.

503. The allegations in Paragraph 503 are conclusions of law to which no response is required.

504. The allegations in Paragraph 504 are conclusions of law to which no response is required.

505. The allegations in Paragraph 505 are conclusions of law to which no response is required.

506. The allegations in Paragraph 506 are conclusions of law to which no response is required.

507. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 507, and on that basis they are denied. It does assert that all students that apply to member colleges are informed of the Christian standards of gender and sexuality upheld by these schools before they enroll, and the students do agree to abide by these standards when they enroll.

508. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 508, and on that basis they are denied. It does assert that all students that apply to member colleges are informed of the Christian standards of gender and sexuality upheld by these schools before they enroll, and the students do agree to abide by them when they enroll.

509. The allegations in Paragraph 509 are conclusions of law to which no response is required, except that CCCU denies that its member schools demean or stigmatize sexual and gender minorities.

510. The allegations in Paragraph 510 are conclusions of law to which no response is required, except CCCU denies that its members schools cause harms to sexual and gender minority students.

511. The allegations in Paragraph 511 are conclusions of law to which no response is required.

512. The allegations in Paragraph 512 are conclusions of law to which no response is required.

Second Cause of Action

(42 U.S.C. Sect. 1983 – Establishment Clause)

513. Intervenors reallege and incorporate the preceding paragraphs.

514. The allegations in Paragraph 514 are conclusions of law to which no response is required.

515. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 515, and on that basis they are denied.

516. The allegations in Paragraph 516 are conclusions of law to which no response is required.

517. The allegations in Paragraph 517 are conclusions of law to which no response is required.

518. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 518, and on that basis they are denied.

519. CCCU lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 519, and on that basis they are denied.

520. CCCU denies the allegations found in Paragraph 520.

521. CCCU denies the allegations found in Paragraph 521.

522. CCCU denies the allegations found in Paragraph 522.

523. CCCU denies the allegations found in Paragraph 523.

524. The allegations in Paragraph 524 are conclusions of law to which no response is required, insofar as a response is required, CCCU denies the allegations.

REQUEST FOR RELIEF

CCCU denies that Plaintiffs are entitled to the relief set forth in Plaintiffs' Class Action Complaint or to any relief whatsoever based on any claim that a named defendant acted or failed to act according to the law regarding Title IX protections, constitutional standards, or any other legal standard in relation to LGBTQ+ students, or any related procedural claim. CCCU denies each and every allegation not previously admitted or otherwise qualified as it relates to actions purportedly impacting LGBTQ+ persons.

WHEREFORE, CCCU requests that this Court:

1. Deny Plaintiffs the relief that they seek and further;
2. The Court deny the Plaintiffs' request for class certification;
3. Issue a Declaratory Judgment against Plaintiffs on all claims for relief for which Plaintiffs seeks declaratory relief;
4. Deny all requests for injunctions sought by Plaintiffs;
5. Award CCCU its costs and attorney fees to the extent provide for by law; and
6. Grant CCCU any other such relief as the Court deems just and proper.

Affirmative and Other Defenses

CCCU alleges the following affirmative defenses to Plaintiffs' Class Action Complaint.

First Affirmative Defense (Lack of Jurisdiction)

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that this Court lacks jurisdiction over some or all of Plaintiffs' claims.

**Second Affirmative Defense
(Lack of Standing)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that Plaintiffs lack standing to pursue some or all of its claims.

**Third Affirmative Defense
(Sovereign Immunity)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that some or all of Plaintiffs' claims are barred by the doctrine of sovereign immunity.

**Fourth Affirmative Defense
(No Private Right of Action)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that some or all of Plaintiffs' claims are barred because no private right of action exists that would allow such claims to be brought.

**Fifth Affirmative Defense
(Lack of Justiciability - Ripeness)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that some or all of Plaintiffs' claims are not justiciable because they are not ripe for judicial review.

**Sixth Affirmative Defense
(Failure to Exhaust Administrative Remedies)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that

the Court should dismiss some or all of Plaintiffs' claims for failure to exhaust administrative remedies.

**Seventh Affirmative Defense
(Failure to Exhaust Non-Administrative Remedies)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that the Court should dismiss some or all of Plaintiffs' claims for failure to exhaust non-administrative remedies.

**Eighth Affirmative Defense
(Failure to Join Indispensable Parties)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that the Court should dismiss some or all of Plaintiffs' claims for failure to join an indispensable party.

**Ninth Affirmative Defense
(Failure to State a Claim for Relief)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that the Court should dismiss some or all of Plaintiffs' Claims for failure to state a claim upon which relief can be granted.

**Tenth Affirmative Defense
(Estoppel)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that some or all of Plaintiffs' claims are barred by the doctrine of estoppel.

