BOB JONES UNIVERSITY IN THE 21ST CENTURY: AN EXAMINATION OF CHARITABLE TAX-EXEMPT STATUS AND RELIGIOUS EXEMPTION FROM TITLE IX FOR RELIGIOUS COLLEGES THAT DISCRIMINATE AGAINST LGBTQ+ STUDENTS

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INTRODUCTION

On March 30, 2021, the Religious Exemption Accountability Project ("REAP") filed a historic class action lawsuit with the goal of challenging the abusive conditions that many private religious colleges and universities have created for LGBTQ+ students. These unsafe conditions have been permitted for decades by the U.S. Department of Education's policies

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surrounding religious freedom.[1] In the complaint, plaintiffs criticize the privileges—tax-exempt status and government funding—that are bestowed upon these institutions despite their discriminatory practices, denouncing the special treatment they receive simply for shrouding their behavior in religious justifications for protection. The complaint went on to criticize the religious exemption to Title IX, alleging that it "permits the Department to breach its duty as to the more than 100,000 sexual and gender minority students attending religious colleges and universities where discrimination on the basis of sexual orientation and gender identity is codified in campus policies and openly practiced."[2]

There are many documented cases in which private religious institutions have engaged in discrimination against LGBTQ+ students without legal repercussions—often involving the enforcement of an "honor code" that prohibits certain types of gender and sexuality expression. For example, one student was expelled from Southwestern Christian University—a semester shy of graduation—when school officials discovered that she was married to a same-sex partner; the school pointed to a "lifestyle covenant" that prohibited "Lesbian, Gay, Bi-sexual and Transgender (LGBT) behavior or acts" to justify its decision.[3] Another student, who is transgender, was expelled from California Baptist University after the school alleged that she committed fraud on her school application by listing her gender as "female."[4] Another student, after it was revealed that she was in a same-sex relationship, was barred from enrolling in her final semester at Grace University; she was told that she could re-enroll only "if she went through a restoration program involving mandatory church attendance, meetings with counselors and mentors, and regular communication with a school dean." She was eventually expelled for continuing to date women, and the school demanded that she return thousands of dollars in federal financial aid money.[5] The complaint filed by REAP alleged dozens of

1. First Amended Complaint at 2–3, Hunter v. U.S. Dep't of Educ., No. 6:21-cv-00474-AA (D. Or. June 7, 2021).

2. *Id*.

3. HUMAN RIGHTS CAMPAIGN, HIDDEN DISCRIMINATION: TITLE IX RELIGIOUS EXEMPTIONS PUTTING LGBT STUDENTS AT RISK 13 (2015).

4. *Id.* at 10. In this case, the student, Domaine Javier, sued the school for an alleged violation of the state Unruh Civil Rights Act, which provides, "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2023). The court refused to grant relief, ruling that her expulsion was not prohibited because the school's educational activities did not qualify as a "business establishment." HUMAN RIGHTS CAMPAIGN, *supra* note 3, at 10.

5. HUMAN RIGHTS CAMPAIGN, *supra*, note 3, at 15.

additional acts of discrimination against LGBTQ+ students. The named plaintiff on the lawsuit, Elizabeth Hunter, was subject to discipline from Bob Jones University after posting online about LGBTQ+ issues, including "her posts about reading a book with a lesbian main character, and about writing a book including a lesbian relationship."[6] Another plaintiff, Victoria Joy Bacon, alleged that school officials at Lipscomb University directed homophobic and transphobic statements against them, including slurs, and that resident advisors witnessed them being called slurs and refused to intervene.[7] Nathan Brittsan only attended Fuller Theological Seminary for a few days before being expelled for being homosexual and married to a same-sex partner.[8] Scott McSwain was told by Union University that he was "going to hell" and that he would be expelled if he did not attend sexual conversion therapy.[9] These examples represent only a fraction of the reported discrimination that LGBTQ+ students have been subjected to by private religious institutions.

