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Title IX's Religious Exemption: Agency Practice and Judicial Application

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Title IX of the Education Amendments of 1972 prohibits discrimination “on the basis of sex” in education programs that receive federal financial assistance. The law also contains nine statutory exceptions to that prohibition, including an exemption for religiously controlled educational institutions. The religious exemption does not operate as a blanket exemption foreclosing all Title IX claims against a religiously controlled school. Nor does it allow religious entities to use the exemption as a pretext for engaging in otherwise unlawful sex discrimination under Title IX. Rather, the exemption allows conduct by a religiously controlled school that would otherwise violate Title IX’s requirements if (1) its actions are motivated by a religious reason, and (2) the application of Title IX would conflict with a religious tenet.

Federal agencies including the Department of Education (ED) that distribute financial assistance to education programs are responsible for ensuring that those programs comply with Title IX; agencies also administer and enforce the statute’s religious exemption. According to ED’s Office for Civil Rights (OCR), when reviewing requests for an exemption assurance, it examines whether the requesting institution has (1) identified the religious organization that controls it; and (2) specified the provisions of the statute or regulations that conflict with religious tenets. With respect to the latter, OCR requests that an institution specify the requirements from which it seeks an exemption and the “religious tenets that conflict with those provisions.” A school may submit a statement of its religious tenets or “submit a statement of its practices, as based on its religious tenets.” As indicated above, even if a school qualifies for a religious exemption from a specific Title IX requirement, the exemption does not insulate a school from all other Title IX requirements. Instead, ED applies the exemption where a school’s compliance with a particular Title IX requirement would conflict with a religious tenet. For instance, while a religious school might claim an exemption allowing it to exclude women from ministry courses because of religious beliefs that only men may be ministers, the exemption would not justify barring women from other courses.

In addition to this administrative enforcement, individuals may bring private suits in federal court to enforce Title IX directly against federally funded schools. Courts thus also play a role in applying the religious exemption and make determinations on whether the exemption forecloses a Title IX claim. To date, it appears that few federal courts have reached questions addressing Title IX’s religious exemption. In the limited case law addressing it, courts have offered some discussion on which entities qualify for the religious exemption and the need to show a religious conflict for it to apply. In general, federal courts appear unlikely to probe into matters of religious interpretation when assessing the applicability of the religious exemption. Rather, if an entity identifies a religious tenet that conflicts with a Title IX requirement and meets the exemption’s other requirements, a federal court would likely apply the exemption without evaluating the religious tenet at issue. If a plaintiff presents evidence that a school’s challenged conduct was not in fact religiously motivated, however, at least one federal court has held that a Title IX claim may proceed for further fact-finding to establish the school’s actual motivation, without involving analysis of religious doctrine itself.

In light of a 2020 Supreme Court decision evaluating Title VII of the Civil Rights Act of 1964, *Bostock v. Clayton County*, some federal courts and federal agencies, including ED, have also concluded that Title IX’s prohibition of discrimination “on the basis of sex” bars sexual orientation and gender identity discrimination. This legal development could prompt new questions about the application of Title IX’s religious exemption. A number of religious educational institutions, for example, have sought and received exemptions from ED’s OCR concerning application of certain Title IX regulatory provisions that could conflict with religious tenets concerning sexual orientation and gender identity. Litigation has also raised questions concerning Title IX’s religious exemption, including a recent pending case challenging the constitutionality of the exemption and actions taken by religiously controlled schools concerning sexual orientation and gender identity.

To the extent there is legislative interest in amending Title IX’s religious exemption, one important consideration, apart from First Amendment issues, involves the constitutional authority that Congress relied upon when enacting Title IX. The Supreme Court has repeatedly interpreted Title IX as Spending Clause-based legislation. Under that framework, recipients of federal funding voluntarily agree to comply with civil rights requirements as a condition of receiving that assistance. For Congress to impose conditions on those funds, the Supreme Court has held that statutory requirements must be “clear” and “unambiguous[]” so that recipients have “notice” of their obligations. Thus, any ambiguities in the law may have implications for how federal courts construe Title IX’s requirements.

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Title IX of the Education Amendments of 1972 prohibits discrimination “on the basis of sex” in education programs that receive federal financial assistance.¹ The law contains several exceptions, including a religious exemption that permits conduct by a religiously controlled educational institution that might otherwise violate the statute’s requirements when (1) the institution acts for a religious reason, and (2) compliance with the statute would conflict with a religious tenet.²

Though the religious exemption was enacted with Title IX’s other original provisions in 1972,³ it has received renewed attention in the past several years,⁴ particularly as questions have arisen concerning whether Title IX’s antidiscrimination mandate may be construed to prohibit discrimination based on sexual orientation and gender identity.⁵ These legal developments have already prompted litigation⁶ and may generate new questions about the application of Title IX’s religious exemption.

This report begins with a discussion of how federal agencies enforce Title IX, including determining whether Title IX’s religious exemption applies.⁷ As many Title IX religious exemption determinations are made at the federal agency level, this report examines Title IX regulations and guidance addressing the exemption, the Department of Education’s (ED’s) application of the exemption, and other federal agency practices. The report then examines case law analyzing Title IX’s religious exemption, including federal court decisions addressing certain features of the statutory text and when the exemption may apply. The report closes with potential considerations for Congress relating to Title IX’s religious exemption.

Title IX: Background and Context

As a general matter, federally funded education programs must comply with Title IX’s prohibition against discrimination “on the basis of sex.”⁸ All public school districts and most colleges and universities receive federal funding and are therefore subject to the statute’s requirements.⁹ For example, denying a qualified female applicant admission into a federally funded vocational

¹ See 20 U.S.C. §§ 1681–89.

² *Id.* § 1681(a)(3).

³ See Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (enacting the antidiscrimination mandate of Title IX and exceptions to that mandate, including the religious exemption).

⁴ Cf. Nate Raymond, *U.S. Judge Upholds Title IX Exemption for Religious Schools*, REUTERS (Jan. 13, 2023), <https://www.reuters.com/legal/government/us-judge-upholds-title-ix-exemption-religious-schools-2023-01-13/>; Evan Gerstmann, *Should There Be a Religious Exemption for Title IX?*, FORBES (June 11, 2021), <https://www.forbes.com/sites/evangerstmann/2021/06/11/should-there-be-a-religious-exemption-for-title-ix/?sh=3f90435af9ee>.

⁵ For more information, see CRS Legal Sidebar LSB10830, *Education Department Proposes New Title IX Regulations: Sexual Orientation and Gender Identity*, by Jared P. Cole (2022); CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole (2021).

⁶ See, e.g., *Maxon v. Fuller Theological Seminary*, No. 20-56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021); *Hunter v. U.S. Dep’t of Educ.*, No. 21-00474, 2023 WL 172199 (D. Or. Jan. 12, 2023), *appeal docketed*, No. 23-35174 (9th Cir. Mar. 14, 2023).

⁷ Discussion of Title IX’s religious exemption as it relates to Section 1557 of the Affordable Care Act of 2010 is beyond the scope of this report. For more information, see CRS Legal Sidebar LSB10813, *Proposed HHS Rule Addressing Section 1557 of the ACA’s Incorporation of Title IX*, by Christine J. Back (2022).

⁸ See 20 U.S.C. § 1681(a) (applying the statute’s requirements to “any education program or activity receiving Federal financial assistance”).

