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THE CONSTITUTIONALITY OF THE TITLE IX RELIGIOUS EXEMPTION

*Madelyn Jacobsen*¹

I. INTRODUCTION

In March of 2021, members of the LGBTQ+ community and former students at religious universities filed suit against the United States Department of Education. In what is now known as *Hunter v. Department of Education*, plaintiffs claimed that the inaction of the Department in confronting discrimination against LGBTQ+ students by religious universities was causing them damage to “mind, body, and soul.”² The plaintiffs argued that the Title IX Religious Exemption was unconstitutional³ and “seemingly permits the Department to breach its duty”⁴ to prevent sex discrimination at universities that receive federal funds. Moreover, they asserted that the exemption

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 - 2 *Hunter v. U.S. Dept. of Educ.*, 6:21-cv-00474-AA (D. Or. Mar. 29, 2021).
 - 3 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.
 - 4 Southwick Law, *Case 6:21-cv-474*, REAP, 2 (Mar. 29, 2021), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/920c04c1-03a4-48f5-9a0c-74e2e4316e55/note/ff5608bc-cac5-4aeb-9fad-bf42e8b36319>; *see also* REAP, <https://www.thereap.org/lawsuit> (last visited Feb. 15, 2022); *see also* *Hunter v. U.S. Dept. of Educ.*, 6:21-cv-00474-AA (D. Or. Mar. 29, 2021).

fails under the Equal Protection and Establishment Clauses of the United States Constitution.⁵

Tensions between LGBTQ+ rights and religious liberty have escalated in the past decade. For example, issues ranging from housing disputes to adoption vetting illustrate the increased scrutiny and strain on the expression of religious conviction.⁶ In the former landmark case legalizing gay marriage, *Obergefell v. Hodges*, the Supreme Court stated that belief in traditional marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”⁷ Now, only five years later, expressions of personal religious views on the sanctity of marriage are questioned and criticized at every front.

Students attend Brigham Young University for the niche environment it provides them during a crucial and developmental stage in life. The Title IX Religious Exemption allows BYU to maintain traditional views and standards for marriage and sexuality. Striking down the religious exemption would prohibit BYU, and other religious universities, from expressing their religious beliefs through honor codes (personal codes of conduct for the school). Moreover, its removal would force them to adopt standards set forth by the government, even if doing so contradicts their doctrine and closely held beliefs.

In responding to *Hunter v. Department of Education*, the courts must decide how to balance two compelling state interests: protecting students against LGBTQ+ discrimination while attending religious universities, and the constitutional right for those institutions to exercise freedom of religion. Striking down the Title IX Religious Exemption would force religious universities to either abandon their sincere religious beliefs or forgo federal funds that allow students to attend their school. Students with financial disadvantages, then, could not attend the university of their choice, compelled instead to attend where they could apply for federal aid without question.

5 *Id.* at 3.

6 *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).

7 *Obergefell v. Hodges*, 576 U.S. ____ (2015).

The Title IX Religious Exemption allows religious universities to provide a religious education—one that requires students to follow a high moral code and provides a unique religious environment. Furthermore, students who seek a non-religious education may choose to attend a wide variety of state schools, private institutions, or even less strict religious universities. The Title IX Religious Exemption is crucial for maintaining diversity in higher education atmospheres, specifically religious diversity. Students can choose where they attend school and how they might pursue their values as they receive an education.

Legal precedent establishes and grants autonomy to religious universities to carry out internal operations and religious educational oversight.⁸ Although secular organizations are subject to comply with Title IX, religious institutions are granted specific independence in choosing their employees and determining admissions policies. The Title IX Religious Exemption provides this same autonomy to religious universities in deciding the makeup of their student body and the moral expectations placed on them. Navigating a balance between the Establishment Clause and Free Exercise Clause is nuanced and sensitive. The Title IX Religious Exemption is crucial for the survival of religious universities and their ability to provide the type of religious education that their beliefs demand. Failing to uphold religious exemptions under Title IX would impede the free exercise of religion, force religious universities to become indistinguishable from non-religious universities, and rob students of crucial religious higher education.

This paper first outlines the history and evolution of Title IX, defines its use, and identifies certain exemptions by referencing eight cases where Title IX applies. In the following section, I provide a brief overview of both an initial purpose and current application of Title IX and the effects of its absence. Next is a review of precedents set through cases wherein religious exemptions are called into question; standards set by these cases prove to either establish or deny

8 *See also* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (2020).

religious exemption by the Supreme Court. The article then explores some limitations of the application of Title IX and the constitutional statutes that support it and discusses both the potential detriments of its misuse and the involvement of the government to prevent misuse in certain circumstances. In the final section, I briefly summarize the significance and constitutionality of Title IX and encourage greater consideration of the impact of this issue: the effect on access to the free exercise of religion if we fail to defend and uphold Title IX.

II. BACKGROUND

A. History of Title IX

In determining the constitutionality of the Title IX Religious Exemption, it is helpful to review the history of Title IX—specifically, why Title IX was created and how it has been applied and modified over time. Before the enactment of Title IX in 1972, women experienced substantial discrimination in education. In the landmark case of *United States v. Virginia*, the Supreme Court recognized that “our Nation has had a long and unfortunate history of sex discrimination.”⁹ Some schools prohibited women from attending without exception, while others restricted their access through quotas that determined the number of women who should be accepted to a university.¹⁰ In 1970, only 8 percent of women age 19 or older had graduated college and discrimination went beyond college admissions alone: women

9 U.S. v. *Virginia*, 518 U.S. 515, 531 (1996), quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); UNITED STATES DEPARTMENT OF JUSTICE, *Equal Access to Education: Forty Years of Title IX*, 1 (June 23, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> (“[I]n the forty years since its enactment, Title IX has improved access to educational opportunities for millions of students, helping to ensure that no educational opportunity is denied to women on the basis of sex and that women are granted “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *U.S. v. Virginia*, 518 U.S. 515, 532 (1996)).