In the REAP lawsuit, plaintiffs argued that it is constitutionally impermissible for government funding to be distributed to private educational institutions that engage in discrimination against students, either through official policies and honor codes or unofficially through other channels. However, I argue that a bright line rule consistent with this position would be difficult to implement in any practical sense—not only because it is virtually impossible for schools to operate without any government funding at all, but also because taking any legislative action to restrict funding to these schools would be extremely unpopular in the current political environment. Under current IRS tax policies, it is unlikely that private religious institutions could have their tax-exempt status revoked for engaging in discrimination on the basis of gender identity or sexual orientation. The most promising route for holding schools responsible for such behavior by revoking tax-exempt status is the IRS promulgating a new regulation forbidding organizations that discriminate on the basis of gender identity or sexual orientation from being categorized as "charitable" for the purpose of tax exemption. The Court should then uphold this new policy by extending the holding of *Bob Jones University v. United States* beyond just racial discrimination. This order of operations is crucial, as it seems unlikely that a potential extension of *Bob Jones University* would be effective if not preceded by a new IRS policy. Congress, as the ultimate source of authority for the IRS, has the power to modify those policies which it considers

6. First Amended Complaint at 12, Hunter v. U.S. Dep't of Educ., No. 6:21-cv-00474-AA.
7. *Id.* at 19.
8. *Id.* at 22.
9. *Id.* at 44.

improper. However, it seems likely that independent agency action coupled with judicial review would be more successful than getting the legislative branch to make the politically-unpopular decision to threaten the tax-exempt status of a large number of private religious colleges and universities. Even when Bob Jones University was engaging in blatant racial discrimination to such an extent that the majority of the public did not approve, it was the IRS and Supreme Court that took action, not Congress.

All of the schools mentioned above claim to be exempt from Title IX for religious reasons, and none has ever been subjected to substantive investigations or discipline from the federal government for civil rights violations against LGBTQ+ students. In the REAP lawsuit, plaintiffs argue that the religious exemption to Title IX, to the extent that it allows institutions to discriminate against students on the basis of gender identity and sexual orientation, is a violation of the Equal Protection Clause of the Fourteenth Amendment. However, I am highly skeptical that the Court would issue a holding consistent with this position any time in the foreseeable future. Thus, some practical stop-gap solutions are necessary. First, there needs to be a dramatic reconfiguration of the religious exemption to Title IX. At the very least, the current process of automatically granting religious exemption to any religious educational institution leaves a lot of ambiguity about what protections exist for students and what remedies are available; moreover, it gives implicit permission to such institutions to engage in more and more discriminatory behavior because they were given no conditions on which their exemption would be granted and they have no fear of losing the exemption. Beyond this, the enforcement mechanisms behind Title IX need to be bolstered so that schools operate with a more legitimate fear of negative consequences if they break the law. Currently, the Office for Civil Rights' ("OCR's") only real enforcement mechanism is the threat of cutting off federal funding, but since this has never been done, it is a hollow threat.

There is an infinite number of questions that could be explored in relation to private religious colleges and universities and their religious free exercise rights. In this Note, I seek to limit my focus to just the issue of discrimination against members of the LGBTQ+ community—those who are gender-identity or sexuality minorities. For example, although Title IX governs the way that school administrations respond to sexual assault and sexual harassment allegations made by members of the campus community, this Note does not seek to address this facet of the Act's effects other than to the extent that such actions (or lack of action) constitute sex-based discrimination (for example, failure to respond to sexual assault allegations made by LGBTQ+ students). I am aware of recent high-profile scandals at

certain private religious institutions involving sexual assault and failure to follow proper reporting and investigation procedures laid out by Title IX; although important, addressing these systematic failures would distract from the religious exemption to Title IX and the disparate treatment that LGBTQ+ minority students are subjected to. Furthermore, this Note does not directly address discrimination perpetrated by primary or secondary schools; rather, the focus is placed on post-secondary educational institutions. Despite this narrow focus, the information and analysis provided in this Note will hopefully prove useful to other scholars who seek to apply my argument to a broader array of educational settings.