⁹ See Dep’t of Educ., Office for Civil Rights, *Sex Discrimination: Frequently Asked Questions* (Aug. 19, 2021), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html>.

program because the school prefers male applicants would violate Title IX.¹⁰ The law can also impose requirements in cases of sexual harassment—schools must respond appropriately to allegations of sexual harassment, and can be held liable for a deliberately indifferent response to a teacher's harassment or abuse of a student, as well as harassment between students.¹¹ In addition, Title IX prohibits schools from retaliating against individuals for reporting sex discrimination.¹²

Title IX has nine statutory exceptions to its antidiscrimination mandate.¹³ One exemption allows an educational institution “controlled by a religious organization” to act in ways that might otherwise violate the statute's requirements if the institution's actions are motivated by a religious reason and compliance with the statute would conflict with a religious tenet.¹⁴ For example, while Title IX generally requires that educational institutions provide equal access to courses for men and women, Title IX's religious exemption might allow some religiously controlled institutions to limit ministry training courses to men, based on religious tenets that only men may be ministers.¹⁵

In enforcing Title IX and its religious exemption, federal agencies and federal courts both play a role. Federal agencies that distribute federal financial assistance to educational programs are responsible for ensuring that their funding recipients comply with Title IX;¹⁶ agencies also make determinations of whether Title IX's religious exemption applies.¹⁷ In addition to administrative enforcement, individuals may enforce Title IX through private suits in federal court.¹⁸ Thus, federal courts, as well as agencies, may evaluate whether Title IX's religious exemption forecloses a particular Title IX claim against a religiously controlled educational institution.¹⁹

¹⁰ See 20 U.S.C. § 1681(a)(1). Title IX's requirements are discussed in more detail in other CRS products. For more information, see CRS Report R47109, *Federal Financial Assistance and Civil Rights Requirements*, by Christine J. Back and Jared P. Cole (2022).

¹¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (teacher harassment of student); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (harassment between students)

¹² See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (holding that Title IX's implied private right of action encompasses claims of retaliation against an individual for reporting or complaining about sex discrimination).

¹³ See 20 U.S.C. § 1681(a)(1)–(9). See generally *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 555 (3d Cir. 2017) (“Congress expressly exempted specific kinds of programs from Title IX's reach—like military academies, religious schools, and sororities, see 20 U.S.C. § 1681(a)(1)–(9)—so we're hesitant to impose further restrictions without strong justifications from Title IX's text.”).

¹⁴ See 20 U.S.C. § 1681(a)(3).

¹⁵ See *infra* “ED OCR's Application of the Religious Exemption.”

¹⁶ See 20 U.S.C. § 1682; *Hunter v. U.S. Dep't of Educ.*, No. 21-00474, 2023 WL 172199, at *2 (D. Or. Jan. 12, 2023) (explaining that individuals may seek relief under Title IX by filing an administrative complaint with the Office for Civil Rights within the Department of Education and discussing case resolution process).

¹⁷ See, e.g., *infra* “Administrative Enforcement.”

¹⁸ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709, 717 (1979) (concluding that the text, history, and purpose of Title IX supported an implied cause of action for victims of sex discrimination and holding that the private plaintiff in the case could maintain her Title IX lawsuit).

¹⁹ See, e.g., *Maxon v. Fuller Theological Seminary*, No. 20-56156, 2021 WL 5882035, at *1–3 (9th Cir. Dec. 13, 2021) (analyzing whether Title IX's religious exemption applied to foreclose plaintiffs' Title IX claim challenging the defendant seminary's expulsion decisions). In 1988, Congress enacted the Civil Rights Restoration Act (CRRA), which among other things, amended Title IX to add a provision defining a covered program or activity subject to its requirements. The Civil Rights Restoration Act of 1987, § 3, Pub. L. No. 100-259, 102 Stat. 28, 28–29. The CRRA defines “program or activity” as “all the operations of” a state or local agency; a college, university, or other postsecondary institution, or a public system of higher education; an entire corporation, partnership, or other private organization, or an entire sole proprietorship, where certain conditions are met; among other covered entities. The CRRA further provides that a “program or activity” subject to Title IX “does not include any operation of an entity which is controlled by a religious organization” if the application of the statute “would not be consistent with the religious tenets of such organization.” See 20 U.S.C. § 1687.

One consideration relevant to how courts interpret and apply Title IX, including its religious exemption, concerns the constitutional authority Congress relied upon to enact the statute. The Supreme Court has interpreted Title IX to have been enacted under Congress's Spending Clause authority.²⁰ Under this framework, covered entities voluntarily agree to comply with civil rights requirements as a condition for receiving federal funding,²¹ much as if they had entered a contract.²² For Congress to impose conditions on those funds, the Court has held that statutory requirements must be “clear” and “unambiguous[]” so that recipients have “notice” of their obligations.²³ Any ambiguity in Spending Clause statutes, then, can have implications for how federal courts analyze their requirements.²⁴

Administrative Enforcement

Federal agencies that distribute federal financial assistance to educational programs are responsible for enforcing Title IX.²⁵ In cases of noncompliance, agencies may terminate assistance as long as they follow certain procedures.²⁶ Title IX's religious exemption, however, forecloses application of the statute if compliance would conflict with a recipient's religious tenet.²⁷ Federal agencies have played a significant role in administering the exemption as they enforce Title IX in education programs that they fund.

To shed light on agency enforcement, this section first discusses agencies' Title IX regulations, including provisions implementing the religious exemption. This section continues by examining how federal agencies have applied the exemption, with a particular focus on ED's Office for Civil Rights (OCR).

Title IX Regulations

Various federal agencies distribute assistance to education programs; those that do are required under Title IX to promulgate implementing regulations.²⁸ Perhaps most prominently, ED distributes substantial financial assistance every year to educational institutions and has

²⁰ *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). Congress's Spending Clause power derives from Article I, Section 8, Clause 1 of the U.S. Constitution (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”).

²¹ *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022), *reh'g denied*, 142 S. Ct. 2853 (2022).

²² *Id.* at 1568.

²³ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”); *id.* (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”); *id.* at 25 (“In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010.”).

²⁴ For more information, see CRS Report R47109, *Federal Financial Assistance and Civil Rights Requirements*, by Christine J. Back and Jared P. Cole (2022). *See also* *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1450 (2023).

²⁵ 20 U.S.C. § 1682.

²⁶ *Id.*

²⁷ *Id.* §§ 1681(a)(3), 1687.

²⁸ *See* Back & Cole, *supra* note 24.

promulgated Title IX regulations for federally funded schools of all levels, including public elementary and secondary schools as well as public and private institutions of higher education.²⁹

Until 2020, ED's Title IX regulations addressed the religious exemption through a brief provision that stated the following:

An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.³⁰

According to that provision, a recipient that “wishes[d]” to claim a religious exemption “shall do so” through written application to ED. One reading of that provision might be that, for a recipient to invoke a religious exemption in response to an agency investigation, it must have claimed an exemption previously in writing. However, ED instead interpreted the regulation to simply offer recipients an avenue for receiving an assurance from OCR that it qualified for an exemption.³¹ In 2020, ED substantially amended its Title IX regulations, including the religious exemption provision mentioned above.³² The new regulations make clear that an educational institution “that seeks assurance of the exemption ... may do so by submitting” a written request,³³ but an educational institution is “not required” to do so and may invoke the exemption even after notice that it is under investigation for noncompliance.³⁴

ED's discussion accompanying the rule explained that the prior regulatory provision—providing that recipients “shall” submit a written statement—was unclear about whether recipients were required to do so in order to claim a religious exemption.³⁵ ED additionally acknowledged that the statute does not require recipients to seek an assurance letter and that OCR's past practice had been consistent with that understanding of the law, permitting institutions to invoke a religious exemption without having first obtained an assurance letter.³⁶ According to ED, its new regulations, which clarify that seeking an assurance is voluntary,³⁷ essentially codify its past practices.³⁸ Thus, recipients who want assurance of an exemption from ED may continue, “as an

²⁹ See 34 C.F.R. § 106.2; DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Title IX Legal Manual* (2021), <https://www.justice.gov/crt/title-ix> [hereinafter DOJ Title IX Legal Manual] (explaining that the document is not a guide for Title IX enforcement regarding “traditional educational institutions such as colleges, universities, and elementary and secondary schools [that] have been subject to the Department of Education's Title IX regulations and guidance for 25 years,” but is instead intended for other federal agencies that fund educational programs such as “police academies, job training programs, vocational training for prison inmates, and other education programs”).

³⁰ See 34 C.F.R. § 106.12(b) (2018), <https://www.govinfo.gov/content/pkg/CFR-2018-title34-vol1/pdf/CFR-2018-title34-vol1-part106.pdf>. Subsection (a) of 34 C.F.R. § 106.12(a) essentially restated the statutory provision.