10 UNITED STATES DEPARTMENT OF JUSTICE, *Equal Access to Education: Forty Years of Title IX*, THE HISTORY OF TITLE IX, 2 (June 23, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

had restricted access to particular majors or courses of study, including medicine; they were offered fewer academic opportunities and scholarships and were required to adhere to harsher rules than male students; women who attended college despite these limitations experienced further discrimination in the workforce and academia, as women faculty were rare and male professors were granted tenure over their female counterparts.¹¹ The overt discrimination against women in higher education was addressed by the passing of Title IX by Congress on June 23rd, 1972—a federal statute that prohibits discrimination based on sex in “educational programs or activities” that receive federal funds, and is enforced by the Office for Civil Rights under the Department of Education.¹²

B. Religious Exemption

During the creation of this statute, Congress provided an exemption to allow religious universities to be exempt from Title IX in circumstances that burden sincere religious beliefs.¹³ To prohibit non-religious universities from using the exemption to discriminate, the statute includes two requirements that universities must meet to qualify for the religious exemption—a university must (1) be controlled by a specific religious organization, and (2) prove that adhering to Title IX would burden the religious beliefs held by the university.¹⁴ The stipulation that a university must be organized or defined by a specific religion means that a university cannot simply

11 WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING, *White House Council on Women and Girls*, March 2011, p. 19 (changes between Title IX’s enactment and 2009 show that “approximately 87 percent of women had at least a high school education and approximately 28 percent had at least a college degree, up from 59 percent with a high school education and 8 percent with a college degree in 1970.”).

12 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.

13 20 U.S.C. § 1681: Title IX statute & 34 C.F.R. Part 106: Title IX regulations.

14 34 C.F.R. Part 106: Title IX regulations, Subpart B - Coverage § 106.11 Application & § 106.12 Educational institutions controlled by religious organizations.

be affiliated with any religion or merely subscribe to a set of beliefs; rather, universities must prove religious affiliation directly through a specific religion. For example, a Christian college that does not affiliate with a specific church but simply wants to uphold the principles of the Bible, would not qualify for the exemption. The second qualification requires a university to prove that complying with Title IX would unduly burden their religious beliefs.¹⁵ In other words, a university is not automatically exempt from all the demands of Title IX. Universities are only exempt from those parts of the law that would be contrary to their religious beliefs.

C. Protections Under Title IX

Since the creation of this statute, various cases clarify what Title IX does and does not protect. The case *United States v. Virginia* involved the Virginia Military Institute (VMI), which was an all-male public university.¹⁶ Petitioners argued that male-only admissions violated the Fourteenth Amendment of the Constitution and sought protection under the Equal Protection Clause. Defendants claimed the state could create the “Virginia Women’s Institute for Leadership” (VWIL) to be an analogous institution to the VMI as an all-girls school.¹⁷ The court ruled that the VMI was unconstitutional in excluding women at their university: the school failed to prove “exceedingly persuasive justification” for excluding women and that the gender-biased admissions policy furthered educational diversity or other compelling interests.¹⁸ The proposed VWIL was not equivalent to the VMI as it would not provide women with analogous military training and opportunity. Ultimately, sex discrimination is

15 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a) (Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization.).

16 *U.S. v. Virginia*, 518 U.S. 515 (1996).

17 *Id.* at 517.

18 *Id.* at 534.

subject to heightened scrutiny and the actions of VMI failed under the U.S. Constitution.

The Supreme Court later expanded Title IX to include further protections for women as they interpreted the statute—protections for sexual harassment¹⁹ and increased equality in sports activities.²⁰ The case *Cannon v. University of Chicago* determined that the government could hold schools accountable for sex discrimination.²¹ The female plaintiff, in this case, was denied admission to a private medical school that was receiving federal funding. Before this case, Title IX did not recognize the right of an individual to bring suit for damages under the statute. This case determined that there was a private cause of action and created a valuable tool for students as they were now allowed to sue their universities for damages based on discrimination.²²

Title IX also protects students against sex-based harassment. *Davis v. Monroe County Board of Education* involved plaintiff Aurelia Davis, who sued the Monroe County Board of Education for being complacent in her child's suffering of sexual harassment.²³ The court stated that the school board acted with "deliberate indifference" and ignored complaints made on behalf of the harassment.²⁴ The Court decided that the complacency of the school toward harassment and failure to act prohibited Davis' daughter from accessing the educational equality provided under Title IX. Further, this case determined that Title IX includes a private right to education and individuals can sue for private damages. In 2010, the case *J.L. v. Mohawk*

19 *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999); *J.L. v. Mohawk Central School District*, 6:09-cv-00943-DNH-DEP (N.D.N.Y. April 27, 2010).

20 *Biediger v. Quinnipiac University*, 928 F.Supp.2d 414, 473 (D. Conn. 2013) (Judge Underhill concluded that the university had "failed to demonstrate a significant change in the quantity and/or quality of athletic participation opportunities provided to its female students.").

21 *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

22 *Cannon*, 441 U.S. 677 (1979).

23 *Davis*, 526 U.S. 629 (1999).

24 *Id.* at 651.

Central School District extended the protections against sex-based harassment to those who do not conform to gender stereotypes.²⁵ Subsequent to the matter, the school was required to implement anti-harassment training and monitoring.²⁶

Finally, the protections of Title IX extended to women's sports. In *Biediger v. Quinnipiac University*, Quinnipiac University eliminated several varsity sports teams, including the women's varsity volleyball team; in its place, the school introduced women's competitive cheerleading as a new varsity sports team, rather than maintaining the volleyball team.²⁷ The so-called "equality" sought by the school was found, instead, to "systematically and artificially [increase] women's teams' rosters and [decrease] men's teams' rosters to achieve the appearance of Title IX compliance."²⁸ The court held that cheerleading did not count as a sport under Title IX and that the school could not count those female cheerleaders as athletes under Title IX.²⁹ This decision required the school to provide more positions on athletic teams for women.