Eleventh Affirmative Defense(Waiver)

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that some or all of Plaintiffs' claims are barred by Plaintiffs' waiver.

**Twelfth Affirmative Defense
(Statute of Limitations)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that some or all of Plaintiffs' claims are barred by the applicable statute of limitations.

**Thirteenth Affirmative Defense
(Laches)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, that by virtue of Plaintiffs' unreasonable delay in commencing this action, which delay has caused prejudice to its constituent Colleges and Universities, certain of the purported claims for relief asserted in the First Amended Complaint are barred by the doctrine of laches.

**Fourteenth Affirmative Defense
(Improper Forum)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU is informed and believes, and on that basis alleges, Plaintiffs have brought their lawsuit in the improper forum.

**Fifteenth Affirmative Defense
(Incorporation of All Applicable Defenses)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, CCCU asserts all applicable defenses pled by all other defendants to this Action, and hereby incorporates the same herein by reference

**Sixteenth Affirmative Defense
(Reservation of Right to Assert Additional Defenses)**

As a separate and distinct affirmative defense to the Class Action Complaint and to each claim for relief contained therein, Plaintiffs have failed to particularize its claims, or that CCCU's lack of knowledge of the circumstances surrounding Plaintiffs' claims prevents it from asserting all applicable defenses at this time. Upon further particularization of the claims by Plaintiffs or upon discovery of further information concerning their claims, CCCU reserves the right to assert additional defenses.

DATED this 12th day of May, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Answer in Intervention in support was served on the following via the indicated method(s) of service:

_____ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

_____ **ELECTRONIC FILING** utilizing the Court’s electronic filing system

_____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

_____ **HAND DELIVERING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known office address(es), on the date set forth below.

_____ **OVERNIGHT COURIER** mailing of certified full, true and correct copies thereof in a sealed, prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), on the date set forth below.

DATED this 12th day of May, 2021

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EXHIBIT C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

ELIZABETH HUNTER, et al.,

Plaintiffs,

v.

No. 6:21-CV-00474-AA

U.S. DEPARTMENT OF EDUCATION,
et al.,

Defendants,

v.

INTERVENOR CCCU'S PROPOSED
MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT

COUNCIL FOR CHRISTIAN COLLEGES
& UNIVERSITIES,

Proposed Defendant-Intervenor.

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LR 7-1(A) CERTIFICATION

The proposed intervenor certifies that, as required by LR 7-1(A), it has conferred with counsel for the parties, who [PROVIDE RESULTS OF CONFERENCE, AFTER INTERVENTION GRANTED].

MOTION AND INTRODUCTION

Defendant-Intervenor Council for Christian Colleges and Universities (“CCCU”) hereby moves to dismiss Plaintiffs’ Complaint Brought under Federal Rules of Civil Procedure 12(b)(1), (6), and (7), the Motion asks this Court to dismiss Plaintiffs’ Complaint on three independent grounds: (1) for lack of standing and redressability, (2) for failure to name all necessary parties, and (3) for failure to state a claim upon which relief can be granted.

CCCU makes this motion because Plaintiffs’ case seeks relief that would not resolve or redress their alleged injuries, against a party that cannot provide them relief, in the absence of the actual real parties in interest and based on claims that are without adequate legal and jurisdictional grounds. Even if successful, Plaintiffs’ suit would *harm* and limit the freedom and choices of the very LGBTQ+ community the Plaintiffs wish to protect. Further, it would threaten the religious identities and freedoms of religious colleges and universities nationwide, including CCCU’s members, by undermining not only their statutory Title IX rights, but also their First and Fifth Amendment rights, without allowing those institutions to be heard directly here.

But even if the Court reached the merits of Plaintiffs’ claims, it would have no choice but to find them legally frivolous. Plaintiffs’ equal-protection claim must be dismissed because they have not alleged and cannot allege facts sufficient to show that the *Department*, in recognizing the Title IX religious exemption, is engaged in any type of discrimination based on sexual orientation or gender identity. And their Establishment Clause challenge to the Title IX exemption is squarely foreclosed by the Supreme Court’s 9-0 decision in *Corporation of the Presiding Bishop v. Amos*,

483 U.S. 327 (1986), and its 9-0 decision in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), where the Court rejected the same kinds of challenge to other, similar religious exemptions and accommodations.

In short, rather than a serious effort to invalidate the Title IX exemption, moreover, Plaintiffs' claims appear to be driven by the Plaintiffs' desire to tell their stories—a desire that is certainly appropriate in an appropriate forum. But the Plaintiffs' stories—important as they are—cannot overcome the reality that here, there can be no well-grounded belief that the Department has acted unlawfully or that the Title IX exemption is unconstitutional, in general or as applied to LGBT students. That exemption is fully within Congress's power. And it serves the important goal of promoting a diversity of viewpoints and approaches in educating the Nation's precious young people.