³¹ See Memorandum from William L. Smith, Acting Assistant Sec'y for U.S. Dep't of Educ., to OCR Senior Staff (Oct. 11, 1989) [hereinafter 1989 Memorandum], <https://www2.ed.gov/about/offices/list/ocr/docs/smith-memo-19891011.pdf>; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,475–76 (2020) [hereinafter 2020 Final Rule].

³² 2020 Final Rule, *supra* note 31.

³³ See 34 C.F.R. § 106.12(b).

³⁴ See *id.*

³⁵ 2020 Final Rule, *supra* note 31, at 30,475.

³⁶ *Id.* at 30,475–76.

³⁷ See 34 C.F.R. § 106.12(b).

³⁸ 2020 Final Rule, *supra* note 31, at 30,475–76 (“The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.”).

option,” to submit a written statement that identifies the regulatory provisions that conflict with their religious tenet.³⁹

In a separate 2020 rulemaking focused more broadly on First Amendment issues, ED added further detail to its Title IX religious exemption regulation.⁴⁰ This addition, according to ED, was intended to clarify which institutions may claim a religious exemption by defining what it means for an educational institution to be “controlled by a religious organization.”⁴¹ The regulations “codify existing factors” OCR had been using to evaluate religious exemption requests, many of which had long been included in nonbinding OCR guidance.⁴² The regulations include a range of nonexclusive factors, any of which is sufficient to establish control by a religious organization,⁴³ including if an educational institution is a school of divinity;⁴⁴ if it requires students or employees to espouse belief in a specific religion;⁴⁵ or if it has a published institutional mission, approved by the governing body of the educational institution, that includes religious beliefs.⁴⁶ A final factor operates as a catch-all, allowing for “[o]ther evidence sufficient to establish that an educational institution is controlled by a religious organization.”⁴⁷

Due in part to ED’s lead role with respect to enforcing Title IX against traditional education institutions,⁴⁸ in 2000 numerous other federal agencies adopted Title IX regulations in a common rule essentially identical to ED’s regulations.⁴⁹ Those regulations can apply when agencies other than ED fund education programs, such as job training programs, vocational training in prisons, or 4-H programs.⁵⁰ Those regulations continue to mirror the pre-2020 ED regulations, although

³⁹ See 34 C.F.R. § 106.12(b).

⁴⁰ Final Rule Regarding Dep’t of Educ. Rule Revisions of Higher Educ. Programs, 85 Fed. Reg. 59,916 (2020) (to be codified at 34 C.F.R. pts. 75, 76, 106, 606, 607, 608, 609).

⁴¹ *Id.* at 59,918.

⁴² *Id.* According to ED, three of the factors are consistent with agency guidance from 1985. Memorandum from Harry Singleton, Assistant Sec’y for U.S. Dep’t of Educ., to Reg’l Civil Rights Dirs., Regions I–X (Feb. 19, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf>. The fourth and fifth factors are consistent with guidance from 1989, in ED’s view. 1989 Memorandum, *supra* note 311. See also Memorandum from William L. Smith, Acting Assistant Sec’y for Civil Rights U.S. Dep’t of Educ., to OCR Senior Staff, (Aug. 2, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850802.pdf>.

⁴³ See 34 C.F.R. § 106.12(c)(1)–(6).

⁴⁴ See *id.* § 106.12(c)(1).

⁴⁵ *Id.* § 106.12(c)(2).

⁴⁶ *Id.* § 106.12(c)(5) (“That the educational institution has a published institutional mission that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.”).

⁴⁷ *Id.* § 106.12(c)(6).

⁴⁸ According to an executive order, the Attorney General coordinates the implementation and enforcement of Title IX across the executive branch. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72995 (Nov. 2, 1980). That authority was delegated to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 0.51(b)(2).

⁴⁹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (2000) (incorporated throughout the Code of Federal Regulations). The Department of Justice has recognized the important role ED plays in Title IX enforcement for traditional educational institutions. See DOJ Title IX Legal Manual, *supra* note 29 (“For more specific information on Title IX as it relates to educational institutions, readers should consult the various documents written and published by the Department of Education, Office for Civil Rights that can be found on the Department of Education website.”).

⁵⁰ See DOJ Title IX Legal Manual, *supra* note 29; Sex Segregation in Youth Rodeo Events Under Title IX Regulations, 45 O.L.C. slip op. (Jan. 13, 2021). A number of federal agencies distribute science, technology, engineering, and mathematics (STEM) research grants to universities. Those agencies are responsible for administering Title IX in those programs. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-187, SEXUAL HARASSMENT IN STEM RESEARCH (2020).

implementing agencies may nonetheless interpret the requirements consistent with ED's practice of not requiring an exemption to be requested in advance.⁵¹

ED OCR's Application of the Religious Exemption

According to ED, when reviewing requests for an exemption assurance, OCR examines whether the institution has (1) identified the religious organization that controls it; and (2) specified the provisions of the statute or regulations that conflict with a religious tenet.⁵² As mentioned above, any of the factors specified in the regulations are sufficient to satisfy (1).

With respect to (2), OCR requests that an institution specify the requirements from which it seeks an exemption and the "religious tenets that conflict with those provisions."⁵³ Alternatively, rather than submit a statement of its religious tenets, an institution may instead "submit a statement of its practices, as based on its religious tenets."⁵⁴ ED has stated that this policy allows OCR to avoid decisions that could be seen as government interpretation of an institution's religious tenets, which could raise First Amendment concerns, while expediting OCR processing.⁵⁵

OCR memoranda, letters to schools, and documents discussing Title IX's religious exemption provide examples of the kinds of requirements that may be subject to exemption requests. Some religious institutions are exempt from Title IX requirements prohibiting discriminatory treatment based on marital or parental status, for instance.⁵⁶ Particular educational institutions have thus sometimes claimed conflict with requirements that would prevent them from disciplining students or employees for being pregnant and unmarried.⁵⁷ In addition, some institutions have tenets that hold only men may be ministers, and thus might limit certain courses that train future ministers to men.⁵⁸ Such institutions might claim an exemption for those courses from requirements concerning equal access to courses for men and women.⁵⁹

A recent Supreme Court decision construing Title VII of the Civil Rights Act, which prohibits sex discrimination in employment, may also have implications for Title IX's religious exemption. In the 2020 decision, *Bostock v. Clayton County*, the Court ruled that Title VII's prohibition of sex discrimination bars discrimination based on sexual orientation and gender identity.⁶⁰ Some courts and federal agencies, including ED, have concluded that this reasoning applies to Title IX—i.e., that Title IX likewise bars discrimination based on sexual orientation and gender identity in education programs that receive federal financial assistance.⁶¹

⁵¹ See e.g., U.S. Dep't of Agric., Food & Nutrition Serv., Memorandum on the Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022).

⁵² Dep't of Educ., Office for Civil Rights, *Exemptions from Title IX*, Dep't of Educ. (Mar. 8, 2021) [hereinafter *Title IX Exemptions*], <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 1989 Memorandum, *supra* note 31, at 3; *Title IX Exemptions*, *supra* note 52.

⁵⁶ *Id.* at 4; see e.g., 34 C.F.R. §§ 106.21(c), 106.40, 106.57, 106.60.

⁵⁷ 1989 Memorandum, *supra* note 31, at 4.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 4.

⁶⁰ 140 S. Ct. 1731, 1737 (2020).

⁶¹ *Grabowski v. Arizona Bd. of Regents*, No. 22-15714, 2023 WL 3961123, at *4 (9th Cir. June 13, 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); see CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole (2021); CRS Legal Sidebar LSB10830, *Education Department Proposes New Title IX Regulations: Sexual Orientation and Gender Identity*, by Jared P. Cole (2022).