Perhaps one of the most noteworthy modifications made to Title IX took place in 2021 by the Department of Education through the Office for Civil Rights.³⁰ Under the Joe Biden administration, the Department expanded the protections of "sex" as outlined in the Title IX statute to include both sexual *identity* and sexual *orientation*.³¹ This change was made in light of the ruling of *Bostock v. Clayton County*, which similarly expanded the definition of sex in

25 J.L. v. Mohawk Central School District, 6:09-cv-00943-DNH-DEP (N.D.N.Y. April 27, 2010).

26 *Id.*

27 *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277 (D. Conn. 2009).

28 *Biediger v. Quinnipiac Univ.*, No. 10-3302, 5 (2d Cir. 2012); *see also Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277 (D. Conn. 2009); *see also Biediger v. Quinnipiac Univ.*, 3:09-cv-00621-SRU (2d Cir. 2012).

29 *Id.* at 10. *See also Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d, at 92.

30 20 U.S.C. §§ 1681 et seq.; *see also* Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).

31 *Id.*

Title VII of the Constitution, as it “prohibits employment discrimination based on race, color, religion, sex, and national origin.”³²

D. Exceptions Under Title IX

U.S. Supreme Court rulings established the ministerial exception which gives religious institutions a high level of autonomy. This exception prohibits employees who perform religious functions from taking suit against religious institutions.³³ The ministerial exception was upheld by the Supreme Court in the ruling of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.³⁴ Although the Supreme Court did not adopt a rigid formula for the ministerial exception, they did determine that religious institutions, including religious schools, have complete control over who they hire and fire, free from government intervention.³⁵

The ministerial exception was strengthened by *Our Lady of Guadalupe School v. Morrissey-Berru*. In that case, a history teacher who taught only secular subjects, and who had little religious training or coursework, was fired by the religious school that employed her.³⁶ She filed suit against the school, claiming discrimination on the grounds that she was primarily a secular teacher, rather than a representative of their religion.³⁷ The Supreme Court held that they could not determine who is or is not considered a “minister” to a religious organization.³⁸ Although she was not teaching religious material, the religious institution still considered the teacher a

32 Bostock v. Clayton County, 590 U. S. 2. (2020).

33 U.S. EEOC, *EEOC-CVG-2021-3, Section 12: Religious Discrimination*, C.2. Ministerial Exception (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_26808142314071610748738049.

34 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

35 *Id.*

36 *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ____ (2020).

37 *Our Lady of Guadalupe*, 591 U.S. (2020).

38 *Id.*

“minister” or representative of their religion. She was, therefore, subject to the exemption held by the school and could be fired at the school’s discretion.

E. Title IX & Higher Education

The history of religion in higher education is also relevant in determining the constitutionality of the religious exemption under Title IX. Higher education was widely championed by predominantly religious organizations in the United States. Some of the oldest universities in the U.S. are religious schools or identified as such in their infancy—the first of which included Harvard (1636, congregational), William and Mary (1693, Anglican), Yale (1701, congregational), Princeton (1746, Presbyterian), Columbia (1754, Anglican), and Brown (1764, Baptist).³⁹ Religious freedom and religious education were inherently part of the pursuit of education since the founding of our country, and moral and religious views were interwoven in higher education until the privatization of religion at the beginning of the 1900s.⁴⁰ Diversity increases in higher education as more students attend college and there are more options for both religious and secular schools—private or public. The Supreme Court has been tasked with drawing lines between protecting religious freedom and avoiding excessive government entanglement in religion and education.

39 Rhonda Jacobsen et al., *No Longer Invisible: Religion in University Education*, 18-19 (OXFORD UNIVERSITY PRESS, 2012), https://www.messiah.edu/download/downloads/id/8926/no_longer_invisible_ch_2.pdf (last visited Jan. 8, 2022).

40 *Id.*

III. THE PURPOSE OF TITLE IX

Title IX was created to provide equal opportunities in higher education for women.⁴¹ Because of historically widespread discrimination against women, substantially fewer women were permitted to attend college than men were. Although the Title IX statute does function to prohibit universities from perpetuating discriminatory policies, the primary creation of the statute was to combat widespread discrimination based on sex in higher education.⁴²

Prior harm and certainly future injury to protected groups were further curtailed by the initial and intentional protections against such outcomes established through Title IX. Harm or injury, for the purpose and consideration used in this paper, are implied as comprehensive terms for any “wrong or detriment done by one individual (or group of individuals) to the body, rights, reputation, and physical or mental well-being, etc.” of another individual (or group of individuals).⁴³ Surely, the allowance of two such protected classes, and their subsequent rights (on the basis of sex or religion, in this case), to be pitted against each other, is an interference with the

41 U.S. DEPT. OF JUSTICE, *Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations*, Purpose, ¶ 1, <https://www.justice.gov/crt/title-ix> (last visited Jan. 8, 2022) (“Congress enacted Title IX with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices in education programs, and to provide individual citizens effective protection against those practices.” See *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)).

42 U.S. DEPT. OF JUSTICE, *Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations*, Legislative History, ¶ 2, <https://www.justice.gov/crt/title-ix> (last visited Jan. 8, 2022) (“As the women[’s] civil rights movement gained momentum in the late 1960’s and early 1970’s, sex bias and discrimination in schools emerged as a major public policy concern. Women, who were entering the workforce in record numbers, faced a persistent earnings gap compared to their male counterparts. As a consequence of the equality in the workforce debate, Americans also began to focus attention generally on inequities that inhibited the progress of women and girls in education.”).

43 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *edition 2. S.V. “harm”*, <https://legal-dictionary.thefreedictionary.com/harm> (last visited Dec. 12, 2021).

legally protected interests of an individual. Harm or injury to the rights of individuals is considered a crime according to criminal case law. It follows that injury through negligence to protect religious freedoms and rights is unlawful—both via Title IX and under the First and Fourteenth Amendments.