For all the above reasons, addressed more fully below, CCCU asks this Court to dismiss Plaintiffs' Complaint.

**BACKGROUND: THE IMPORTANCE OF TITLE IX'S
RELIGIOUS EXEMPTION TO STUDENTS, INCLUDING LGBTQ+ STUDENTS**

Before considering the legal reasons for dismissing Plaintiffs' claims, it is important for the Court to understand the stakes in this lawsuit. Many religious colleges and universities throughout America—including the vast majority of CCCU's members—rely heavily on Title IX's religious exemption to provide the kind of faith-filled educational experience that is critical to most of their students, not to mention their families. That is because the implementation and enforcement of Title IX, under the authority of the federal Department of Education, often reflects secular standards and mores that are in tension with the sex-related standards and mores embraced by many religious colleges. As the Supreme Court emphasized in *Obergefell v. Hodges*, even where those standards and mores run counter to prevailing culture, these “decent and honorable”

religious beliefs “long ha[ve] been held—and continue[] to be held—in good faith by reasonable and sincere people[.]” especially people of faith. 576 U.S. 644, 657, 672 (2015). The Title IX exemption is thus critical to the ability of educational communities organized by such “reasonable and sincere people” to convey their faith to the next generation of believers.

Despite the tension with prevailing culture, moreover, many students at religious colleges not only identify as LGBTQ+, but also find meaning and joy in attending an institution with teachings and standards that reflect traditional Judeo-Christian sexual ethics. In that regard, Plaintiffs’ claim that religious colleges systematically cause them and their peers various kinds of harm is refuted by the very study on which they appear to rely—a non-peer reviewed survey commissioned by the Religious Exemption Accountability Project (REAP), the organization sponsoring their lawsuit. There are, of course, many reasons to question the findings of a non-peer reviewed report designed by unknown persons that was commissioned to deal with issues raised in a lawsuit by the plaintiffs’ own lawyers. But even if the study’s findings are taken at face value, that very study, when compared with the results of peer-reviewed studies by professional researchers at major academic institutions, show that, in many important categories, LGBTQ+ persons at religious colleges do better, and are treated better, than at secular universities.¹

¹ These conclusions are supported by a meta-analysis of seven national studies spear-headed by Rutgers University and supported by Indiana University, University of Minnesota, and UCLA. A full comparison of these two studies is not practicable in this context, but a longer discussion is included in our proposed answer at ¶ 1. When compared with the REAP study, the Rutgers study shows that that sexual and gender minority students do measurably worse than their heterosexual/cis-gender peers at *both* religious and secular/public colleges. Further, the REAP report itself shows that, in some important respects, such as acceptance on campus, rates of loneliness, and rate of physical and sexual abuse, LGBTQ+ students do measurably and substantially better at religious colleges than they do at their secular, public counterparts. Compare Maren Greathouse *et al.*, *Queer-spectrum and trans-spectrum student experiences in American higher education: the analyses of national survey findings*, Rutgers, Tyler Clementi Center 23–25 (Aug. 2018), <https://rucore.libraries.rutgers.edu/rutgers-lib/60802/>, with College Pulse, *Religious Exemption Accountability Project* 7–9 (March 2021),

As Congress has repeatedly recognized, moreover, religious colleges and universities play an important role in U.S. higher education. See, *e.g.*, 154 Cong. Rec. H7658-03 (2008); 20 U.S.C. §1011a(a)(2). Beyond academic excellence competitive with secular schools, religious colleges and universities offer students advantages—including advantage for LGBTQ+ students—that are not as readily available in secular institutions. These include not only the opportunity to study academic disciplines from the standpoint of faith, but also the opportunity to naturally integrate community service into higher education²; enjoy greater physical safety³; and experience a broader diversity of philosophical and political perspectives among professors and students.⁴

In short, as a matter of national education policy, it makes no sense to strip the many religious colleges with “reasonable and sincere” Judeo-Christian views of human sexuality of their Title IX exemption, thereby threatening those colleges’ continued existence. But even if this were defensible as a policy matter, this lawsuit does not provide an appropriate, judicially cognizable means of accomplishing that result.

https://f.hubspotusercontent00.net/hubfs/5666503/LGBTQStudentDivide_March2021Report_REAP_CollegePulse.pdf.

² See, *e.g.*, Concordia University Irvine, *Concordia Serves*, <https://www.cui.edu/aboutcui/community/serving/concordia-serves> (“Last year, over 1,000 members of our CUI family stepped into the community on one day, called to give to others from the abundance they have been given.”).

³ Tanya Loudonback, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016), <http://www.businessinsider.com/safest-college-campuses-in-america-2016-1> (18 of the top 25 safest colleges in America are religious).