A number of institutions have sought and received Title IX religious exemptions based on religious tenets concerning sexual orientation and gender identity.⁶² For instance, some institutions have sought and obtained exemptions from Title IX requirements that could require allowing transgender students to participate in athletics consistent with their gender identity.⁶³ In addition, in response to an OCR investigation that a university's student group recognition process violated Title IX by refusing to treat "LGBTQ+" student groups similarly to other groups, the university successfully obtained a religious exemption for this practice.⁶⁴

Even if a school qualifies for a religious exemption from a specific Title IX requirement, however, that does not insulate a school from all other Title IX requirements. Instead, ED applies the exemption where there is a specific conflict between a religious tenet and a particular requirement. For instance, while a religious school might claim an exemption allowing it to exclude women from ministry courses because of beliefs that only men may be ministers, the exemption would not justify barring women from other courses.⁶⁵

Application of Religious Exemption by Agencies Other Than ED

As mentioned above, all agencies that distribute federal financial assistance to educational programs—not just ED—enforce Title IX.⁶⁶ The statute's religious exemption applies no matter the agency distributing funding. For example, the U.S. Department of Agriculture's (USDA's) Food and Nutrition Service (FNS) distributes federal financial assistance to certain educational programs, including through the National School Lunch Program.⁶⁷ FNS recently announced that, consistent with the interpretations of Title IX issued by ED and the Department of Justice, it interprets Title IX to prohibit discrimination based on sexual orientation and gender identity.⁶⁸ At least one private religious school that participates in the USDA National School Lunch program objected to compliance with this interpretation of Title IX.⁶⁹ It then received confirmation that it qualifies for Title IX's religious exemption.⁷⁰

⁶² See, e.g., Letter from Catherine Lhamon, Ass't Sec'y for Civil Rights, to Kevin Worthen, President, Brigham Young Univ. (Jan. 3, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/brigham-young-university-response-01032022.pdf>.

⁶³ See, e.g., Letter from Kenneth Marcus, Ass't Sec'y for Civil Rights, to Paul Haines, President, Taylor Univ. (Jan. 15, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/taylor-university-response-01152019.pdf>.

⁶⁴ See, e.g., Letter from Catherine Lhamon, Ass't Sec'y for C.R., to Adam Morris, President, Azusa Pac. Univ. (Nov. 21, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/azusa-pacific-university-response-11192022.pdf>.

⁶⁵ 1989 Memorandum, *supra* note 311, at 4.

⁶⁶ Congress has sometimes specifically directed agencies to conduct regular reviews to ensure compliance with Title IX. See, e.g., 51 U.S.C. § 40909 (directing the Administrator of the National Aeronautics and Space Administration to conduct Title IX compliance reviews of at least two grantees annually).

⁶⁷ See CRS In Focus IF10266, *Child Nutrition Reauthorization (CNR): An Overview*, by Kara Clifford Billings and Randy Alison Aussenberg. USDA's FNS also administers the School Breakfast Program, Special Milk Program, Child and Adult Care Food Program, and the Summer Food Service Program.

⁶⁸ U.S. Dep't of Agric., Food & Nutrition Serv., Memorandum on the Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022), <https://www.fns.usda.gov/cr/crd-01-2022> [hereinafter USDA Religious Exemption Guidance].

⁶⁹ See Divya Kumar, *Tampa Religious School to Receive Federal Lunch Funds After All*, TAMPA BAY TIMES (Aug. 8, 2022), <https://www.tampabay.com/news/education/2022/08/08/tampa-religious-school-to-receive-federal-lunch-funds-after-all/>.

⁷⁰ Joint Motion for a Stay of Briefing and Hearing on Plaintiff's Motion for Temporary Restraining Order, Faith Action Ministry Alliance, Inc. v. Fried et al, No. 8:22-cv-01696 (M.D. Fla. Aug. 5, 2022 Mid. Dist. Fl.), ECF No. 24.

USDA subsequently issued guidance clarifying that Title IX's religious exemption allows "an institution to be exempt on religious grounds if there is a conflict between Title IX and a school's governing religious tenets."⁷¹ That guidance indicated that while institutions have the option to seek recognition from USDA of an exemption, they are not required to first submit written requests in order to claim an exemption.⁷² Instead, institutions may invoke an exemption after a complaint is filed or USDA begins compliance efforts.⁷³ This position appears consistent with ED's practice regarding the religious exemption.⁷⁴

Case Law Addressing Title IX's Religious Exemption

To date, it appears few federal courts have reached questions concerning the interpretation or application of Title IX's religious exemption.⁷⁵ In the limited case law that does exist, courts have offered some discussion of certain aspects of the provision, including which entities can qualify for the religious exemption and the need to show a religious conflict for it to apply. In addition, at least one federal court has held that when a religiously controlled educational institution asserts a religious reason for the challenged conduct, but the plaintiff presents evidence that the challenged conduct was not in fact religiously motivated, the case may proceed for further fact-finding to establish the actual motivation for the challenged conduct.⁷⁶ More generally, recent changes interpreting Title IX to prohibit sexual orientation and gender identity discrimination⁷⁷ may give rise to more Title IX litigation, including with respect to its religious exemption and certain provisions of the Constitution.⁷⁸

⁷¹ USDA Religious Exemption Guidance, *supra* note 68.

⁷² See 7 C.F.R. § 15a.205 (USDA Title IX religious exemption regulations).

⁷³ See USDA Religious Exemption Guidance, *supra* note 68.

⁷⁴ See *supra* notes 32–39.

⁷⁵ See, e.g., *Goodman v. Archbishop Curley High School, Inc.*, 149 F.Supp.3d 577, 584 (D. Md. 2016) ("Few courts have addressed the breadth of Title IX's religious exemption and none have addressed it in the context of employment discrimination or retaliation claims."). Apart from Title IX's statutory religious exemption, some federal district courts have dismissed Title IX claims alleging discrimination in employment against a religious educational institution on the basis of a First Amendment-derived doctrine called the ministerial exception. See, e.g., *Koenke v. Saint Joseph's Univ.*, No. 19-4731, 2021 WL 75778, at *3–4 (E.D. Pa. Jan. 8, 2021) (stating that "Title VII and Title IX are federal statutes governing, *inter alia*, employment relationships," determining that "hostile work environment claims, particularly those brought pursuant to Title VII or Title IX, clearly fall within the scope of cases banned by the ministerial exception," and holding that the ministerial exception barred all of plaintiff's employment discrimination claims); *Petruska v. Gannon Univ.*, No. 04–80, 2008 WL 2789260, at *5 (W.D. Pa. Mar. 31, 2008) ("In short, the ministerial exception acts as a constitutionally-mandated limitation upon the reach of Title VII—and Title IX—to the extent those laws as applied would infringe Gannon's First Amendment right to choose its 'ministers' (as that term is defined by our circuit court of appeals)."). See also *Clark v. Newman Univ.*, No. 19-1033, 2022 WL 4130828, at *13 (D. Kan. Sept. 12, 2022) (denying defendant's motion for summary judgment and instead concluding that a jury would have to resolve whether the plaintiff was a ministerial employee within the meaning of the First Amendment's ministerial exception). The application of the ministerial exception is beyond the scope of this report but is discussed in other CRS products. See CRS Legal Sidebar LSB10455, *UPDATE: Our Lady of Guadalupe and the Ministerial Exception to Antidiscrimination Laws*, by Valerie C. Brannon (2020).

⁷⁶ See *infra* "Pretext Determinations."

⁷⁷ For more information, see CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole (2021).

⁷⁸ See, e.g., *Hunter v. U.S. Dep't. of Educ.*, No. 21-00474, 2023 WL 172199, at *1–3 (D. Or. Jan. 12, 2023) (discussing plaintiffs' various claims relating to Title IX's religious exemption, including a motion for a preliminary injunction seeking to enjoin the Department of Education from applying Title IX's religious exemption to private religious (continued...))