IV. THE MINISTERIAL EXCEPTION

The ministerial exception, established by the Supreme Court, allows religious institutions to have autonomy over the internal affairs of the church including hiring and firing of their employees, or anyone they consider to be a “minister”. Multiple cases strengthen this autonomy granted to religious institutions. For example, the ruling of *Corporation of Presiding Bishopric v. Amos* gave churches autonomy over any hiring or firing that may appear completely secular.⁴⁴ The plaintiff, in this case, worked for a church-owned gym for several years but was fired when he did not comply with the religious expectations of the institution. His church required that he (like all their employees) pay a religious tithe to the church, which he did not pay. His job was primarily secular since he maintained the gym facility owned by the church. The Supreme Court determined that the discriminatory firing by the religious institution of the employee with an almost entirely secular job was not only constitutional, but it was also not a violation of the Establishment Clause.⁴⁵

This case affirmed that the government cannot invalidate decisions made by a religious institution regarding who will administer in the faith and represent that institution. Religions are allowed complete autonomy in deciding the standards for employees, who they hire and fire, and who they consider a minister. These determinations are at the discretion of the religion, and without government interference, which was endorsed in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, by Justice Thomas:

44 Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

45 *Id.*

The question of whether an employee is a minister is itself religious, and the answer will vary widely. Judicial attempts to construct a civil definition of “minister” through a bright-line test or multi-factor analysis, risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the “mainstream” or unpalatable to some.⁴⁶

Hosanna-Tabor served to strengthen the autonomy given to churches in *Corporation of Presiding Bishopric v. Amos*. A teacher at a religious school was fired after having taken significant time away from work for health concerns.⁴⁷ It appeared that she was fired for her health problems and not for religious reasons; the Supreme Court decided that although her job was secular, her position as a teacher at the religious school was deemed a ministerial position by the religious school and would be recognized as such.⁴⁸ Beyond what was established in *Corp. of Presiding Bishopric*, Chief Justice Roberts clarified that the ministerial exception applies to hiring and firing based on religious standards versus those that are not. In the case of *Hosanna-Tabor*, he stated, “The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter “strictly ecclesiastical”—is the church’s alone.”⁴⁹ This case further substantiates the strength of autonomy granted to religious institutions.

Based on these precedents, religious institutions may terminate an employee for any reason, religious or not, without government intervention. In the case of *Hosanna-Tabor*, even if the plaintiff was terminated for her health problems, and not for religious reasons,

46 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 1 (2012) (THOMAS, J., concurring).

47 *Id.* at 3.

48 *Id.* at 19.

49 *Hosanna-Tabor*, No. 10–553, slip op. at 19–21 (Jan. 11, 2012) (today the Court holds only that the ministerial exception bars an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her (internal quotation marks omitted)); see also *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952).

any hiring or firing of “ministers” falls under the ministerial exception. Although hiring and firing “ministers” is different from rejecting and accepting students, the autonomy established by the courts through the ministerial exception is significant. The complete control of “ministers” by religious organizations leads us to believe that the makeup of a student body and standards of conduct would be also in the control of the religious university. A minister is a position that is more closely connected with a religious institution than a student is; however, religious universities claim that their student body is also an extension and representation of them as a religion.

A minister influences members of the faith and is tasked with teaching, befriending, and encouraging all to live per the faith. The individuals in a student body may be more influential on each other than a teacher or minister. Ministers are tasked with preparing the students to move forward into society with the belief in the principles of the religion. It is often the moral standards and religious convictions of the students that encourage other students to increase their own belief or continue in that faith, and not the teachers. The ratio of teachers or religious leaders to students does not permit students to meet one on one with these leaders frequently. A student may only be able to meet with a religious leader or teacher once a month. Thus, the regular religious influence that a student may experience through education is often derived primarily from their peers.

The students that create a student body may be considered ministers. Often, peer relationships have a strong influence on both students and teachers within the faith, whether their peers are members of the faith or not. The moral and religious standards for students created and upheld by a university impact the religious convictions of its students and the furthering of beliefs and values that the religion seeks to encourage. Viewing students as ministers, or representatives of a religious institution, gives religious universities autonomy to decide who will be admitted, the makeup of the student body, standards for students, and potential dismissal of students. Furthermore, the autonomy over the makeup and standards of the student body should be free from government intervention if they qualify to use religious exemption under Title IX. If the religious university is from a specific church and can prove that following Title

IX is contrary to their religious beliefs, they are allowed to use the religious exemption. The autonomy given to religious institutions, established by the ministerial exception, links religious employment decisions with religious university decisions. If a university believes an honor code with specific standards is essential in providing what they consider to be a religious education, that is for the religion to decide, free from government interference.

Again, it is the religious institutions themselves that decide who they consider a minister. Several religions and, by extension, their religious institutions consider students to be impactful ministers as they share their faith through friendship, by participating in weekly services, and even as counselors to one another as they navigate university courses together. In the same way that a religious university can hire and fire teachers, it can also accept, deny, or expel students at its discretion. It is important to note a distinction, however, between the autonomy of a religious institution over who they employ as ministers or accept as students, and that their exemption from some limitations is still subject to other limitations under the statute. Because limitations to, or qualifications for, religious exemption or autonomy must exist at some intersection, the language in Title IX requires the institution to prove that compliance with Title IX would be contrary to their religious beliefs. Religious universities may exercise their prerogative over the religious education they provide or expectations of their students; a university qualified for a religious exemption, however, is not permitted to simply forgo all Title IX requirements in their policies and decisions.