⁴ Ellen B. Stolzenberg, et al., *Undergraduate Teaching Faculty: The HERI Survey 2016-2017*, Higher Education Research Institute at UCLA 38 (2019), <https://heri.ucla.edu/monographs/HERI-FAC2017-monograph.pdf>.

ARGUMENT

I. Plaintiffs Cannot Demonstrate Standing.

At the threshold, Plaintiffs' case does not meet the basic requirements of justiciability, and it should be dismissed under FRCP 12(b)(1) for lack of subject matter jurisdiction. Redressability of injury is a fundamental question of standing, and Plaintiffs are suing a party that neither discriminates against them, nor provides the basis for others to so discriminate. Defendant Department of Education simply recognizes a statutory exemption, found at 20 U.S.C. §1681(a)(3), that Congress itself created, and which Intervenors believe the Constitution requires. Plaintiffs are thus asking the Department to take actions it is unable to do: either rewrite a Congressional statute, or order Christian schools to change their codes of conduct based on their fundamental beliefs. Both of these actions are ultra vires—beyond the power, authority, and jurisdiction of the Department. Ironically, moreover, if the plaintiffs prevailed, they would simply deny themselves and other members of the LGBTQ+ community the ability to obtain federal financing to attend many religious schools. This would have the result of limiting, not expanding, Plaintiffs' choices and freedoms.

Justiciability in federal court is measured by Article III's case or controversy standard, and it contains three requirements. First and foremost, there must be alleged (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *Id.* at

45–46; *see also* *Warth v. Seldin*, 422 U.S. 490, 505 (1975). As the Supreme Court has taught, “[t]his triad of injury in fact, causation, and redressability constitutes the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103–04 (1998). For a case to be justiciable, Plaintiffs have the burden of proof to satisfy all three prongs. *Ibid.*

Prong one, regarding actual, concrete injury, is a question of fact that cannot be adjudicated by this Court because it lacks the proper parties before it to determine the truth of Plaintiffs’ allegations of injury. But the Court need not consider the question of injury because, even if all of Plaintiffs’ allegations are true, they simply do not meet points two and three of this triad, causation and redressability. The alleged acts of discrimination simply were not those of the Department. Further, the Department cannot force or require Christian colleges or universities to reverse their religious beliefs and student conduct codes related to these issues.

A. The Department of Education does not make distinctions on the basis of gender or sexuality, and thus has not caused Plaintiffs’ alleged injuries.

Plaintiffs allege that they have been caused a variety of harms by certain Christian colleges and universities that uphold Christian standards of sexuality and gender on their campuses and in their student codes of conduct. They complain that the Department allows this to occur by extending an exemption to religious colleges from the non-discrimination requirements of Title IX. But they do not claim the Department itself discriminates against LGBTQ+ persons, and neither do they allege that the Department could force the schools to change their policies.

Plaintiffs have thus failed the requirement of redressability: The “case or controversy” limitation of Art. III requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not an injury that results from the independent action

of some third party not before the court. *Simon*, 426 U.S. at 41–42. As the Supreme Court held in *Allen v. Wright*, 468 U.S. 737 (1984), abrogated as to other issues by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), alleged discrimination by third parties, even if empowered by tax-exemption or other state support, cannot be the basis of standing for suit against the government agency responsible for the tax exemption or support. *See id.* at 757–60 (parents of children could not sue IRS for tax exemptions given unlawfully to private schools they could not attend). In *Allen*, the Court ruled that the injury to the plaintiffs were highly indirect and insufficient to establish standing because they “result[] from the independent action of some third party [private schools] not before the court.” *Id.* at 757. The same is true here.

B. The Department cannot require the Christian schools to modify their religious identity, beliefs and codes, and thus a favorable ruling cannot redress Plaintiffs’ alleged injuries.

Plaintiffs also seek a declaration that religious colleges and universities can no longer benefit from the religious school exemption of Title IX. But such a declaration would not invalidate the conduct and lifestyle codes of these universities. Rather, it would merely prevent students like Plaintiffs from receiving federal funds to attend these schools.

This redressability problem is well illustrated in *Simon*, 426 U.S. at 41–42. There the Court held that standing to challenge a tax exemption for hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals’ policy concerning the provision of medical services to indigents. The causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs’ injury and the challenged Government action. *Id.* at 40–46.

So too here: The Department is simply performing ministerial acts in applying statutory

(and likely constitutionally required) exemptions to religious schools. It is those private, third parties that are making their own decisions about student codes of conduct. Further, as in *Simon*, there is no certainty that withdrawing Title IX exemptions (which would be beyond the Department's mandate and powers anyway), would cause the schools to change their codes. Indeed, given their religious convictions regarding these matters of sexuality and gender, it is quite unlikely that most of them would change. At the most, such change is the kind of "unadorned speculation" that "will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44. And for that reason, too, Plaintiffs' Complaint must be dismissed for lack of standing.