Religious Control

As discussed above, the statutory text of Title IX's religious exemption limits its applicability to educational institutions "controlled by a religious organization."⁷⁹ More specifically, 20 U.S.C. § 1681(a)(3) provides that Title IX's prohibition of discrimination "on the basis of sex" 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."⁸⁰

Addressing the first clause of § 1681(a)(3), the U.S. Court of Appeals for the Ninth Circuit, in an unpublished decision, held that an educational institution need not be controlled by an external religious organization to qualify for the exemption.⁸¹ In *Maxon v. Fuller Theological Seminary*, the court rejected the plaintiffs' argument that the statutory text requires "two entities," an educational institution and a separate, controlling religious organization distinct from the school.⁸² The court reasoned that the "ordinary meaning of 'organization' is broad enough to encompass" an entity contained within the same educational institution such as an institution's board of trustees or board of directors, and pointed to the Department of Education's long-held interpretation that § 1681(a)(3) does not require that "the controlling religious organization be a separate legal entity than the educational institution."⁸³ To the extent that § 1681(a)(3) could be subject to multiple interpretations, the court deferred to ED's interpretation to conclude that "Title IX's religious exemption encompasses educational institutions, including divinity schools like Fuller, that are controlled by their own religiously affiliated boards of trustees."⁸⁴

Conflict with a Religious Tenet

For Title IX's religious exemption to apply, an educational institution must not only be controlled by a religious organization; compliance with Title IX must also conflict with a religious tenet.⁸⁵ More specifically, the statutory text provides that the exemption applies "if the application of this subsection would not be consistent with the religious tenets of such organization."⁸⁶ Though case law addressing Title IX's religious exemption is limited, federal courts appear unlikely to probe into matters of religious interpretation when assessing the applicability of the religious exemption, a reticence that might reflect First Amendment concerns.⁸⁷ Rather, as long as the

colleges and universities concerning claims relating to sexual orientation and gender identity), *appeal docketed*, No. 23-35174 (9th Cir. Mar. 14, 2023).

⁷⁹ See 20 U.S.C. § 1681(a)(3).

⁸⁰ *Id.*

⁸¹ *Maxon v. Fuller Theological Seminary*, No. 20-56156, 2021 WL 5882035, at *1 (9th Cir. Dec. 13, 2021). For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit, the Second Circuit, etc.) refer to the U.S. Court of Appeals for that particular circuit. Collectively, the federal appellate courts are termed "federal courts of appeals."

⁸² *Id.*

⁸³ *Id.* (citing Final Rule Regarding Dep't of Educ. Rule Revisions of Higher Educ. Programs, 85 Fed. Reg. 59,916, 59,956 (2020) (to be codified at 34 C.F.R. pts. 75, 76, 106, 606–609). The court also added that this interpretation was formalized in ED's 2020 regulations, "which said that if an 'educational institution is a school or department of divinity,' that is 'sufficient to establish that [it] is controlled by a religious organization.'" *Id.* (alteration in original) (quoting 34 C.F.R. § 106.12(c)).

⁸⁴ *Id.*

⁸⁵ See 20 U.S.C. § 1681(a)(3).

⁸⁶ *Id.*

⁸⁷ See, e.g., *Maxon*, 2021 WL 5882035, at *2 (citing *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)) (rejecting argument (continued...))

institution plainly identifies a religious tenet that conflicts with a Title IX requirement, at least one federal court has held that Title IX's religious exemption applies.⁸⁸

In an unpublished decision in *Maxon v. Fuller Theological Seminary*, the Ninth Circuit addressed a Title IX claim alleging that a Christian seminary had discriminated based on sexual orientation when it expelled students married to same-sex partners.⁸⁹ In its analysis, the court concluded that the seminary qualified as a religiously controlled institution within the meaning of Section 1681(a)(3)⁹⁰ and that the institution's religious tenets motivated the challenged decisions, thereby exempting the school from Title IX compliance with respect to the plaintiffs' claims.⁹¹

The plaintiffs had argued, among other things, that Title IX's religious exemption did not apply because it was unclear whether there was "a legitimate conflict between the school's religious tenets and Title IX's prohibition on sex discrimination."⁹² The court rejected the plaintiffs' arguments, pointing to the school's religious tenets, as expressed in the seminary's Sexual Standards, that "sexual union must be reserved for marriage, which is the covenant union between one man and one woman."⁹³ The school's Standards also "outline[d] the expectation that all members of the school community 'abstain from what it holds to be unbiblical sexual practices.'"⁹⁴ Thus, the court concluded, to the extent that Fuller had expelled the students "because their marriages were with spouses of the same sex, rather than the opposite sex," Title IX's religious exemption applied to permit "religiously motivated decisions that would otherwise violate Title IX's prohibition on sex discrimination."⁹⁵

Put another way, the court concluded that in the case of the seminary, because retaining students married to same-sex partners conflicted with a religious tenet concerning marriage, Title IX's prohibition did not apply to the challenged expulsions.⁹⁶ The court also rejected the plaintiffs' argument that more fact-finding was necessary to determine if there was a religious conflict, determining that the lower court had not erred in resolving that question on a motion to dismiss.⁹⁷ The court of appeals stated that "[t]o the extent that Plaintiffs ask us to second-guess Fuller's interpretation of its own religious tenets, we cannot grant Plaintiffs any relief."⁹⁸

that it was unclear whether the seminary's religious tenet conflicted with Title IX). *See Mitchell*, 530 U.S. at 828 (plurality opinion) ("[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.").

⁸⁸ *Cf. Maxon*, 2021 WL 5882035, at *2–3 (discussing religious conflict between the seminary's religious tenets concerning marriage and Title IX compliance and applying Title IX's religious exemption); *Stevens v. Brigham Young Univ. - Idaho*, 588 F. Supp. 3d 1117, 1131 (D. Idaho 2022) (discussing absence of evidence of conflict between religious tenets and Title IX compliance and declining to apply Title IX's religious exemption to plaintiff's Title IX pre-assault claim).

⁸⁹ *Maxon*, 2021 WL 5882035, at *1–2.

⁹⁰ *Id.* at *1.

⁹¹ *Id.* at *2–3.

⁹² *Id.* at *2.

⁹³ *Id.*

⁹⁴ *Id.* *See also Maxon v. Fuller Theological Seminary*, 549 F.Supp.3d 1116, 1119 (C.D. Ca. 2020) (indicating that the seminary's Sexual Standards Policy also states that the "seminary believes premarital, extramarital, and homosexual forms of explicit sexual conduct to be inconsistent with the teaching of Scripture").

⁹⁵ *Maxon*, 2021 WL 5882035, at *2.

⁹⁶ *See id.*

⁹⁷ *Id.* at *2–3.

⁹⁸ *Id.* at *2 (citing *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). *See also id.* at *3 (addressing and (continued...))

At a minimum, however, federal courts have required religious educational institutions to sufficiently identify an applicable religious tenet and explain how it conflicts with Title IX compliance in a particular circumstance to justify application of the religious exemption. In two recent decisions—one involving sexual abuse and harassment allegations and another concerning discrimination in athletics—federal district courts held that the Title IX exemption did *not* apply based on the entities' failures to make this showing.