For example, a religious institution offering specific classes only to men or only to women, need only prove that abiding by Title IX would go against their religious beliefs. If the classes were based on sincere religious beliefs where students were taught specific religious principles viewed as unique to their sex, such actions would qualify for a religious exemption under Title IX. Similarly, if a religious university that qualifies for the Title IX exemption were to maintain an abundance of men's sports teams but neglected to have any women's teams, they would need to prove that creating equal teams for men and women violates their religious beliefs. In the case that a school has no sincere religious reasons for giving more sports

opportunities to men than women, such action would not qualify under the Title IX Religious Exemption. These examples are hypotheticals of how the Supreme Court could limit the extent to which Title IX Religious Exemption extends. Although religious universities should be granted a high level of autonomy as established by the ministerial exception, they must still be subject to the requirements outlined by the religious exemption.

Importantly, different universities have different levels of religious affiliation. There may be limits placed on the religious exemption via Title IX by the courts which might include a heightened level of religious involvement. For example, some universities may be affiliated with a religion, but teachers are not required to be members of the religion, and students are not required to take courses on religious material or follow any moral code. Other universities may act as a more literal extension of religion with religious requirements for teachers and students, tuition costs subsidized by religious tithes, and religious courses or requirements for all students who attend. Although the connection and commitment of religious universities related to various religions differ, the extent to which an institution is involved in or affiliated with religion may play a role in determining which schools may qualify for the exemption and which ones do not.

V. DIVERSITY IN HIGHER EDUCATION

Access to public, private, and religious education promotes a variety of options for those who pursue education at any level. The option for students to choose where they attend school, by default, encourages diversity in how and what a student chooses to study. Arguably, a university education is sought after and used to further develop one's belief systems and world views; it follows that the ability of a student to contribute to society is shaped by their decision to not only attend any university available to them but to choose where and what that education might be. Theological studies point to religious education being central to the development of students and societies, both secular and sacred. To limit students' options to a higher education system that is strictly private or only public (non-religious) would not only offend the First Amendment of the Constitution, but it would

also effectively incite a rebellion against the very tenet upon which our country was founded: religious freedom. Religious freedom in higher education must persist as an essential government interest.

If the government were to further restrict religious universities and prohibit students from pursuing their sincere views on the sanctity of marriage, students' ability to attend a school with the religious education they desire would be severely limited. The Title IX exemption is crucial in allowing religious universities to provide the niche type of education that students continue to seek. The government does not decide what religious education should entail; the educational program and the extent of religious affiliation or involvement are determined by the religious institution. This provides students with a variety of both religious and secular emphases at a school of their choosing. Schools can be secular in their entirety, have religious roots, have religious affiliations, or be completely connected with a specific religion.

Religious educational institutions decide for themselves whether and to what degree they are exempt from Title IX. "In the nearly 50 years since the enactment of Title IX, the Office for Civil Rights has never denied a claim to religious exemption...[t]herefore, a religious institution may presently decide what is a burden to their religious beliefs."⁵⁰ However, the limitations to these burdens have not been defined. For example, there is a difference between requiring all *admitted students* to abide by a code of conduct and discriminating based on sexual orientation only upon *application* for admittance, which an applicant should—and likely would—be aware of. Similarly, there is a difference between discrimination based on how someone identifies and discriminating against someone who is breaking a code of conduct that all students must follow. Whether or not a religious school may refuse a student admission based on the religious beliefs of the school being contrary to the applicants' (such as when a student identifies as LGBTQ+) has not been established as a rule.

50 WHAT IS THE RELIGIOUS EXEMPTION TO TITLE IX & WHAT'S AT STAKE IN LGBTQ STUDENTS' LEGAL CHALLENGE, THE CONVERSATION (Jun. 22, 2021, 2:59 PM), <https://theconversation.com/what-is-the-religious-exemption-to-title-ix-and-whats-at-stake-in-lgbtq-students-legal-challenge-161079>.

Those who disagree with the views or values of a university—or may even find their policies to be offensive—can apply to or attend a different religious school or a variety of other state or private schools. School choice allows students to choose a university that best fits their priorities and religious alignment in higher education. To limit religious universities’ approach to higher education through Title IX would hinder students’ ability to find and flourish in an educational environment they seek. The religious exemption afforded in Title IX allows all students, both religious and non-religious, to choose a school that will help them develop in the ways they desire. The absence of the Title IX Religious Exemption only *hurts* students who wish to attend religious schools.

In *Obergefell v. Hodges*, the Supreme Court implied that traditional views on marriage still maintain a place in our society and that “reasonable” and “sincere” people may hold these beliefs.⁵¹ A religious university run by a religion with traditional views on marriage and qualify for the Title IX Religious Exemption. Because of this, the institution may be exempt from complying with Title IX, if it is contrary to their sincere religious beliefs.⁵² In providing a religious education they may have a code of conduct or code of ethics that includes restrictions on marriage that coincide with their sincere beliefs on traditional marriage.

As an institution may be directly controlled by and affiliated with a religion, their code of conduct may be central to the type of education and environment they provide. Because students seek a spiritual and religious education, they may be willing to abide by the policies a university requires students to maintain (such as specific moral or physical standards), or even tolerate the policies they disagree with. Under Title IX, religious-exempted schools should be allowed to keep a code of conduct that maintains a specific and limited moral standard (a policy dealing with the sanctity of marriage or

51 *Obergefell*, 576 U.S. ____ (2015) (the Supreme Court held that “state bans on same-sex marriage and on recognizing same sex marriages duly performed in other jurisdictions are unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment.”).

52 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a)

sexuality, for example). Because students may attend public, private, or religious universities, it is up to students to decide if they want to attend a university with these views and moral expectations.

VI. FEDERAL FUNDING

Funding related to Title IX remains a key element in determining the constitutionality of the Title IX Religious Exemption. A university will not receive federal funds if they do not comply with the requirements of Title IX.⁵³ Religious schools, like private universities, are allowed to keep policies that public schools cannot. Religious universities are allowed specific exemptions that do not preclude them from accepting federal funding. Public schools and private and religious schools differ in their tax exemption status, requirements, and federal funding available to them.

