No. 20-56156

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNA MAXON, ET AL.,
Plaintiffs-Appellants,

v.

FULLER THEOLOGICAL SEMINARY, ET AL.,
Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of California
The Honorable Consuelo Bland Marshall
2:19-cv-09969-CBM-MRW

BRIEF OF *AMICI CURIAE* CAMPUS CRUSADE FOR CHRIST, CHI ALPHA CAMPUS MINISTRIES, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, AND YOUNG LIFE IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), Campus Crusade for Christ, which operates in the United States under the name "Cru," hereby certifies that it has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), Chi Alpha Campus Ministries hereby certifies that it has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious ministries that serve college students nationwide. These ministries contribute to the vibrant diversity of student organizations on campus, welcoming everyone to their meetings, activities, and events. But to cultivate a distinctive ethos of ministry and service, these ministries select leaders that embody their core religious beliefs.

The First Amendment rights of assembly and expressive association protect that prerogative. They do so even when—especially when—those organizations' beliefs conflict with majoritarian views.

Like Amici, religious schools such as Fuller Theological Seminary (the "Seminary") contribute to the vibrant diversity of views in American higher education. The same First Amendment rights that shelter Amici also safeguard the Seminary's ability to educate and minister. Organizations like Amici depend on religious schools like the Seminary to train their future leaders and staff. Indeed, faith groups of all stripes

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity other than Amici or its counsel contribute money to this brief's preparation or submission. All parties have consented to this filing.

depend on seminaries to train the next generation of religious leaders in their beliefs and traditions free from governmental interference.

Moreover, conditioning long-enjoyed benefits upon a change in a religious group's religious standards significantly harms communities of faith. This principle applies both when religious schools and religious students suddenly lose federal funding and when religious student organizations like Amici are refused registered status unless they remove all religious leadership qualifications.

Campus Crusade for Christ, Inc., or "Cru," has more than 1,400 chapters on American college campuses involving over 100,000 students. Cru's interdenominational mission seeks to ensure that "everyone knows someone who truly follows Jesus." Cru's campus impact depends on its leaders' ability to articulate and model consistently the values that animate Cru.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. It works to reconcile students to Christ, equipping them through communities of prayer, worship, fellowship, discipleship, and missions. Its 320 university chapters across the country provide community groups, foster creativity

and diversity, promote student leadership, and conduct community outreach. Chi Alpha's campus impact depends on its leaders' ability to articulate and model consistently the values that animate Chi Alpha.

InterVarsity Christian Fellowship/USA seeks to "establish and advance . . . witnessing communities of students and faculty who follow Jesus as Savior and Lord." Largely through its student leaders, InterVarsity conducts interdenominational outreach and religious ministry on over 600 college campuses throughout the country. InterVarsity's campus impact depends on its leaders' ability to articulate and model consistently the values that animate InterVarsity.

Young Life ministers to students from middle school through college in all 50 states and in more than 100 countries. Its mission is "to introduce adolescents to Jesus Christ and help them grow in their faith." Young Life's campus impact depends on its leaders' ability to articulate and model consistently the values that animate Young Life. For nearly fifty years, Young Life has partnered with Fuller Theological Seminary to train Young Life's leaders. The Seminary offers a Youth Ministries graduate degree program to Young Life staff that combines the

Seminary's educational offerings, traditional Young Life training modules, and experiences in Young Life field ministry.

INTRODUCTION

Constitutional protections for speech, worship, association, and assembly safeguard "the most sacred of all property"—that of conscience. James Madison, *Property* (Mar. 29, 1792), *in* 1 *The Founders' Constitution* 598, 598 (Philip B. Kurland and Ralph Lerner eds., 1986). The First Amendment secures for minorities and majorities alike the right to hold views, espouse ideas, and form associations around shared values. In so doing, the First Amendment guides our polity toward "[a] confident pluralism that conduces to civil peace and advances democratic consensus-building." Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371) [hereinafter Brief of Gays & Lesbians for Individual Liberty].

Plaintiffs' arguments cut to the quick of that confident pluralism. While the statutory language and agency interpretations of Title IX may decide this case, statutes and agency interpretations change under majoritarian pressures. The First Amendment endures. The Seminary's

fundamental rights to associate, assemble, speak, and worship do not rise or fall on the meaning of "controlled by a religious organization." And the security of these rights does not depend on an administrative permission slip. Our Constitution guarantees it.