II. Plaintiffs Have Failed To Name Necessary Parties That Are Beyond The Court's Jurisdiction.

Rule FRCP 12(b)(7) provides yet another reason to dismiss, as (1) Plaintiffs have failed to join necessary parties under Rule 19(a)(1)(B)(i)—the named religious colleges who benefit from the Title IX religious exemption—and (2) it would not be feasible to join them. Plaintiffs' allegations of harm rest on direct factual allegations about the purported conduct of religious schools they name in the Complaint, yet none of those schools has been included as a defendant. That failure is fatal to Plaintiffs' claims, and the Complaint must therefore be dismissed.

CCCU can of course speak for its members against Plaintiffs' facial challenge to the Title IX religious exemption. But CCCU is simply not able to respond to the numerous allegations brought by the multiplicity of Plaintiffs against 25 different colleges, only 18 of which are CCCU members, and of whose day-to-day operations CCCU has no meaningful knowledge. For this Court to fairly assess these challenges to the application of the religious exemption would require the response and involvement of the individual colleges discussed in the Complaint.

Courts in the Ninth Circuit conduct the necessary-party analysis in three steps. *First*, they determine if the party is "necessary[.]" *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.

1992). *Second*, they ask whether, if a party is necessary, that party can feasibly be joined. *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005). Third, and finally, they ask “in equity and good conscience” whether, if a necessary party cannot feasibly be joined, the action can proceed with the existing parties. *Ibid.* “By its very nature[.]” this inquiry is “heavily influenced by the facts and circumstances of individual cases,” 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1604, and the rule itself is designed to avoid the harsh results of rigid application. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990). Applying that approach here—and accepting Plaintiffs’ factual allegations and drawing all factual inferences in their favor, *Paiute-Shoshone Indians of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011), it is apparent that colleges Plaintiffs have named are necessary parties and that joinder would not be feasible.

A. The religious schools named in the Complaint are necessary parties to this action.

As relevant here,⁵ an “absent party is necessary” when it has (1) a “‘legally protected’ interest,” FRCP 19(a), that is “more than a financial stake, and more than speculation about a future event[.]” *Ward v. Apple Inc.*, 791 F.3d 1041, 1050–51 (9th Cir. 2015), and that (2) it will be unable to protect without joining the action. FRCP 19(a). A party can have a legally protected interest in a case’s outcome even if “the very existence of [its] interest depends on the legality of the Act” being challenged—in other words, all that a party must show is “a *claim* to an interest[.]” *Shermoen*, 982 F.2d at 1317 (emphasis in original).

In *Shermoen*, for example, a group of Native Americans sought to invalidate a statute that created a reservation for each of two tribes—the Hoopa Valley Tribe and the Yurok Tribe. *Id.* at

⁵ A party is also necessary if, in its absence, the Court will be unable to afford complete relief to the existing parties. FRCP 19(a)(1)(A). But CCCU does not rely upon that provision here.

1316. The plaintiffs' case was ultimately dismissed because neither tribe was included as a defendant, and the tribes stood to lose their reservations if the plaintiffs succeeded. *Id.* at 1317. In affirming the Rule 12(b)(7) dismissal, the Ninth Circuit held that the tribes had a legally protected interest in the case because the Complaint challenged the constitutionality of the very act creating their reservations. *Id.* at 1318.

By analogy, the same is true here. Here, like the tribes in *Shermoen*, the religious colleges named in the Complaint⁶ have a legally protected interest in the constitutionality of the Title IX religious exemption as applied to LGBT students. Congress intended to protect all religious schools from the full weight of Title IX whenever Title IX's application would conflict with their religious tenets. Should this Court agree with the plaintiffs' claims, then these religious schools will lose their right to rely on this exemption. These schools, recipients of a statutory right no less than the tribes in *Shermoen* were, will lose that right if the plaintiffs are successful.

After a court determines that a party has an interest, it must then determine "whether that interest will be *impaired or impeded* by the suit" in the party's absence. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). This Court has recognized that adequate representation can minimize the risk of harm. *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 251–52 (D. Or. 2017) (Aiken, J.). And the Ninth Circuit has instructed courts to ask the same questions as they do with FRCP 24's intervention-as-of-right-inquiry to determine the adequacy of an existing party's representation:

⁶ Indeed, the loss of this right would impact the nearly 1,000 religious colleges and universities found throughout the United States. Though CCCU is not claiming here that Rule 19 "require[s] Plaintiffs to join every other person who *conceivably* may be affected by a declaration that the challenged law is unconstitutional on the equal protection and establishment challenges presented," at least those colleges directly named in relation to plaintiffs' as-applied challenge are necessary, because of their need to respond to the factual allegations in the Complaint. *Martinez v. Clark Cty., Nev.*, 846 F. Supp. 2d 1131, 1149 (D. Nev. 2012) (emphasis added).