Scholarly literature has already examined the tax-exempt status question to a certain extent regarding the history and potential application of the *Bob Jones University* case. Some articles, like *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, take the position that the case only came out the way it did because race is treated much differently than other protected categories.[10] This is somewhat contrary to the argument of this Note: the holding in *Bob Jones University* should be extended to protect students against discrimination beyond that which is solely on the basis of race. Other articles criticize the Court's holding in *Bob Jones University* as overly broad and failing to take into consideration the school's viable religious liberty claims. One such article, Bob Jones University v. United States: *A Political Analysis*, highlights what it refers to as the "hazards" of the Supreme Court getting involved in such questions, holding out free exercise of religion as an important principle. Despite this article's fundamental disagreement with my proposal that the holding in *Bob Jones University* be extended, the article contributes a great amount of political analysis of the history of tax-exempt status for religious institutions and the cases that have developed the Court's jurisprudence on the issue.[11] This information allowed me to more fully understand how policy and jurisprudence might most effectively evolve in the future. Some articles, such as *The Sexual Integrity of Religious Schools and Tax Exemption,* touch on the *Obergefell v. Hodges* decision and how the recognition of same-sex couples' fundamental right to marry may impact the civil rights owed to them in educational contexts. The aforementioned article notably takes the position that the Court's decision in *Obergefell* is explicitly inconsistent with "applying *Bob Jones* to the disadvantage of religious schools that maintain sexual conduct policies"—which is at odds with the

10. Olatunde C. A. Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence* 21–22 (Columbia L. Sch. Pub. L. . & Legal Theory Working Paper, Paper No. 10-229, 2010).

11. Neal Devins, *Bob Jones University v. United States: A Political Analysis*, WM. & MARY J. L. & POL. 403, 404 (1984).

central position of this Note.[12] Other articles, such as *Discrimination in the Name of the Lord* and *Discriminatory Religious Schools and Tax-Exempt Status*, offer relevant analysis of the interaction between free exercise by religious universities and the civil rights protections afforded to students; however, their decades-old perspectives require updating in light of relevant legal and political developments.

Scholarly literature has also explored the issue of religious exemption from Title IX. One article, *Should Religious Groups Be Exempt from Civil Rights Laws?*, delves deeply into the issue, examining civil rights protections for race, sex, and sexual orientation.[13] However, there is a gap in this article, written in 2007, which does not account for new developments in the law surrounding the definition of discrimination "on the basis of sex," especially in the context of civil rights laws like Title IX and Title VII. This has important implications for what is thus categorized as discrimination *on the basis of sex*. In the U.S. Supreme Court's October 2019 term, the Court released an opinion in *Bostock v. Clayton County* that held, "[a]n employer who fires an individual merely for being gay or transgender violates Title VII."[14] This opinion relies on a new (to the Supreme Court's jurisprudence) definition of discrimination on the basis of sex. If this definition is applied to Title IX as well, there may be implications for how colleges and universities must act in order to remain in compliance with Title IX.

One work of scholarship stands out in particular for its similarity to this Note's contribution to the debate. In 2022, the Brigham Young University Prelaw Review published an article entitled *The Constitutionality of the Title IX Religious Exemption*. This article responds to the *Hunter v. Department of Education* lawsuit, but its author, Madelyn Jacobsen, makes the opposite argument from mine by arguing that the religious exemption to Title IX is "crucial for maintaining [religious] diversity in higher education" and that restricting or eliminating the religious exemption to Title IX would necessarily constitute a restriction on free exercise of religion.[15] Jacobsen mimics the language often used in legal disputes surrounding free exercise of religious "closely held beliefs." This Note contributes a much-needed alternative perspective on the debate where the Jacobsen article left a clear gap. Another work of scholarship stands out in particular for the similarities that the author brings in personal background that contribute to the article's

12. Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption,* 40 HARV. J.L. & PUB. POL'Y 255, 267, 314–18 (2017).

13. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?,* 48 B.C. L. REV. 781, 783 (2007).

14. Bostock v. Clayton Cnty, 140 S. Ct. 1731, 1737 (2020).

15. Madelyn Jacobsen, *The Constitutionality of the Title IX Religious Exemption*, 36 BYU PRELAW REV. 67, 69 (2022).

perspective. The author of *Loving the Sinner: Evangelical Colleges and Their LGB Students* notes that she attended Wheaton College, a private Christian college that is one of the many targets of the *Hunter v. Department of Education* lawsuit, and reflects on this experience as being "encased in a protective coating of ignorance and denial" about her homosexuality.[16] Because of this background, the author homes in on the personal experiences of LGBTQ+ students at private religious colleges and carefully considers the stakes of all major actors: the religious institution's interest in maintaining the pure religious character of its student body and minority students' interest in expressing themselves fully while still attending the college in question. The author conducts analysis through a framework of "institutional religious freedom," focusing mainly on sexual codes of conduct, voluntary association, and third-party burdens. This Note adopts a similar perspective, due to my similar personal upbringing, but shifts the analytical angle from the religious freedom owed to institutional actors to the civil rights owed to minority students.

I. BACKGROUND

A. GOVERNMENT FUNDING AND TAX-EXEMPT STATUS FOR PRIVATE RELIGIOUS COLLEGES

Public institutions have historically provided the setting for legal challenges to laws that involve education; colleges like the University of Michigan and University of Texas have famously been involved in litigation over segregation and affirmative action because of their receipt of significant funds from state and federal sources. There is a bit more uncertainty surrounding the applicability of such laws to private institutions. Although private religious colleges may not be fully state sponsored like public institutions, almost none of them operate entirely independently from the government. Federal funds are given to private religious colleges through a variety of means, including loans and grants for construction and renovation of campus facilities;[17] noncategorical state "capitation grants"[18]; Medicare reimbursements for campus medical centers; National Institute of Health ("NIH") grants for science departments; and Health Resources and Services Administration grants to medical, dental, or nursing programs.[19] Federal

16. Elizabeth J. Hubertz, *Loving the Sinner: Evangelical Colleges and Their LGB Students,* 35 QUINNIPIAC L. REV. 147, 175 (2017).

17. Tilton v. Richardson*,* 403 U.S. 672, 672 (1971).

18. Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 736 (1976).

19. Office for Civil Rights, *Title IX of the Education Amendments of* 1972, DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/title-ix-education-amendments/index.html [https://perma.cc/LDD6-BJM7].

student loans, tuition tax credits, and federal Pell Grants allow colleges to be able to raise tuition rates without lowering enrollment.[20] Beyond direct grants and loans, private religious colleges also receive a tremendous amount of assistance from the savings received through tax-exempt status.[21] Furthermore, gifts to religious colleges are treated as charitable deductions for income-tax purposes, which incentivizes giving.[22] Thus, the perception that private educational institutions are independent from the public sphere is a myth.

An oft-repeated argument about the private sector (including privately-owned businesses and private colleges and universities) is that it should be subject to fewer government restrictions and regulations because of its independence from the public sector. However, since the vast majority of private religious colleges accept millions of dollars of public funds each year, plaintiffs in the *Hunter* lawsuit argued that there are constitutional restrictions on how those funds may be used. Plaintiffs acknowledge that the receipt of public funds is permissible; "[h]owever, when the government provides public funds to private actors . . . the Constitution restrains the government from allowing such private actors to use those funds to harm disadvantaged people."[23] In light of this, it would be inconsistent to allow institutions that receive public funds or that benefit from tax-exempt status to discriminate against sexual and gender minority students.