The same associational rights that shelter the Seminary and Amici also provide vital protection to Plaintiffs. All minority voices possess a "powerful ally in the First Amendment," which allows sexual minorities to find their voice "in places where dominant public opinion does not support LGBT freedom." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 937 (2009).

Before the trial court, the Plaintiffs' argued that the Supreme Court's decision in *Christian Legal Society v. Martinez* required the court to apply a lower level of scrutiny to the Seminary's associational claim. Pls.' Mem. Opp'n Summ. J. 17–18, *Maxon v. Fuller Theological Seminary*, No. 2:19-cv-09969-CBM-MRW (C.D. Cal. Mar. 24, 2020), ECF No. 53 [hereinafter Pls.' Mem. Opp'n Summ. J.]. But Plaintiffs did not raise this argument on appeal, and for good reason: *Martinez* is a limited public

forum case. As a limited public forum case, *Martinez* has no application here.

The Seminary is an expressive association organized for the purpose of training religious leaders. Plaintiffs' claim applies Title IX in a way that would harm the Seminary's expressive purpose, triggering strict scrutiny.

Strict scrutiny is not satisfied here. Title IX prohibits invidious discrimination. But it exempts institutions where sex is relevant to admissions and hiring decisions. Plaintiffs' application does not further Title IX's purpose of prohibiting invidious discrimination. Nor can Plaintiffs establish a compelling governmental interest in regulating a seminary's religious training of ministers.

ARGUMENT

I. The First Amendment Protects The Freedom To Cultivate A Religious Community Around A Shared Mission.

A. The freedoms of association and assembly safeguard American pluralism and foster cultural diversity.

Expressive associations "play[] a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984). They

buttress our republic by teaching citizens "to transcend their individual interests and opinions and to develop civic responsibility." Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 17 (1985). Educational institutions and organizations like Amici are not just places for collective expression. They compose a vital network of diverse institutions that form the individuals who compose American society—"preeminent example[s]" of those associations that provide "critical buffers between the individual and the power of the State." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., joined by Kagan, J., concurring) (quoting *Roberts*, 468 U.S. at 619).

An individual's religious, political, and civil identity within a pluralistic society is forged through community. *See* Robert Nisbet, *The Quest for Community* 49 (1953) (describing "the family and local community and the church" as "the area[s] of association" that generally shape an individual's "concept of the outer world"). The right to associate in pursuit of shared goals—to enter into community—safeguards the

rights to speak, worship, and protest.[2] *See Roberts*, 468 U.S. at 622. Collective expression "undeniably enhance[s]" and supports these rights—for all people. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Associational rights also furnish a bulwark against state encroachment on other constitutional rights. This is especially true for religious groups, whose "autonomy . . . has often served as a shield against oppressive civil laws." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., joined by Kagan, J., concurring).

Freedom to associate and assemble has facilitated American progress since the founding. During debates over the proposed Bill of Rights, Theodore Sedgwick of Massachusetts objected to including a right of assembly, questioning the wisdom of "descend[ing] to such minutiae," and moved to strike the right from the amendment. 1 Annals of Cong. 759 (1789) (Joseph Gales ed., 1834). In response, John Page of Virginia reminded the First Congress of the 1670 trial of William Penn and

[2] Today, regrettably, the enumerated First Amendment right of assembly has largely been subsumed into the unenumerated right of association, producing confusion about association's constitutional grounding. *See* John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 82 (2012).

William Mead, who were arrested in England for leading an unlawful assembly when they and their Quaker congregation attempted to worship secretly. *See id.* at 760. Thus reminded of the need to safeguard the right peaceably to assembly, a "considerable majority" defeated Sedgwick's motion. Inazu, *Liberty's Refuge* 25.

When Federalists attacked Democratic-Republican societies following the Whiskey Rebellion, James Madison sprang to defend the groups' rights. Ralph Ketcham, *James Madison* 355 (1st paperback ed. 1990). "To Madison the issue was clear: a free government could in justice neither proscribe lawful political societies nor set itself up as the judge of what censures on [their] conduct were permissible." *Id.*

Several decades later, Tocqueville commented on the unique stature of private association in America—particularly the link between associations, which he labeled "the mother science" of our democratic system, and equality. Alexis de Tocqueville, 2 *Democracy in America* 902 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2012) (1835). He reported, "Wherever, at the head of a new undertaking, you see in France the government, and in England, a great lord, count on seeing in the United States, an association." *Id.* at 896. Today, the

freedom of association remains "especially important in preserving political and cultural diversity." *Roberts*, 468 U.S. at 622. "[A]ssociational freedom enables minority voices to cultivate and maintain their *distinctive identity*," fortifying that diversity "against not only overt suppression of ideas, but also against the soft tyranny of mass opinion." Brief of Gays & Lesbians for Individual Liberty at 6, 12 (emphasis in original).