The recently filed case of *Hunter v. Department of Education* is a class-action lawsuit attempting to prevent religious universities from receiving federal funding because of the religious exemption under Title IX.⁵⁴ More than thirty LGBTQ+ students argue that the religious universities they attended kept discriminatory LGBTQ+ policies related to religious bias and because of those policies, the complainants were negatively impacted. The students claim complacency of the Department of Education toward “tax-payer funded discrimination,” which they assert is a violation of their due process and equal protection rights.⁵⁵ Further, the plaintiffs contend that the Title IX Religious Exemption maintained by these schools is unconstitutional.⁵⁶ In response to the argument presented in this case and the proposed outcome to stop religious universities from receiving

53 34 C.F.R. Part 106: Title IX regulations, Subpart B - Coverage § 106.11 Application & § 106.12 Educational institutions controlled by religious organizations [45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020].

54 *Hunter v. U.S. Dept. of Educ.*, 6:21-cv-00474-AA (D. Or. Mar. 29, 2021).

55 *Id.*

56 *Id.*

federal funds, the precedent established in *Espinoza v. Montana* is applicable.⁵⁷

Espinoza v. Montana asks and answers the following pertinent question: has a violation of the Free Exercise Clause and the Equal Protection Clause occurred if a state maintains a law that prohibits a general scholarship for education to be used at a religious school? The case argued that a general government scholarship offered to children or families to help pay for school was discriminatory if it excluded religious schools.⁵⁸ The crux of the case centered on families who were required to choose between being eligible for the scholarship or having their children attend the religious school they had chosen. Several families were denied the scholarship because their children continued to attend religious schools. Montana argued that due to their “no aid” provision that restricted them from providing any aid to religion, no breach of the Free Exercise Clause had occurred.⁵⁹ The Supreme Court stated, “...Montana’s interest in creating a greater separation of church and State than the Federal Constitution requires cannot qualify as ‘compelling’ in the face of the infringement of free exercise here.”⁶⁰ The Supreme Court held that the policy in question did, in fact, “[discriminate] against religious schools and the families whose children attend or hope to attend them, [and was] in violation of the Free Exercise Clause of the Federal Constitution.”⁶¹ Students cannot be discriminated against for their religion or attending a religious school.

57 *Espinoza v. Montana*, 591 U. S. ____ (2020). Public elementary and secondary schools are also subject to the sex discrimination prohibitions of the Equal Protection Clause of the U.S. Constitution and the requirements of the Equal Educational Opportunities Act of 1974.

58 *Espinoza*, 591 U.S. at 12 (2020).

59 *Id.* at 7.

60 *Espinoza v. Montana*, No. 18–1195, slip op. at 18–20 (Jun. 30, 2020) (“Because the Free Exercise Clause barred the application of the no-aid provision here, the Montana Supreme Court had no authority to invalidate the program on the basis of that provision.”).

61 *Montana*, slip op. at 6–22.

Because students are not denied general scholarships due to their religious school or affiliation, they choose which institution they pay those funds or scholarships to. Federal funds that are ultimately received by schools are not paid to the schools themselves. Rather, schools receive funds (that are technically issued by the federal government) through students by way of the Free Application for Federal Student Aid (FAFSA): need-based financial aid and loans offered to students by the federal government to cover the cost of education.⁶² Because of this, the government remains unentangled from religion in education, since the funding is awarded directly to the student and not the institution. Students may then exercise their right to attend the school they desire using the funds they have been awarded. Applying the precedent established in *Espinoza v. Montana*, the government cannot prohibit schools from accepting payment from students using federal funds, nor can it prevent students from having access to FAFSA simply because they choose to attend a religious school (except for schools for clergy). Because of the way federal funds through FAFSA are distributed and used, there is no breach of the Establishment Clause.

In the case of *Hunter v. Department of Education*, the plaintiffs seek to prevent religious schools that are currently operating under the Title IX Religious Exemption from receiving federal funds. The case of *Bob Jones University v. The United States* provides such an example of federal funding being restricted from a religious university based on their practices.⁶³ Bob Jones University maintained a policy that was religiously motivated, which prohibited interracial dating and marriage. The Supreme Court ruled that protecting against racial discrimination was an overriding government interest and that such discrimination triggered strict scrutiny; Bob Jones University

62 U.S. DEPT. OF JUSTICE, *Title IX Legal Manual: Scope of Coverage, Federal Financial Assistance & Direct and Indirect Receipt of Federal Assistance*, ¶ 2, <https://www.justice.gov/crt/title-ix> (last visited Jan. 8, 2022); see also Congressional Research Service, *Supreme Court Rules That Excluding Religious Schools from Aid Program Violates Constitution: Implications for Congress* (July 2, 2020); <https://crsreports.congress.gov/product/pdf/LSB/LSB10509>.

63 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

faced a decision: to either do away with their racially discriminatory policy or lose their tax-exempt status.⁶⁴ The U.S. Supreme Court ruled (8–1) on May 24, 1983, that nonprofit private universities that prescribe and enforce racially discriminatory admission standards based on religious doctrine do not qualify as tax-exempt organizations under Section 501(c)(3) of the U.S. Internal Revenue Service.⁶⁵ The university held its ground—maintaining policies of racial discrimination, though based on religious beliefs—and was responsible for paying back taxes dating to their original notice from the IRS in 1970.⁶⁶ The university lost its tax-exempt status and didn’t regain it until 2017.⁶⁷ Although this case does not deal with vouchers or scholarships, it is an example of the limitations on the autonomy of a religious university (or their discriminatory policies) and subsequent loss of tax exemption status and federal financial aid.

The case of *Bob Jones University v. the United States* deals with racial discrimination, which differs in severity from discrimination based on religion or sex. For example, in the case of *Craig v. Boren*, the court created a level of scrutiny that lies between rational basis and strict scrutiny called intermediate scrutiny: the court struck down an Oklahoma law that allowed 3.2 percent beer to be sold to women 18 and older, but only sold to men 21 and older.⁶⁸ Although this law was based on a series of statistics for gender norms in those age groups, the court determined that the general habits of

64 *Id.* at 581 (“Until 1970, the IRS extended tax-exempt status to Bob Jones University under § 501(c)(3). By the letter of November 30, 1970, ...the IRS formally notified the University of the change in IRS policy and announced its intention to challenge the tax-exempt status of private schools practicing racial discrimination in their admissions policies.”).