This stance represents a logical extension of the U.S. Supreme Court's 1983 opinion in *Bob Jones University v. United States*, in which the Court held that Bob Jones University ("BJU"), a private religious college, did not qualify as a tax-exempt organization under §501(c)(3) of the Internal Revenue Code because of its racially discriminatory policies.[24] In 1980, the IRS had issued a ruling providing that a private school with a racially discriminatory policy does not qualify as "charitable" within the common law concepts reflected in the Internal Revenue Code. The Court held that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[25] BJU continued to enforce its policy of denying admission to applicants who engaged in interracial marriage or applicants who were known to advocate for interracial marriage. In light of

20. Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018, 8:00 AM), https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities [https://perma.cc/7AMF-U6A2].

21. *Id.*

22. *Id.*

23. First Amended Complaint at 3, Hunter v. U.S. Dep't of Educ., No. 6:21-cv-00474-AA (D. Or. June 7, 2021).

24. Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

25. *Id.* at 575, 586.

this discriminatory policy, the IRS revoked BJU's tax-exempt status. The university was asked to pay a portion of federal unemployment taxes for a year, and then filed a refund action in federal District Court; the IRS filed a countersuit claiming millions of dollars in unpaid taxes.[26]

The Court analyzed Internal Revenue Code ("IRC") §501(c)(3)—the portion of the Internal Revenue Code that sets forth regulations that apply to charitable organizations—against the backdrop of the congressional purpose, which was to give preferential treatment to charities in exchange for the benefit that they provide to society, and their relationship with the public interest.[27] The Court invoked the history of charitable tax-exempt status; the status was originally conceived as similar to charitable trusts, which could not "be illegal or violate established public policy."[28] In light of this purpose, the majority held that in order to qualify for tax-exempt status, an institution must "demonstrably serve and be in harmony with the public interest," and that "[t]he institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[29] Indeed, any institution that engaged in racial discrimination was excluded from the category of those that confer a public benefit and could thus be excluded from the charitable category and stripped of the accompanying tax-exempt status. Therefore, the IRS's action stripping BJU of its charitable tax-exempt status was a valid exercise of its congressionally-granted authority.

One portion of the *Bob Jones University* decision that is potentially relevant to the question before us is which level of scrutiny the court should apply. It is worth noting that this analysis should not be interpreted to mean which level of scrutiny should be applied when sex is involved—a question that would involve its own analysis of what is included in the definition of "sex discrimination." Indeed, the Court did not craft its ruling in *Bob Jones University* based on whether race is a suspect classification that triggers the application of strict scrutiny. Rather, the question is how closely the Court should scrutinize government policies that implicate religious freedom. In *Bob Jones University*, the Court applied strict scrutiny to the potential burden that the IRS rule placed on religious freedom for the university. Thus, this means that the relevant balancing test that the Court would have to consider in judicial review of a new IRS rule would be whether there is an overriding interest in protecting the LGBTQ+ community from discrimination that outweighs the religious freedom of private religious universities. In engaging

26. *Id.* at 574.
27. *Id.* at 585–92.
28. *Id.* at 591.
29. *Id.* at 592.

in this examination, the Court should come to the same conclusion as the similar question, from *Bob Jones University*, regarding racial discrimination.[30]

The First Amendment provides a baseline level of protection for religious freedom, providing that the government "shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[31] The Court's jurisprudence regarding the Free Exercise Clause has evolved over time, beginning with a compelling interest test and eventually departing from it in *Employment Division v. Smith*.[32] In *Smith,* the majority delivered a scathing criticism of the compelling interest test, claiming that its application would produce a "constitutional anomaly" and "a private right to ignore generally applicable laws."[33] *Smith* explicitly rejected the compelling interest test's expansion of the First Amendment's protection of religious liberty and asserted that the Free Exercise Clause

> does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.[34]

It may surprise a modern audience to learn that Justice Antonin Scalia wrote the majority opinion in *Smith*, which places limits on religious freedom when it clashes with a compelling governmental interest.[35]

30. It is worth noting that the potential application of the *Bob Jones University* case to discrimination by colleges and universities based on sexual orientation and gender identity has been considered by relevant actors to some extent. In fact, during the oral argument phase of *Obergefell v. Hodges*, Justice Alito invoked *Bob Jones University*, asking if the Court's holding that a college was not entitled to tax-exempt status if it engaged in racial discrimination might be applied to a college's opposition to same-sex marriage. Transcript of Oral Argument at 38, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556). In response, General Verrilli responded that "it's certainly going to be an issue . . . I don't deny that." *Id.*