B. The freedoms of association and assembly preserve a group's autonomy over its expressive activity.

A group's identity determines its message. That's why government may not dilute an unpopular group's message through compelled or coerced inclusion of unwanted members. A community that lacks the authority to select its members will quickly lose control over its identity and desired ends. This interdependence between membership and message compels a conclusion that the freedom to associate encompasses "a freedom not to associate." *Roberts*, 468 U.S. at 623.

Plaintiffs' claim strikes where the sacred rights of conscience converge. The First Amendment contemplates a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. It is difficult to

imagine a claim that fuses a more potent mix of political, social, educational, and religious ends than the challenge to the Seminary in this case. It challenges the Seminary's abilities to practice its faith, to spread its message, to maintain the integrity of its views, and to teach those views to others. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .").

Constitutional protections for these rights are most necessary when exercised in a way that most people feel is "misguided, or even hurtful." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995). Robust protection of associational rights allows space for everyone. The same associational rights that allow the Boy Scouts to select who may lead its troops, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000), also allow a gay softball league to exclude straight players, *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1161–63 (W.D. Wash. 2011).

Schools and campus organizations must remain free to select students, faculty, and leaders according to their faith-based criteria. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (stating that the First Amendment shields religious institutions' "autonomy with respect to internal management decisions that are essential to the institution's central mission"); *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 709 (9th Cir. 2010) (explaining that "the Fourteenth Amendment," including the remedial powers of Section 5, "was intended to extend, and not retract, the freedoms enshrined in the First"). Every admitted student, every hired faculty member, and every chosen leader impacts the message these organizations convey. *See Hurley*, 515 U.S. at 572. The First Amendment ensures an institutional and organizational integrity that fosters a healthy, robust exchange of ideas. *Cf. Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (explaining that "falsehood and fallacies" in the marketplace of ideas should be cured by "more speech, not enforced silence"). Courts must "defer[] to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653.

C. The Seminary and Amici are archetypes of expressive associations.

Government action that significantly undermines a group's advocacy or requires a group to change its message infringes on associational rights. *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 13 (1988). Only "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas," can justify such an infringement on such rights. *Roberts*, 468 U.S. at 623.

Throughout American history, faith-based institutions have been an integral part of the fabric of American higher education. And on hundreds of secular public and private campuses, student groups like Amici provide smaller faith-based communities to foster students' personal development.

These organizations are "the archetype" of expressive associations. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., joined by Kagan, J., concurring). The principles animating freedom of association "appl[y] with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Id.*

For example, the Seminary holds itself out to the public as a "community dedicated to the equipping of men and women for the manifold ministries of Christ and his church." *Mission, Vision and Values*, Fuller Theological Seminary (last visited June 10, 2021).[3] It exists to "Form[] Global Leaders for Kingdom Vocations." *Id.*

The Seminary and Amici share the same true north. In fact, Amicus Young Life has partnered with the Seminary for nearly fifty years to train Young Life's leaders. *See Fuller Seminary Through the Years*, Fuller Theological Seminary (last visited June 10, 2021).[4]

As Plaintiffs' First Amended Complaint recognized, the Seminary's Non-Discrimination Policy states that the school does not exclude students based on sexual orientation. *Maxon v. Fuller Theological Seminary*, No. 2:19-cv-09969-CBM-MRW, slip op. at 3 (C.D. Cal. Oct. 7, 2020). But the Seminary embraces moral standards informed by orthodox Christian teaching. Plaintiffs' application of Title IX would jeopardize the Seminary's ability to express and inculcate those views.

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[3] https://www.fuller.edu/about/mission-and-values/.

[4] https://www.fuller.edu/about/history-and-facts/fuller-seminary-through-the-years/.

II. Plaintiffs' Claim Triggers Strict Scrutiny, Which Is Not Satisfied Here.

A. Plaintiffs' application of Title IX fails strict scrutiny because the means extend well beyond Title IX's compelling purpose.

This Court must strictly scrutinize laws that burden the right to expressive association. *Dale*, 530 U.S. at 648; *Apilado*, 792 F. Supp. 2d at 1163. Strict scrutiny applies whether the burden on association is intentional, *See Roberts*, 468 U.S. at 623, or merely an incidental effect of the law. *NAACP*, 357 U.S. at 460–61.