65 *Id.*

66 *Id.* (“[On] April 16, 1975, the IRS notified the University of the proposed revocation of its tax-exempt status. On January 19, 1976, the IRS officially revoked the University’s tax-exempt status, effective as of December 1, 1970, the day after the University was formally notified of the change in IRS policy.”).

67 In February 2017, BJU president Steve Pettit announced that Bob Jones University had, after more than 30 years, regained its tax-exempt status.

68 *Craig v. Boren*, 429 U.S. 190 (1976).

a demographic were not enough to justify gender-based discrimination. In striking the Oklahoma law down, the court outlined that sex discrimination was subject to intermediate scrutiny, not simply a rational basis.

Notably, discrimination based on sex triggers intermediate scrutiny, while discrimination based on race triggers strict scrutiny. The precedent established in *Bob Jones University v. the United States* should not be applied in this instance because the interest of protecting against racial discrimination is held higher than the free exercise of religion; similarly, the free exercise of religion is held in higher interest than religiously motivated sex discrimination. For this reason, a religious school with policies that include religiously motivated discriminations, but do not violate the discriminatory limits of the statute, should not lose its religious exemption or federal funding.

Conversely, Title IX does not apply to schools that do *not* receive federal funding.⁶⁹ A private school or university, for example, that is funded entirely from sources other than the federal government is not obligated to prohibit the same activities that Title IX prohibits. However, if an educational organization receives federal funds, it cannot choose to provide services to some people and not others. “For example, if a religious organization receives public money to run an emergency food distribution program, that organization may not serve only persons of their faith and turn away others; institutions that use federal money may not discriminate against a person

69 U.S. DEPT. OF JUSTICE, *Title IX Legal Manual: Scope of Coverage*, Federal Financial Assistance, ¶ 1, <https://www.justice.gov/crt/title-ix> (last visited Jan. 8, 2022) (“Title IX prohibits, with certain exceptions, any entity that receives “federal financial assistance” from discriminating against individuals on the basis of sex in education programs or activities. The clearest example of federal financial assistance is the award or grant of money...It is also important to remember that not only must an entity receive federal financial assistance to be subject to Title IX, but the entity also must receive federal assistance at the time of the alleged discriminatory act(s)...” See *Huber v. Howard County, Md.*, 849 F. Supp. 407, 415 (D. Md. 1994)).

seeking help who is eligible for the service.⁷⁰ In addition, organizations may not require those they serve to profess a certain faith or even to participate in religious activities without qualifying for religious exemption.

As it stands, Congress delegated to each funding agency the authority to implement the prohibition of sex discrimination (in educational programs or activities of recipients of federal financial assistance under Title IX) by issuing regulations that have the force and effect of law.⁷¹ Students who receive federal funds under FAFSA are not currently discriminated against based on sex or gender identity (with few [religious] exceptions). If students are not allowed to choose to attend a religious university using federal funds, they are effectively being discriminated against based on religion. If both the letter and spirit of the law are to be upheld and honored, the government must neither “further *nor inhibit*” religious agenda.⁷² The failure of the government to protect this balance, or government support for cutting off federal funding, instead, implicates governmental action in *favor* of inhibiting religion.

VII. THE ESTABLISHMENT CLAUSE & FREE EXERCISE CLAUSE

The current tension between religious exemptions of Title IX and LGBTQ+ rights demonstrates the careful balance required by the Establishment Clause and Free Exercise Clause of the constitution. Together, with other constitutional protections, the Establishment Clause—which prohibits the government from *establishing or*

70 The White House, *Partnering with The Federal Government: Some Do's and Don'ts for Faith-Based Organizations*, COMPASSION IN ACTION, ¶ 18, <https://georgewbush-whitehouse.archives.gov/government/fbci/guidance/partnering.html> (last visited Dec. 8, 2021).

71 U.S. DEPT. OF JUSTICE, *Title IX Legal Manual: Discriminatory Conduct, Disparate Impact*, ¶ 2, <https://www.justice.gov/crt/title-ix> (last visited Jan. 8, 2022).

72 See also Hamilton, *The Establishment Clause*, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264> (last visited Dec. 9, 2021).

furthering religion,⁷³ and the Free Exercise Clause—which ensures that religious *practice* is free from government intervention,⁷⁴ afford individuals with protections to both practice religion and secure government neutrality on those religious practices. Title IX Religious Exemption does not offend or impede the Establishment Clause of the Constitution. An example that illustrates how these concepts work together is illustrated by changes in religious freedom in recent years. The stricter “Lemon Test” used by the Supreme Court was replaced with the looser protections for religious liberty in *Employment Division v. Smith*. Under the Lemon Test, statutes for religious freedom set by the government must meet three standards, including 1) the government action must have a legitimate secular purpose, 2) the effect of the government action must neither advance nor inhibit religion, and 3) the result of the government action must not excessively entangle the government with the affairs of religion.⁷⁵

The subsequent precedent in *Employment Division v. Smith*, then, would be foundational in deciding whether the Title IX Religious Exemption is constitutional. *Employment Division v. Smith* determined that generally applicable laws that do not target a specific religious practice or group are not in violation of the Free Exercise Clause of the First Amendment, and therefore constitutional.⁷⁶ The court can enforce generally applicable laws that are neutral, regardless of whether a secondary result has limitations to religion. In this case, laws against sex discrimination already exist via Title IX. Title IX is a generally applicable law. Removing the religious exemption, however, or essentially making a new law that says the religious exemption is no longer valid is not a neutral law. It specifically targets religious universities and limits their ability to freely exercise religion. Taking away the exemption would be purposefully trying to limit religious exercise and is not neutral.