31. U.S. CONST. amend. I (emphasis added).

32. WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding that if a government burden on religious free exercise is allowed to stand, "it must be either because . . . [it] represents no infringement by the State on [one's] constitutional rights of free exercise, or because any incidental burden on the free exercise of [one's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' ") (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990) (departing from the *Sherbert* balancing test, claiming that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" and weaving a creative interpretation of the Court's Free Exercise Clause jurisprudence to justify the departure).

33. *Smith*, 494 U.S. at 886.

34. *Id.* at 872.

35. *Id.* This surprising result cannot be attributed to a lack of vigor with which Antonin Scalia was willing to defend the rights of religious people in the United States—specifically Christians. Rather, scholars have speculated that the decision was because the case at hand involved Native Americans who

Congress reacted explosively to this inflammatory Supreme Court decision, fearful that it may lead to infringement on the free exercise of the religious beliefs of Christians. Shortly after *Smith* was decided, Congress passed the Religious Freedom Restoration Act ("RFRA"), which expanded the religious freedom protection granted by the First Amendment by legislatively establishing a compelling interest test (a test that had been explicitly rejected by the judicial branch). Under this new law, whenever the government imposes a burden on religious liberty, the courts are required to apply strict scrutiny in their analysis of the government's justification.[36] RFRA prohibits the government from substantially burdening the free exercise of religion, "even if the burden results from a rule of general applicability," unless the government is able to demonstrate that application of the burden (1) furthers a compelling governmental interest; and (2) does so by the least restrictive means.[37] Because of RFRA's new permissive standard, the Court would be required to analyze any potential burden on the free exercise of religion by private religious institutions under strict scrutiny, using a compelling interest test. This law makes it more difficult to hold religious institutions responsible for engaging in discrimination against LGBTQ+ individuals because it provides such strong protections for religious groups against government intervention.

Government funding and tax-exempt status are one important piece of the puzzle when it comes to protecting LGBTQ+ individuals from experiencing discrimination at the hands of their private religious institutions. The other piece is Title IX, a historic legislative act drafted in the Civil Rights era to prevent discrimination in the realm of education, which applies certain standards to all educational institutions that are the recipients of government funding, *including* private religious schools. However, the efficacy of the Act is undermined by the blanket exemptions granted to religious organizations. The process for granting religious exemptions to Title IX should either be vastly reworked, or the exemptions should be done away with entirely. I will analyze these options and consider the legality and practicality of each option.

were practitioners of indigenous religion, which the Court did not view in as sympathetic of a light as it may have viewed practitioners of Christianity. However, due to apprehension that this opinion may be applied to Christians in the *future*, the legislature responded with RFRA.

36. Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343 (2013).

37. Religious Freedom Restoration Act: Free Exercise of Religion Protected, 42 U.S.C. § 2000bb-1.

B. TITLE IX AND THE RELIGIOUS EXEMPTION

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[38] In *Cohen v. Brown University*, the Court recognized Congress's dual objectives in passing Title IX: (1) "to avoid the use of federal resources to support discriminatory practices;" and (2) "to provide individual citizens effective protection against those practices."[39] Specifically, Title IX, also known as the Education Amendments of 1972, was intended to update Title VII of the Civil Rights Act, which had been passed in 1964. Title VII prohibits *employment* discrimination based on race, color, religion, sex, and national origin, but Title IX was intended to expand that prohibition against discrimination to the education system as well.[40] Without Title IX, the only aspect of the education system in which discrimination on the basis of sex would be prohibited is discrimination against *employees* of the school; Title VII left *students* largely unprotected.