- whether “the interests of a present party to the suit are such that it will undoubtedly make all” of the absent party’s arguments;
- whether the party is “capable of and willing to make such arguments”; and
- whether the absent party would “offer any necessary element to the proceedings” that the present parties would neglect.

Shermoen, 982 F.2d at 1318 (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir.1980)).

On this point too, the facts in *Shermoen* are instructive. There, although several members of one tribe had intervened to represent their own interests in the constitutionality of the act, the Ninth Circuit held that there was “no credible claim that they could sufficiently represent the interest” of the other tribe. 982 F.2d at 1318. Even if both tribes would have defended the constitutionality of the same challenged act, that was not enough.

It is likewise very unlikely that the interests of the religious schools named in the Complaint will be fully protected here. Though CCCU can—and will—support the general, facial constitutionality of Title IX’s religious exemptions, it is not positioned to respond to the factual allegations that pervade the Complaint regarding the application of that exemption to each of the Plaintiffs’ situations. Certainly, CCCU will not be able to assert factual responses with respect to the schools that are not among its members, and really cannot practicably do so, absent extraordinary burden and cost, even for its own members.

In sum, only the named individual schools have the institutional knowledge necessary to respond to the factual allegations made against them, and, in their absence, those claims will likely go un rebutted. For these reasons, even assuming the Plaintiffs have stated legitimate claims (*but see infra* Section III), the individual religious colleges named in the Complaint are necessary parties, and those claims must be dismissed.

B. It would not be feasible to join many of the necessary parties because the Court lacks personal jurisdiction over them.

The next thing a party seeking dismissal under Fed. R. Civ. P. 12(b)(7) must show is that it would not be feasible to merely add the missing necessary parties to the litigation. Rule 19 recognizes “three circumstances in which joinder is not feasible:” (1) “when venue is improper”; (2) when the Court lacks personal jurisdiction over the necessary parties; and (3) when joinder would destroy subject matter jurisdiction. *Peabody Western Coal Co.*, 400 F.3d at 779. Here, joinder is not feasible because this Court lacks personal jurisdiction over many of the necessary parties.

In that regard, it is hornbook law that courts have personal jurisdiction over defendants located outside of a forum state *only* when those defendants have sufficient “minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). “The plaintiff bears the burden” of demonstrating personal jurisdiction over the defendant by showing (1) that the defendant “purposefully direct[ed] his activities” to the forum state and (2) that the claim “arises out of or relates to the defendant’s forum-related activities[.]” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Under this framework, courts lack specific jurisdiction even when an injury is suffered in the forum state if the defendant’s conduct was not itself directed at the state. *Ipsl LLC v. College of Mount Saint Vincent*, 383 F.Supp.3d 1128, 1139–40 (D. Or. 2019) (dismissing tort claims for lack of personal jurisdiction when the defendant New York college, despite phone calls, letters, and physical visits to Oregon, had not aimed the alleged harmful conduct at the forum state).

Here, only two colleges mentioned by name in the Complaint are in Oregon—George Fox University and Corban University. Compl., Dkt. 1 at ¶¶ 9–10. Those colleges are, of course, subject

to this Court's general jurisdiction. But none of the other named schools, which are scattered in 18 states around the country, is subject to that jurisdiction.⁷ Any web presence, e-mails, phone calls, and even the occasional recruiting visit, if any, simply do not rise to the level of contacts to justify personal jurisdiction. *See College of Mount Saint Vincent*, 383 F.Supp.3d at 140. And any contacts those schools may have with Oregon are unlikely to be related to plaintiffs' claim that Title IX's religious exemption is unconstitutional. At very least, the Complaint is silent about how, if at all, any of the named schools' reliance on the Title IX religious exemption harmed the plaintiffs in Oregon.

In sum, many of the religious schools necessary to respond to the factual bases of plaintiffs' claims *cannot* be joined because this Court lacks personal jurisdiction over them.

C. This Court should dismiss the case because the action cannot proceed without the named religious schools.

The final question is whether the case can equitably proceed without the necessary parties. And here too, the Court should dismiss under Rule 12(b)(7) because (again assuming the Plaintiffs have stated valid claims) it cannot proceed without the named schools to respond to the Complaint's factual claims.