1. Title IX's compelling governmental interest is in prohibiting invidious discrimination, which the Seminary does not practice.

Title IX generally forbids sex-based discrimination in higher education. But Congress also included exemptions for situations in which sex may be relevant to the school's hiring or admissions calculus. These exemptions show that Congress sought to achieve its purpose without eradicating *all* sex-based discrimination.

Title IX does not purport to eradicate all forms of sex discrimination. Title IX eradicates *invidious* discrimination. 118 Cong. Rec. 5803 (1972) (reflecting that Title IX's purpose was to end "*corrosive and unjustified* discrimination against women" in higher education

(emphasis added)). As Congress debated the adoption of Title IX, the Supreme Court decided *Reed v. Reed* and held that the Equal Protection Clause applies to sex-based discrimination. *See* 404 U.S. 71, 75 (1971). *Reed* and its progeny prevent government from using gender as an "inaccurate proxy" for more "germane" criteria, *Craig v. Boren*, 429 U.S. 190, 198 (1976), such as fitness to administer an estate, *see Reed*, 404 U.S. at 75, or financial dependence on a spouse, *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973). But the courts have upheld classifications that are "not the 'accidental by-product of a traditional way of thinking about females.'" *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)).

Consistent with this, Title IX includes several exemptions where sex is a relevant consideration. The statute exempts private undergraduate institutions, such as such as the highly selective "Seven Sisters," five of which continue to admit only women. 20 U.S.C. § 1681(a)(1) (2018). It exempts fraternities and sororities. *Id.* § 1681(a)(6)(A). It exempts schools with "religious tenets" that make sex a relevant consideration. *Id.* § 1681(a)(3). Congress did not—and could not, consistent with the First Amendment—"compel the ordination of

women by the Catholic Church or by an Orthodox Jewish seminary." *See Hosanna-Tabor*, 565 U.S. at 189.

Neither Title IX nor its legislative history mentions sexual orientation or same-sex marriage. But should this Court interpret Title IX consistently with Title VII, as applied by the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the statutory language and purpose remain unchanged. Title IX targets invidious discrimination. But it expressly recognizes that "sex" (including, arguendo, sexual orientation) remains relevant to some institutions—including religious schools—in a way that is not invidious. In so doing, Title IX preserves both individual and institutional diversity in higher education.

Plaintiffs present no argument that the Seminary uses sex as a proxy for other, more relevant predictors of a student's ability to succeed academically and to serve as the Seminary's ambassador after graduation. In other words, there is no evidence that the Seminary engages in *invidious* discrimination. Instead, the record establishes that the Seminary has adopted community standards that maintain the distinctive religious identity that animates it.

Nor could Plaintiffs establish a compelling governmental interest in controlling the way a seminary trains ministers of the faith. Indeed, as the religious exemption in Title IX suggests, the government's interest is in avoiding such entanglements with deeply religious matters. *E.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186) (explaining that the First Amendment secures for religious organizations autonomy over "matters of church government"); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (holding that autonomy over matters of church government, which includes the ability to choose representatives using criteria the church deems relevant, extends beyond "ordained ministers . . . to those persons who are actively in the process of becoming ordained ministers").

2. The Constitution applies to both the carrot and the stick.

In the Court below, Plaintiffs attempted to wave away the Seminary's constitutional concerns as a mere deprivation of a subsidy. Pls.' Mem. Opp'n Summ. J. 15–18. And Plaintiffs renewed that theme in their opening brief here, describing the Seminary as "taxpayer-funded." Pls.' Br. 3.

But the Constitution applies to the government's carrot and to its stick. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (reaffirming that the First Amendment prohibits "indirect coercion or penalties on the free exercise of religion" (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Conditions attached to subsidies place "substantial," though "indirect," burdens on First Amendment rights. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981); *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (expressly reaffirming *Thomas*).

For five decades, many religious schools accepted federal funds under consistent terms. Plaintiffs now seek to alter the deal—to force religious schools to choose between a core tenet of their faith and a vital

source of funding. This ultimatum "puts the same kind of burden upon" First Amendment rights "as would a fine imposed" for engaging in protected activity. *Thomas*, 450 U.S. at 717. The loss of federal funding would harm religious schools, religious students, and organizations like Amici, many of whom depend on religious educational institutions to train their future leaders.