Regulations that govern the implementation of Title IX are set forth in the Code of Federal Regulations ("CFR"), and the Office for Civil Rights ("OCR")—a department within the U.S. Department of Education—has the legal authority to enforce Title IX.[41] The OCR performs invaluable work: investigating complaints, ensuring that institutions are complying with necessary regulations, and even providing technical assistance.[42] One of the most important tools that the OCR wields is the right to conduct compliance reviews. This provides a significant incentive for schools to comply with its legal obligations because if it is found to violate Title IX, there can be harsh consequences—at least on paper. First, an institution is given the option to voluntarily remedy the violation. If it refuses to do so, OCR may: (1) initiate a termination of the institution's federal funding, or (2) refer the case to the U.S. Department of Justice to pursue a case in court.[43] However, these threats have proven hollow, as no university has yet had its federal funding revoked—a bold move that would send shockwaves through the higher education community in the United States. Separately from federal agency

38. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

39. Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996) (quoting Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)).

40. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)–2000(e)(17).

41. 34 C.F.R. § 106.

42. Valerie McMurtrie Bonnette, *How Title IX Is Enforced* GOOD SPORTS, INC. (2012), http://titleixspecialists.com/wp-content/uploads/2013/09/How-Title-IX-is-Enforced.pdf [https://perma.cc/3EM6-A7YV].

43. *Id.*

enforcement of Title IX through administrative channels, individuals have the authority to initiate proceedings against allegedly discriminatory institutions. An individual has the right to file a lawsuit in court alleging Title IX violations and to file a complaint with the OCR, but the former is not required to have standing for the latter.[44] Courts may order specific remedies or may award monetary damages to victims of sex discrimination who file lawsuits. Given that the OCR's threat of revocation of federal funding is a largely hollow threat, the "implied private right of action" of Title IX has "given Title IX its teeth" and serves as a crucial enforcement mechanism.[45]

Title VII contains a religious exemption section which restricts the protections afforded by the new piece of legislation. Section 2000e-1 states, "[t]his subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . ."[46] Thus, when Congress recognized that the protections of Title VII were exclusively restricted to the employment sector and set out to expand it to the education sector, Congress inserted a similar section exempting religious organizations from Title IX as well. Despite Title IX's illusion of broad protection against discrimination, § 106.12 goes on to exempt educational institutions that are controlled by religious organizations, declaring that the act "does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization."[47] In the cases of both Title VII and Title IX, the religious exemption sections were crafted as a part of a political compromise with the religious right to pass the legislation.[48]

For most of the history of Title IX, very few institutions sought religious-based exemptions. However, in 2013, there was a sudden increase in the number of official claims of religious exemption. In fact, between 2013–2021, more than 120 religious institutions claimed exemption from Title IX.[49] This development can largely be traced back to evangelical fears

44. *Id.*

45. R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS. (2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/L38R-TEGD].

46. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-1(a).

47. 34 C.F.R. § 106.12(a).

48. Kif Augustine-Adams, *What Is the Religious Exemption to Title IX and What's at Stake in LGBTQ Students' Legal Challenge*, THE CONVERSATION (June 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 [https://perma.cc/5L2W-QR7G].

49. *Id.*

about the Obama administration—anticipation of a crackdown on religious freedom. Though it was not to the extent that the American evangelical community expected, the Obama administration did seek to expand the protections of Title IX. On October 26, 2010, the executive branch issued guidance to schools to include LGBTQ+ individuals under Title IX protections. The letter defined gender-based harassment under Title IX in a new way, labeling it sex discrimination "if students are harassed . . . for failing to conform to stereotypical notions of masculinity and femininity."[50] The letter goes on to explicitly state that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[51]