In one case, a district court rejected a university's contention that Title IX's religious exemption barred a plaintiff's claim alleging that the school had a policy of deliberate indifference to the sexual harassment of students.⁹⁹ The plaintiff in the case, a female student, alleged ongoing sexual harassment and abuse by her professor¹⁰⁰ and brought a Title IX claim (among other things) that alleged the university's combination of its Title IX and Honor Code offices into one entity demonstrated a policy of deliberate indifference to sexual harassment claims.¹⁰¹ That combined office could discipline students for violating the university's Honor Code, including for sexual behavior violating religious rules, and no exception was made under the Honor Code for individuals reporting sexual misconduct.¹⁰² The university asserted Title IX's religious exemption in response to the student's claim, but the district court held the exemption did not apply.¹⁰³ There was no evidence, the court stated, that "combining the Title IX and Honor Code offices . . . was necessary to comply with a religious tenet" or that "granting amnesty to those reporting sexual misconduct to the Title IX office would violate a religious tenet."¹⁰⁴

In another case, a federal district court rejected a private religious high school's assertion of Title IX's religious exemption for also failing to identify how Title IX compliance conflicted with a religious tenet—this time in the athletics context.¹⁰⁵ In that case, *Herrera ex rel. E.H. v. Valley Christian Academy*, a private high school refused to permit a female athlete on another school's football team to play in games or extracurricular sports activities that occurred on its premises, or when its team was visiting her school to compete against that team.¹⁰⁶ The high school contended that its refusal to permit the plaintiff to play in football games against its own football team was based on its code of conduct requiring that "[t]here is to be no physical contact between boys and girls at Valley Christian Academy."¹⁰⁷ Declining to apply Title IX's religious exemption, the

rejecting the plaintiffs' related argument that the lower court should not have relied on documents offered by the school "to decide that Fuller's religious tenets conflicted with Title IX," adding that "to the extent Fuller dismissed Plaintiffs because it found that their same-sex marriages violated the school's Sexual Standards policy, we may not second-guess Fuller's reasonable interpretation of its own religious tenets") (citing *Mitchell*, 530 U.S. at 828). The court of appeals also affirmed the lower court's dismissal of the plaintiffs' complaint without leave to amend on the basis that, given the record in the case, the plaintiffs "could allege no additional facts to save their challenge to Fuller's differential treatment of same-sex marriages as compared to opposite-sex marriages, since Fuller's actions fell squarely within Title IX's religious exemption." *Id.* at *3.

⁹⁹ *Stevens v. Brigham Young Univ. - Idaho*, 588 F.Supp.3d 1117, 1131 (D. Idaho 2022).

¹⁰⁰ *See id.* at 1121–27.

¹⁰¹ *Id.* at 1129–31.

¹⁰² *Id.* at 1130 (stating that the evidence showed that the Honor Code office "did not give amnesty from the Honor Code to those who reported sexual misconduct," creating a "chilling effect for anyone to report sexual misconduct" and "confidentiality issues and the risk of a student being accused of Honor Code violations" if the student were to make such a report).

¹⁰³ *Id.* at 1131 (also concluding that the plaintiff's evidence was sufficient to preclude summary judgment on the Title IX claim).

¹⁰⁴ *Id.*

¹⁰⁵ *Herrera ex rel. E.H. v. Valley Christian Acad.*, 616 F. Supp. 3d 1040 (C.D. Cal. July 25, 2022).

¹⁰⁶ *Id.* at 1040–45.

¹⁰⁷ *Id.* at 1045.

district court concluded that the school's policy was insufficient on its own for the exemption to apply in the absence of an explanation as to "how the banned contact is inconsistent with its religious teachings."¹⁰⁸ Drawing a contrast between the seminary in *Maxon* and the private school at issue, the district court reasoned that while the seminary in *Maxon* had directly linked its policy banning same-sex unions to biblical teachings, "Valley Christian's policy banning physical contact between members of the opposite sex does not provide an explicit link between the inappropriate conduct and Valley Christian's religious teachings."¹⁰⁹ Accordingly, the district court denied the school's motion to dismiss the plaintiff's Title IX claim on the basis of the religious exemption, stating that "it would be inappropriate to apply . . . at this stage."¹¹⁰

Pretext Determinations

Title IX's religious exemption does not allow religious entities to use a religious reason as a pretext for unlawful sex discrimination.¹¹¹ At least one federal court, for example, has allowed a Title IX claim to proceed against a religious entity to determine whether a religious reason or a nonreligious reason—differential treatment based on sex *disconnected* from a religious belief—actually motivated the challenged alleged action.¹¹² In other words, when a plaintiff offers evidence of different treatment based on sex unrelated to a religious tenet, but the institution at issue contends such differential treatment was motivated by a religious tenet, it is possible that a federal court may permit a factual inquiry into whether the institution's actions were in fact motivated by a religious belief, or whether religion is being used as a pretext for unlawful sex discrimination under Title IX.¹¹³

As a general matter, when analyzing intentional discrimination claims, federal courts assess whether evidence offered in a particular case would allow a jury to conclude that an action was taken against an individual for a discriminatory reason.¹¹⁴ Discriminatory intent can be shown in different ways, including with evidence of pretext—that is, evidence discrediting the defendant's asserted explanation for its actions to support a showing that "a discriminatory reason more likely motivated the defendant's decision."¹¹⁵ In the context of a Title IX retaliation claim, for example,

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing and discussing *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1119 (C.D. Cal. 2020), *aff'd*, No. 20-56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021), *aff'd*, No. 20-56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021)).

¹¹⁰ *Herrera*, 616 F. Supp. 3d at 1054.

¹¹¹ See generally *Hunter v. U.S. Dep't. of Educ.*, No. 21-cv-00474, 2023 WL 172199, at *1 (D. Or. Jan. 12, 2023) ("Congress intended the religious exemption to be narrow lest it 'open a giant loophole and lead to widespread sex discrimination in education.'") (quoting S. REP. NO. 100-64, at 23 (1987) as reprinted in 1988 U.S.C.C.A.N. 3, 25), *appeal docketed*, No. 23-35174 (9th Cir. Mar. 14, 2023)).

¹¹² See *Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577, 584, 586 (D. Md. 2016).

¹¹³ See *id.* Cf. *Geary v. Visitation of Blessed Virgin Mary Par. Sch.*, 7 F.3d 324, 325 (3d Cir. 1993) (stating that "when a religious employer contends that a religious tenet or practice—not illegal discrimination—motivated a challenged employment action, the [Age Discrimination in Employment Act] will apply only so long as the plaintiff does not challenge the validity of the doctrine or practice and asks no more than whether the proffered religious reason actually motivated the employment action.").

¹¹⁴ See generally, e.g., *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

¹¹⁵ See, e.g., *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1177 (10th Cir. 2001) (in a Title IX analysis, stating that a "plaintiff demonstrates pretext either by showing that a discriminatory reason more likely motivated the defendant's decision or that the employer's proffered explanation is unworthy of belief"). See generally *Reeves*, 530 U.S. at 147 (stating that "[i]n appropriate circumstances, the trier of fact can reasonably infer (continued...)

changed or inconsistent explanations for a school's conduct may support a finding that those explanations were not its actual reasons and that its conduct was instead retaliatory.¹¹⁶ Pretext can also be shown with evidence that an entity belatedly offered a rationale for its actions in a manner that suggests it is a post-hoc cover for discriminatory conduct;¹¹⁷ or in cases when an entity asserts it was applying a standard policy to the plaintiff, but there is evidence that it applied the same policy more leniently or differently to other individuals similar or comparable to the plaintiff.¹¹⁸

Of the few federal courts that have analyzed a Title IX claim against a religious educational institution, at least one has held that when a plaintiff alleges sufficient facts that the religious entity took a challenged action for nonreligious reasons—rather than for its asserted religious reasons—a Title IX claim may proceed for further fact-finding on the question of pretext and is not immediately foreclosed by the religious exemption. In a 2016 decision in *Goodman v. Archbishop Curley High School*, a federal district court denied a motion to dismiss a Title IX claim brought by a school librarian alleging that her religious employer fired her in retaliation for reporting suspected sexual abuse of a student by a teacher.¹¹⁹ The Catholic school that employed the plaintiff argued, among other things, that Title IX's religious exemption barred her retaliation claim.¹²⁰ The school contended that it fired her for belatedly (rather than immediately) reporting child sex abuse contrary to its own policies and Canon Law, and argued that allowing her claim to proceed would be inconsistent with those religious tenets.¹²¹ The plaintiff contended that her termination was not for violating religious school policies or Canon Law, but was rather in

from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'") (citation omitted).

¹¹⁶ See, e.g., *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 868–70 (9th Cir. 2014) (stating with respect to a Title IX claim alleging that the school fired its softball coach and replaced him with a less competent coach in retaliation for complaints about sex discrimination in the school's athletic program, that the school's "shifting, inconsistent reasons for [the coach's] termination are themselves evidence of pretext").