After five decades of receiving federal funding under a stable statutory scheme, Plaintiffs seek to use this Court to impose an ultimatum: accept radically altered conditions or forfeit *all* federal assistance. For most schools, the latter option is suicide. Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, The Atlantic (July 7, 2016) (quoting the president of the National Association of Scholars as saying that most schools that turn down federal funds would likely face "bankruptcy within a year or two").[5]

[5] https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/.

Students would also suffer from this squeeze. Seven out of every ten students attending member schools of the Council for Christian Colleges and Universities rely on federal funding. *CCCU Update on Hunter v. U.S. Department of Education Lawsuit*, Council for Christian Colls. & Univs. (May 12, 2021).[6] Loss of that funding would disproportionately impact "low-income and first-generation college students, as well as students from racial and ethnic minority groups." *Id.* Military veterans would be barred from using their hard-earned benefits on a degree from many religious schools. Though administered by schools, these funds directly benefit *students*. Plaintiffs' reimagined Title IX would deprive these students of choice in their education.

"Facilitating pluralism means funding pluralism." John D. Inazu, *Confident Pluralism* 67 (2016). Federal funding in education encourages diversity among both students and institutions. Religious schools such as Fuller Theological Seminary and organizations like Amici contribute vitally to that diversity. "Historically and to the present day," religious organizations have played a singularly important role in "developing,

[6] https://www.cccu.org/news-updates/cccu-update-hunter-v-u-s-department-education-lawsuit/.

transmitting, communicating, and enforcing concepts of morality and justice." McConnell, *supra*, at 18. Where government provides subsidies to "promote a diversity of viewpoints and ideas," it "should not be permitted to demand its own orthodoxy as a condition to obtaining generally available benefits." Inazu, *Confident Pluralism* 127.

B. *Martinez*'s limited public forum analysis does not apply here.

Before the district court, Plaintiffs relied on *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), to respond to the Seminary's constitutional concerns and to suggest that a lesser level of scrutiny is appropriate. Pls.' Mem. Opp'n Summ. J. 15–18.

But *Martinez* offers Plaintiffs no assistance in this case. *Martinez* is a limited public forum case and thus inapposite. *See Martinez*, 561 U.S. at 679. And even within the realm of cases dealing with limited public fora, federal courts interpret *Martinez* narrowly. While *Martinez* turned on the viewpoint neutrality of a university's all-comers policy,[7]

[7] As stipulated by the parties in *Martinez*, the all-comers policy in that case required student organizations to "accept all comers as voting members, even if those individuals disagree with the mission of the group." 561 U.S. at 674.

recent cases have held that individualized exemptions undermine the neutrality of an all-comers policy. *See, e.g.*, *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 2021 WL 1387787, at *21 (E.D. Mich. Apr. 13, 2021); *Roe v. San Jose Unified Sch. Dist. Bd.*, 2021 WL 292035, at *13 (N.D. Cal. Jan. 28, 2021).

Other courts applying *Martinez* have held that inclusionary policies less ambitious than an all-comers policy often amount to viewpoint discrimination. *E.g.*, *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 898 (S.D. Iowa 2019) ("[B]ecause the University does not have an all-comers policy, *Martinez* does not resolve the viewpoint-neutrality question here."). Exemptions to an all-comers policy have opened the door to as-applied constitutional challenges under the First Amendment. *InterVarsity Christian Fellowship/USA*, 2021 WL 1387787, at *21; *Roe*, 2021 WL 292035, at *16.

Of course, Title IX is not an all-comers policy, and the United States Government cannot turn the entire field of higher education into a limited public forum through federal funding. Accordingly, *Martinez* does not apply.

Indeed, Plaintiffs invite this Court to work *Martinez* in reverse. Once accepted to the school, Plaintiffs would have broad access to its resources and facilities. Upon graduation, Plaintiffs would receive a diploma bearing the school's name, seal, and imprimatur. In other words, Plaintiffs would have access to much that was denied to the student groups in *Martinez* and *Alpha Delta Chi*. *See Martinez*, 561 U.S. at 669–70 (discussing how official recognition granted a student organization access to the school's money, facilities, names, and logos); *Alpha Delta Chi–Delta Chapter v. Reed*, 648 F.3d 790, 795–96 (9th Cir. 2011) (same).

CONCLUSION

To safeguard both secular and religious educational institutions' rights to pursue truth—and to preserve the rights of all marginalized groups—Amici respectfully request that this Court affirm the lower court's dismissal and do so in a decision grounded in the First Amendment.

Date: June 17, 2021

Respectfully submitted,

/s/ *Bradley J. Lingo*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 17, 2021. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Bradley J. Lingo