⁷ The other schools are located in (1) South Carolina (Bob Jones University); (2) Texas (Baylor University); (3) Tennessee (Union University and Lipscomb University); (4) New York (Nyack College); (5) Idaho (Brigham Young University-Idaho); (6) California (Fuller Theological Seminary, Azusa Pacific University, La Sierra University, and Westmont College); (7) Nebraska (York College and Grace University); (8) Ohio (Cedarville University); (9) Pennsylvania (Clarks Summit University, Messiah University, and Eastern University); (10) Oklahoma (Oklahoma Christian School and Oklahoma Baptist University); (11) Georgia (Toccoa Falls College); (12) Iowa (Dordt University); (13) Indiana (Indiana Wesleyan University); (14) Utah (Brigham Young University-Provo); (15) Virginia (Liberty University); (16) Colorado (Colorado Christian University); (17) Illinois (Moody Bible Institute); and (18) Washington (Seattle Pacific University). Compl., Dkt. 1 at ¶¶ 11–43.

Rule 19(b) provides four factors to consider in determining whether to dismiss an action: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Confederated Tribes of Chehalis Indian Rsrv. v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991). Only the first two factors are relevant here. And both point decisively toward dismissal.

As to the first factor: For the reasons described above, the named colleges will be substantially prejudiced if they are not allowed to respond to plaintiffs' factual allegations and ultimately lose their right to rely on the Title IX religious exemption despite their sincere religious beliefs about sex and gender.⁸ To be sure, CCCU as intervenor can protect the interests of the named colleges in resisting Plaintiffs' *facial* challenge to the Title IX exemption. But CCCU's participation cannot eliminate the prejudice to the named colleges that would result from their being denied the ability to respond to Plaintiffs' *as-applied* challenges—which necessarily depend on facts specific to each school.

Nor (as regards the second factor) will it be possible to lessen the harm that Plaintiffs' requested relief will impose on the named schools by carefully crafting the opinion. If this Court decides that Plaintiffs are correct, and that the Title IX religious exemption as applied with respect to LGBT students violates the Constitution, then, by the force of that holding's logic, Plaintiffs will be entitled to the full declaratory relief they are seeking.⁹ In a constitutional challenge seeking injunctive relief as applied to a particular group, it really is all or nothing.

⁸ In the Ninth Circuit, the Rule 19(b) prejudice analysis is the same as the Rule 19(a) necessary-party analysis. *Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 n.4 (10th Cir. 1989).

⁹ Plaintiffs will not, however, be entitled to attorneys' fees because 42 U.S.C. §1988 does not apply to cases against the federal government.

Simply put, the plaintiffs have chosen not to name the vast majority of parties necessary to this case. And assuming Plaintiffs have stated valid claims (*see infra* Section III), this Court cannot fully address Plaintiffs' as-applied claims without the input of those necessary parties. Plaintiffs' Complaint therefore should be dismissed under Rule 12(b)(7).

III. Plaintiffs Have Failed To State A Claim Upon Which Relief Can Be Granted.

Even if Plaintiffs did have standing, and were suing the correct parties, their case would still need to be dismissed as it fails the threshold requirement of Rule 12(b)(6)—stating a claim upon which relief can be granted. Plaintiffs assert a series of constitutional claims, including those under the First, Fifth, and Fourteenth Amendments. But constitutional provisions are not self-executing and must be invoked against government agencies via appropriate statutory provision. Plaintiffs invoke 42 U.S.C. § 1983 for this purpose, *see* Compl., Dkt. 1, at ¶¶ 492, 513, but it is black letter law that § 1983 applies only to *state* governments and their sub-divisions. It simply does not apply to the federal government. Further, even if they could find a statutory cause of action, the substantive constitutional provisions they cite simply have not been violated by the only defendant here, namely, the Department.

A. The Federal Government and its agencies are not proper targets of lawsuits brought under 42 U.S.C. § 1983 or as *Bivens* federal constitutional tort claims.

It is long established that § 1983—the only basis for Plaintiffs' claims against the Department—is inapplicable to persons acting under color of *federal* law. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 398 n.1 (1971) (Harlan, J., concurring). As the Supreme Court has put it, “Section 1983 claims ... do not apply to federal government actors. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 n.21 (1987); *accord Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir.1997) (“[B]y its very terms, § 1983 precludes liability in federal government actors.”).

Moreover, Plaintiffs' claims would fail even if they had filed them under *Bivens*, which governs civil rights claims against federal defendants. The Department of Education is a federal agency, and the Supreme Court has held that federal agencies are not appropriate defendants for *Bivens* actions. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 486 (1994).