¹¹⁷ See, e.g., *Ollier*, 768 F.3d at 870 (observing that "the timing of [plaintiff's] termination suggests that [the school]'s allegedly nonretaliatory reason is merely a *post hoc* rationalization for what was actually an unlawful retaliatory firing"); *Miller v. Bd. of Regents of Univ. of Minn.*, 402 F.Supp.3d 568, 576–77 (D. Minn. 2019) (discussing evidence supporting Title IX claim alleging that decision not to renew coaching contract was based on sex, including that the university had told the plaintiff its decision was not based on her performance but then "reversed course" at trial to contend that its decision was based on her poor performance). See generally *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 56 (1st Cir. 2000) (in the context of a Title VII analysis, stating that "[a]nother method of establishing pretext is to show that [the defendant]'s nondiscriminatory reasons were after-the-fact justifications, provided subsequent to the beginning of legal action"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993) (in the context of a Title VII analysis, stating that "[t]he pretext inquiry thus normally focuses upon factual questions such as . . . whether the putative non-discriminatory purpose was stated only after the allegation of discrimination").

¹¹⁸ See, e.g., *Gossett*, 245 F.3d at 1177 ("Evidence sufficient to raise a fact issue on whether a defendant's proffered explanation is pretextual may take a variety of forms, including evidence that the defendant treated the plaintiff differently from others who were similarly situated, which we have held is especially relevant to a showing of pretext."); *Chipman v. Grant Cnty. Sch. Dist.*, 30 F. Supp. 2d 975, 977, 979–80 (E.D. Ky. 1998) (in Title IX context, pointing to evidence that selection committee for local chapter of National Honors Society applied policy against premarital sex differently in refusing to admit female students who gave birth out of wedlock, as the committee did not ask any other student offered admission—male or nonpregnant female—if they had engaged in premarital sexual activity). See generally, e.g., *Miceli v. JetBlue Airways Corp.*, 914 F.3d 73, 84 (1st Cir. 2019) (in the context of a Title VII analysis, discussing ways of showing pretext with evidence that an employer disparately applied a standard policy).

¹¹⁹ *Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577, 584, 586 (D. Md. 2016).

¹²⁰ *Id.* at 584, 586.

¹²¹ *Id.* at 583.

retaliation for reporting sexual abuse allegations in the first instance.¹²² To that end, the plaintiff alleged, among other things, that the school was already aware of sexual abuse allegations against the same teacher before her report¹²³ and that school officials sought to dissuade her from discussing the sexual abuse.¹²⁴ She also alleged that the first time school officials told her of any policies or procedures regarding requirements to follow after a report of sexual abuse was at the time the school suspended her.¹²⁵

In allowing the Title IX claim to go forward, the district court relied on a federal appellate court decision allowing an age discrimination claim against a religious employer. In that earlier case, *DeMarco v. Holy Cross High School*, the U.S. Court of Appeals for the Second Circuit permitted the age discrimination claim to proceed in order to determine whether the religious employer's asserted religious justifications for firing the plaintiff—his failure to attend Mass with students, for example—were its actual reasons, rather than his age.¹²⁶ The Second Circuit in *DeMarco* emphasized that such an inquiry “‘need not, and indeed should not, evaluate whether a defendant’s stated purpose is unwise or unreasonable,’” but should instead focus on “‘determining whether the articulated purpose is the actual purpose for the challenged employment-related action.’”¹²⁷ Nor should that kind of pretext inquiry, the court of appeals reasoned in *DeMarco*, typically involve “‘calling into question the value or truthfulness of religious doctrine.’”¹²⁸

Although the Second Circuit's analysis in *DeMarco* concerned whether the plaintiff's age discrimination claim would implicate the Establishment Clause of the First Amendment, the district court in *Goodman* found the analysis persuasive with respect to Title IX's religious exemption.¹²⁹ As such, the *Goodman* court concluded that allowing the plaintiff's Title IX claim to proceed in order to assess pretext would not be “inconsistent with [the school's] religious tenets” nor “threaten [its] religious interests or freedoms” given the focus of the pretext inquiry.¹³⁰ The district court thus denied the school's motion to dismiss on the basis of Title IX's religious exemption.¹³¹

As described previously, another way of showing pretext in the Title IX context is through evidence that a school applied the same policy to individuals in a different way based on sex.¹³² Given the dearth of case law concerning Title IX's religious exemption, however, it is an open question if and how federal courts might evaluate evidence of an entity's disparate application of a *religiously* based standard, particularly when no other religious tenet accounts for the differential treatment.¹³³ To date, at least one federal appellate court (in a nonprecedential

¹²² *Id.* at 581.

¹²³ *Id.* at 580.

¹²⁴ *Id.* at 580–81.

¹²⁵ *Id.* at 581.

¹²⁶ *Id.* at 585–86 (discussing and quoting the Second Circuit decision in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir.1993), which addressed a claim brought under the Age Discrimination in Employment Act).

¹²⁷ *DeMarco*, 4 F.3d at 170–71.

¹²⁸ *Id.* at 171.

¹²⁹ *Goodman v. Archbishop Curley High Sch.*, 149 F. Supp. 3d 577, 586 (D. Md. 2016).

¹³⁰ *Id.*

¹³¹ *Id.* at 586, 589.

¹³² *See supra* “Pretext Determinations.”

¹³³ In its unpublished decision in *Maxon v. Fuller Theological Seminary*, the Ninth Circuit noted that the plaintiffs had alleged that the seminary “treated them more harshly because they violated the Sexual Standards policy by being in same-sex marriages as compared to students who violated the Sexual Standards policy by engaging in other forms of (continued...)”

opinion) and one district court have issued decisions in cases alleging such differential treatment, but neither found it necessary to reach that issue.¹³⁴

Constitutional Challenges

Federal government actions, including legislation, must comport with constitutional requirements. At least one federal district court has addressed a challenge to Title IX's religious exemption on various constitutional grounds in a case involving its application to discrimination based on sexual orientation and gender identity.¹³⁵ In *Hunter v. U.S. Department of Education*, the plaintiffs alleged, among other things,¹³⁶ that Title IX's religious exemption was unconstitutional on the basis that it violated their rights to equal protection and substantive due process under the Fifth Amendment and violated the Establishment Clause of the First Amendment.¹³⁷

The plaintiffs in *Hunter*—"sexual and gender minority students" who attended or applied to private religious colleges and universities receiving federal funding—alleged that Title IX's religious exemption violated their right to equal protection under the Fifth Amendment by targeting them for stigmatic harm¹³⁸ and unequal treatment,¹³⁹ including in the form of discipline, expulsion, and the rejection or rescission of admissions because of their sexual orientation or gender identity.¹⁴⁰ The court concluded that the plaintiffs had adequately alleged injury and standing to pursue their equal protection claim¹⁴¹ but had offered no allegations or evidence that Congress intended to discriminate when enacting the religious exemption¹⁴²—a necessary element for challenging a facially neutral law on equal protection grounds.¹⁴³

Relying on Ninth Circuit and federal district court decisions, the court went on to acknowledge that distinctions based on sexual orientation or gender identity may survive an equal protection challenge if the challenged law passes a constitutional test commonly referred to as "intermediate scrutiny."¹⁴⁴ A law can satisfy this standard if it serves an important government objective and

prohibited sexual conduct." No. 20-56156, 2021 WL 5882035, at *2 n. 1 (9th Cir. Dec. 13, 2021). The court of appeals concluded that it did not need to decide whether that could be a cognizable theory of liability in the absence of a religious tenet that otherwise explained the differential treatment, because the plaintiffs had offered insufficient factual allegations to show such differential treatment. *Id. Cf. Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 139–41 (3d Cir. 2006) (concluding plaintiff's Title VII claim against a religious employer implicated the First Amendment, as the plaintiff's allegation that the school treated male employees who committed other actions contrary to Catholic doctrine more favorably than the plaintiff's abortion advocacy would require the court to "assess the relative severity of offenses," which "would violate the First Amendment").

¹³⁴ *Maxon*, 2021 WL 5882035, at *2 n.1; *Hall v. Lee College*, 932 F. Supp. 1027–29 (E.D. Tenn. 1996) (finding, in case alleging college suspended female student based on out-of-wedlock pregnancy while not similarly suspending a male student who violated the policy, that evidence about the male student did not support the claim).