73 U.S. CONST. Amend. I, § 1.2 Establishment Clause.

74 U.S. CONST. Amend. I, § 1.4 Free Exercise Clause.

See also <https://law.justia.com/constitution/us/amendment-01/03-free-exercise-of-religion.html>

75 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

76 *Employment Division v. Smith*, 494 U.S. 872 (1990).

The current facts can also be compared to those of *Fulton v. City of Philadelphia*. This case involved the refusal of Catholic Social Services (CSS) to train and certify foster parents who were same-sex couples, which was contrary to a state law that prohibited discrimination based on sexual orientation and gender identity.⁷⁷ Because the government has control over foster care and adoption, they must be even more careful about how they limit religion. The Supreme Court ruled that the government could not remove CSS from making contracts with them for adoption services. Their religiously motivated discrimination was not unconstitutional as the law was not applied neutrally in this case and inhibited the free exercise of religion.

VIII. SOCIAL HARM

It could be argued by those seeking retribution against religious universities who discriminate based on religious policies that there are social benefits to removing religious barriers in education such as religious exemptions and discrimination. However, the collective negative impact associated with the intervention or disruption of social norms or “controls”—the variables designed for a specific religious nature—would be substantial in a largely religious and community-based environment designed to be beneficial for those who choose it. Removal of the religious tenets of an educational environment would do more harm than good. Social control theory proposes that relationships, commitments, values, norms, and beliefs encourage the conformity of people; thus, if moral codes are internalized and individuals are tied into and have a stake in their wider community, they will voluntarily limit their propensity to commit [divergent] acts, or “harm” others.⁷⁸

In any educational environment, two of the largest objectives of a school that directly benefit the institution and the student are edu-

77 *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).

78 Natasha Madon et al., *Social Control and Self-Control Theories*, 5 Review of The Roots of Youth Violence, UNIV. OF TORONTO (May 6, 2016, 1:32 PM), http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/volume5/chapter12_social_control.aspx.

cational success and attrition (pursuing vs dropping out). Social controls (variables) are employed to achieve these goals and “encourage conformity” in the process. Inherent social harm is caused by students who choose to attend a school but refuse to abide by the policies of that institution or contribute to the commitments and values of the university. If the intervention of these “controls” by individual students who do *not* want to conform (and could choose not to, by attending school elsewhere) is permitted, the larger student body and university “community” are then compromised.

Studies aimed at addressing such issues show the positive impact of the protection provided for those seeking higher education under current laws. The socioeconomic groups examined in one study included those with opposing tendencies, understanding whether and how equality of access to higher education has changed over time, and the likelihood of different socioeconomic groups (gender, racial, and ethnic) entering various types of postsecondary institutions. The results of one study indicated persistent inequality concerning the socioeconomic background only, but notable improvements in access to postsecondary opportunities for both women and African Americans.⁷⁹ This example establishes a core element of the equality, opportunity, and protection available to individuals under Title IX: members of minority groups (based on gender and race here), who have been largely and historically unprotected and underrepresented in education, now have *increased* access to higher education.

If the objectives of the protections under the Fourteenth Amendment and Title IX are to further protect and provide an opportunity for the marginalized, removing those protections may unravel the progress gained thus far. No evidence suggests that removing the religious exemption under Title IX—or worse, limiting Federal funding for those who would otherwise attend religious universities—would improve access to postsecondary education and opportunities for the very parties affected by its safeguards. Rather, those opportunities would be further limited. By keeping the current and constitutional statutes of Title IX it seems likely that access to higher

79 *Stratification in Higher Education: A Comparative Study*, (Yossi Shavit et al. eds., STANFORD UNIVERSITY PRESS, 2007) (2010).

education for minority and protected groups would only continue to improve. There is harm done in thinking that to preserve the rights of some, the rights of others must be removed or infringed upon; under the current constitutional statutes there is protection for the rights of sex- and gender-based groups *and* religious-based exemptions.

IX. CONCLUSION

The Title IX Religious Exemption is crucial for preserving religious freedom, diversity in higher education, and federal funding for education. Case law establishes that autonomy granted to religious institutions is constitutional and those religious universities are free to make their own decisions in promoting and providing religious education. Restricting funding from religious universities that will not adopt policies contrary to their religious beliefs is incompatible with the “benevolent” or constitutional neutrality required and protected by the First Amendment of the constitution.⁸⁰ Government involvement in religion and its foremost duty to defend both the Establishment Clause and the Free Exercise Clause is to ensure that those statutes complement and not contradict one another; the religious exemptions maintained by Title IX should continue to be supported with both neutrality and accommodation.

An area for future discovery would include the limitations to the religious exemption via Title IX. Case law has established an understanding and acceptance of differences between action and belief. However, all religious universities that currently accept students who use federal funding will be affected if the Title IX exemption is removed. So, should universities be allowed to seek religious exemption under Title IX in determining who to grant acceptance or denial from their university? Is there a distinction between requiring students to live up to a certain moral standard and denying someone entrance for their sexual orientation or gender identity? If Title IX Religious Exemptions are removed, other religious exemptions

80 John R. Vile, *Benevolent Neutrality*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://mtsu.edu/first-amendment/article/826/benevolent-neutrality>.

might be consequently struck down as well. The Supreme Court's decision on religious exemption bleeds into other areas of law when two government interests remain at odds. The future of the free exercise of religion will be irreparably altered if exemptions for religious institutions and universities cease to exist.

The Supreme Court has refrained from outlining rules in determining constitutional acts, and instead, is ruling on specific cases and facts on an individual basis. However, the determination of *Hunter v. Department of Education* may negatively affect the future of religious exemptions, sex discrimination, and religious instruction and diversity in higher education. More importantly, greater consideration of the long-term impact of such cases must be made before setting what is arguably a harmful precedent. The constitutionality of Title IX must not be the only issue in question; rather, we must consider the future of the free exercise of religion if we fail to defend it now.