B. None of Plaintiffs' constitutional claims are valid against the Department of Education.

But even if Plaintiffs had adequately pled a statutory basis for relief against the Department, Plaintiffs' constitutional claims are frivolous and therefore cannot be the basis for relief. Plaintiffs invoke the First, Fifth, and Fourteenth Amendments to the US Constitution. But none of these provisions implicate the actions of the Department here. The due process and equal protection provisions of the Fourteenth Amendment, by their terms, only apply to state governments. The Amendment clearly states: "No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *state* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, Sec. 1 (emphasis added). The specificity of this language has been recognized as limiting these 14th Amendment provisions to state governments and actors, and excluding federal actors. As the Supreme Court has said, like §1983 claims, Fourteenth Amendment claims do not apply to federal government actors. *See San Francisco Arts & Athletics, Inc.*, 483 U.S. at 543 n.21 ("The Fourteenth Amendment applies to actions by a State.").

Further, no alleged action of the Department actually violates either the First or the Fifth Amendments. It was long ago recognized in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1986), that the mere fact of statutory religious exemption does not violate the Establishment Clause of the First Amendment. *Amos* involved the hiring of a janitor by a church-connected gym,

and it was found that the 702 exemption to the Title VII Civil Rights Act, which allows religious organizations to making hiring decisions based on its religious beliefs, even as to non-ministerial positions, was entirely constitutional, and did not violate the Establishment Clause. *Id.* at 336-339. The Court reiterated the same point nearly 20 years later in *Cutter v. Wilkinson*, when it held that the Religious Land Use and Institutionalized Persons Act was constitutional despite the fact that it clearly favored religious rights over other rights. 544 U.S. 709, 724–26 (2005).

And, as discussed above in the standing section, nothing in the Complaint alleges that the Department itself makes distinctions between students based on gender and sexuality. Rather, it merely oversees and implements the Congressionally created religious-college exemption. The exemption states that the section on sex discrimination simply “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” 20 USC §1681(a)(3). This is very similar in meaning to Title VII’s exemption, which says that the anti-discrimination provisions there “shall not apply to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with ... its activities.” 42 U.S.C. §2000e-1.

The 702 exemption has been held to allow religious employers to making hiring and employment decisions using religious criteria in relation to all its employees, from janitors, to secretaries, to teachers, and accountants. *Amos*, 483 U.S. at 336–39. There is no meaningfully constitutional difference between the 702 exemption and the Title IX religious college exemption, and thus Plaintiff fails to state a legitimate constitutional claim.

The fact that federal aid, in the form of loans and grants, goes to the students that attend these schools does not change the analysis. Plaintiffs allege that many of students remain in debt

because of the federal financial aid they used to attend these institutions. Compl., Dkt. 1, at ¶ 45. But indirect federal aid such as this to religious institutions simply does not raise Establishment Clause concerns. As the Supreme Court has repeatedly held, “[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

In the *Zelman* case, the Court was dealing with vouchers for church-run or religiously affiliated primary and secondary schools, which are assumed to be highly religious, or pervasively sectarian. But the indirect nature of the aid means that the religious decisions made by the schools could not be attributed to the federal government. Similarly, in this case, where the aid at issue is directed to the students themselves, who have free and independent choices as to where to spend it, the religious decisions and standards of the schools cannot be attributed to the government, either under the First or the Fifth Amendment. *See Zelman*, 536 U.S. at 661–63.

Further, in the more recent case of *Espinoza v. Montana Dep’t of Revenue*, the Supreme Court has ruled that, when it comes to subsidizing private education, “once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” 140 S. Ct. 2246, 2255, 2261 (2020) (The Free Exercise Clause “protects religious observers against unequal treatment” and against “laws that impose special disabilities on the basis of religious status.”); *see also Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717–18 (1981) (holding that the Free Exercise Clause forbids the government from “condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith, or ... den[ying] such a benefit because of conduct mandated by religious belief”). The relief Plaintiffs seek would effectively operate as a ban on

indirect federal assistance to religious schools that adhere to traditional Judeo-Christian sexual ethics—which would violate the Free Exercise Clause as interpreted in *Espinoza* and *Thomas*.

In short, striking down the Title IX religious exemption may not be an absolute ban on students using federal funds at *all* religious schools, but it would be a practical ban as to all religious colleges and universities that uphold traditional biblical teaching on issues of sexuality and gender. Such a ban is not required by the Establishment Clause, as we see in *Zelman*, and indeed, as *Espinoza* shows, is forbidden under the Free Exercise Clause.

For all these reasons, Plaintiffs claims under the First and Fourteenth Amendments must be dismissed.

CONCLUSION

The Complaint is fatally flawed. Plaintiffs lack standing to challenge the Title IX religious exemption and, in their attempts to do so, they have failed to include parties necessary to the resolution of their claims. But even if this Court finds they have cleared the hurdle of standing, and that the case can continue without the religious schools named in the Complaint, the Court must nevertheless dismiss the case, as Plaintiffs' legal claims are frivolous.

DATED this 12th day of May, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing motion to dismiss and memorandum in support was served on the following via the indicated method(s) of service:

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_____ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

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DATED this 12th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains 6154 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.