¹³⁵ *Hunter v. U.S. Dep't. of Educ.*, No. 21-cv-00474, 2023 WL 172199, at * 9–17 (D. Or. Jan. 12, 2023) (analyzing plaintiffs' various arguments regarding their motion to amend their complaint).

¹³⁶ *See id.* at *3 (listing all of the plaintiffs' various claims).

¹³⁷ *See id.* at *9 (concluding that plaintiffs had failed to state a claim for "violations of their rights to equal protection; substantive due process; the Establishment Clause; freedom of speech; freedom of assembly and association, and freedom of religion; or [the Religious Freedom Restoration Act].").

¹³⁸ *Id.* at *6.

¹³⁹ *Id.* at *10.

¹⁴⁰ *Id.* at *2.

¹⁴¹ *See id.* at *6–7.

¹⁴² *Id.* at *10.

¹⁴³ *Id.* (citing and discussing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)).

¹⁴⁴ *Id.* at *11 (citing *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 481 (9th Cir. 2014); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015)).

employs means that are substantially related to achieving that objective.¹⁴⁵ The *Hunter* court concluded, however, that the plaintiffs had not alleged how the religious exemption failed this constitutional test.¹⁴⁶ Rather, in the court's view, the limited scope of the exemption—applying “only to the extent that a particular application of Title IX would not be consistent with a specific tenet of the controlling religious organization”—appeared to be substantially related to the important government objective of accommodating religious exercise.¹⁴⁷

The plaintiffs in *Hunter* also alleged that Title IX violated the Establishment Clause of the First Amendment by impermissibly promoting religion.¹⁴⁸ The district court concluded that the plaintiffs had failed to plausibly allege such a violation,¹⁴⁹ relying extensively on the Supreme Court's 1987 decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.¹⁵⁰ In *Amos*, the Supreme Court upheld a religious exemption from Title VII's prohibition of religious discrimination in employment against an Establishment Clause challenge,¹⁵¹ reasoning that the law had a “permissible legislative purpose,” the government was not itself advancing religion, and the law did not “impermissibly entangle church and state.”¹⁵² The district court in *Hunter* emphasized that the plaintiffs had not identified legal authority to distinguish the case from *Amos*,¹⁵³ and thus the Establishment Clause claim failed.

An appeal of the decision in *Hunter* is pending before the Ninth Circuit.¹⁵⁴

Considerations for Congress

Rather than granting a blanket exemption from all the requirements of Title IX, the statute's religious exemption applies only to situations in which a religiously controlled educational institution's Title IX compliance would conflict with a religious tenet.¹⁵⁵ To assert the exemption, religiously controlled educational institutions must at least identify the religious tenet (or practices based on tenets) and conflict at issue.¹⁵⁶ When making determinations of whether the

¹⁴⁵ *Id.* at *11 (quoting *Harrison v. Kernan*, 971 F.3d 1069, 1076 (9th Cir. 2020)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Meanwhile, the court observed that neither the plaintiffs nor defendants had developed arguments for an as-applied equal protection challenge, and that the plaintiffs' pleadings offered no explanation as to how the exemption was unconstitutional as applied to them specifically. *Id.* The district court further concluded that the plaintiffs' substantive due process claim failed to satisfy pleading standards for its “vague, conclusory, and solitary reference to ‘substantive due process’” in the complaint, with no discussion addressing the elements of such a claim or factual allegations to support it. *Id.* at *11–12.

¹⁴⁸ *See id.* at *12–13 (explaining that “[t]he Establishment Clause prohibits the Government from compelling an individual to participate in religion or its exercise, or otherwise from taking action that has the purpose or effect of promoting religion or a particular religious faith”) (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

¹⁴⁹ *Id.* at *13–15.

¹⁵⁰ 483 U.S. 327 (1987).

¹⁵¹ *Id.* at 329–30 (addressing whether application of the religious exemption in Section 702 of Title VII of the 1964 Civil Rights Act to the secular nonprofit activities of religious organizations violated the Establishment Clause and reversing the district court's holding that it did).

¹⁵² *Id.* at 335–39.

¹⁵³ *Hunter v. U.S. Dep't. of Educ.*, No. 21-cv-00474, 2023 WL 172199, at * 13 (D. Or. Jan. 12, 2023). *See also id.* at *14 (stating that the plaintiffs had “failed to demonstrate any impermissible purpose Congress had in enacting the religious exemption, especially in light the Supreme Court's decision in *Amos* and other cases upholding religious exemptions”); *id.* at *15 (stating that Title IX's religious exemption “is materially indistinguishable from that in *Amos*”).

¹⁵⁴ *See Hunter v. U.S. Dep't. of Educ.*, No. 23-35174, 2023 WL 172199 (9th Cir. Mar. 14, 2023).

¹⁵⁵ *See* 20 U.S.C. § 1681(a)(3).

¹⁵⁶ *Id.*

religious exemption applies, it appears that neither federal agencies such as ED nor federal courts are likely to question or probe the religious doctrine itself; rather, the focus of the inquiry is on whether a conflict with a Title IX requirement, for example, has been sufficiently identified.¹⁵⁷

To date, federal case law does not reflect extensive analysis of Title IX's religious exemption. Much of this analysis has occurred in district court decisions and unpublished court of appeals cases that, while perhaps having persuasive value in future cases, do not establish binding precedent. Instead, the application of the exemption has been largely administrative, with federal agencies like ED determining whether an educational institution is both religiously controlled and whether Title IX compliance conflicts with a religious tenet. In the administrative enforcement context, it appears that the majority of claims involving Title IX's religious exemption have arisen in the higher education context, rather than in K–12 private schools.¹⁵⁸

As litigants raise novel legal questions regarding Title IX, and federal agencies and some federal courts interpret Title IX to prohibit sexual orientation and gender identity-based discrimination,¹⁵⁹ it may be that new applications of Title IX's requirements will generate increased administrative activity and judicial analysis of Title IX's religious exemption.

As a general matter, should it choose to do so, Congress has the authority to alter the scope of Title IX's religious exemption and the considerations relevant to qualifying for the exemption, subject to First Amendment limitations. Congress could, for example, pass legislation that specifically addresses the mechanics of invoking the religious exemption. In addition, and as indicated earlier, the Supreme Court has interpreted Title IX as Spending Clause legislation.¹⁶⁰ Thus, to the extent that there is legislative interest in amending Title IX's religious exemption, one consideration unique to Spending Clause legislation might apply: in general, the Supreme Court requires that conditions or requirements in such legislation must be clear and unambiguous.¹⁶¹ As an alternative to amending the text of Title IX's religious exemption, Congress could direct federal agencies like ED to promulgate new regulations addressing the exemption consistent with particular policy goals.

¹⁵⁷ See *supra* “ED OCR’s Application of the Religious Exemption” and “Conflict with a Religious Tenet.”

¹⁵⁸ See, e.g., See Dep’t of Educ., Office for Civil Rights, *Correspondence* (last visited June 21, 2023) (compiling Title IX religious exemption requests), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html>.

¹⁵⁹ For more information, see CRS Legal Sidebar LSB10830, *Education Department Proposes New Title IX Regulations: Sexual Orientation and Gender Identity*, by Jared P. Cole (2022); CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole (2021). Compare *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (concluding that a school board policy barring a transgender student access to the bathroom consistent with their gender identity constituted discrimination based on sex under Title IX), with *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (ruling that “sex” under Title IX refers to “biological sex” and a school board policy barring transgender students from access to the bathroom consistent with their gender identity was permissible under the statutory and regulatory carve-outs for sex-segregated facilities).

¹⁶⁰ See *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

¹⁶¹ See generally, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (stating that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously,” and that Congress must “speak with a clear voice” to enable recipients to “exercise their choice knowingly, cognizant of the consequences of their participation.”). For more information, see CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress’s Spending Power*, by Victoria L. Killion.

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