The Code of Federal Regulations lays out a very basic framework for how exemptions are to be granted. C.F.R. § 106.12, governing Educational Institutions Controlled by Religious Organization, suggests that no formal process must be followed in order to secure a religious exemption to Title IX..."[52] The further relevant procedures provided by the Code do not serve to *confer* exemption on the institutions, but only to *reassure* the institutions that they are eligible for those exemptions. Indeed, even without such advance assurance of religious exemption, if the Department of Education notifies an institution that it is under investigation for non-compliance with Title IX, the institution may choose to raise its exemption at that time. To do so, the institution shall submit a letter to the Department of Education's Assistant Secretary, "identifying the provisions of this part which conflict with a specific tenet of the religious organization"—regardless of whether or not the institution already sought assurance before the fact.[53] An institution may write to the Department of Education's Assistant Secretary to seek assurance of their religious exemption. However, "[a]n institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption."[54] Consistent with this interpretation of the automatic triggering of this exemption, in 1976, President Oaks of Brigham Young University wrote a letter to the Department of Education that he clarified was *notifying* the Department of BYU's exemption from Title IX (rather than *requesting* exemption). President Oaks specifically noted that BYU "did not concede that the Department of Health, Education and Welfare has the power to review our claim of exemption on the ground of religion."[55] Thus, there is a

50. Letter from Russlynn Ali, U.S. Dep't of Educ., to Colleague (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [https://perma.cc/2JY7-93JW].

51. *Id.*

52. 34 C.F.R. § 106.12(a).

53. *Id.* § 106.12(b).

54. 34 C.F.R. § 106.12(b).

55. Letter from Martin H. Gerry, Dir., Off. for C.R., U.S. Dep't of Educ., to Dallin H. Oaks,

long history—stretching back almost as far as the origin of the exemption itself—of the automatic triggering mechanism of the religious exemption to Title IX.

Once exemptions started being requested, the Department of Education started approving requests—seemingly indiscriminately: "In the nearly 50 years since the enactment of Title IX, the Office for Civil Rights has never denied a claim to religious exemption. As a result, religious educational institutions decide for themselves whether and to what degree they are exempt from Title IX."[56] In 2014, the Department of Education—under the Obama administration—issued guidelines making it clear that transgender students are also protected under Title IX. This guidance, paired with the growing contemporary evangelical panic surrounding transgender people, seems to have drastically increased the number of schools seeking exemptions from Title IX. In response to this avalanche of requested (or declared) exemptions, a number of Democratic Senators asked the Department of Education to publish a list, for the first time, of the colleges that specifically request waivers. In the letter, the Senators cited taxpayers' "right to know when institutions of higher education—as recipients of tax dollars—seek and receive exemptions under Title IX."[57] The Department of Education released the requested list, revealing that at the time 248 schools had been granted exemption to Title IX. Under the Trump administration, new regulations reversed the policy of transparency. However, under the Biden administration, the policy was again reversed; today, an official list is once again maintained by the Department of Education's Officer for Civil Rights, along with a copy of the office's response to each request.[58]

Title IX's private enforcement mechanism was put to use on March 9, 2020, when an individual filed a complaint with the OCR, alleging that Brigham Young University ("BYU") discriminates against students on the basis of sex. BYU is a private university with enrollment of almost 35,000 students, and is affiliated with the Church of Jesus Christ of Latter-day Saints.[59] The university is known for its strict honor code, which until recently included a section explicitly titled "Homosexual Behavior" that

President Brigham Young Univ. (Aug. 12, 1976); Elise S. Faust, *Who Decides? The Title IX Religious Exemption and Administrative Authority*, 2017 BYU L. REV. 1197, 1210 (2017).

56. Augustine-Adams, *supra* note 48.

57. Press Release, Senator Ron Wyden, 7 Senators Call for Transparency for LGBT Students at Schools Seeking Religious Exemptions (Dec. 18, 2015), https://www.wyden.senate.gov/news/press-releases/wyden-7-senators-call-for-transparency-for-lgbt-students-at-schools-seeking-religious-exemptions [https://perma.cc/53K8-RDT5].

58. *Other Correspondence*, U.S. DEP'T OF EDUC., OFF. FOR C.R., https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html [https://perma.cc/PL2J-TCEG].

59. *Facts & Figures*, BRIGHAM YOUNG UNIV., https://www.byu.edu/facts-figures [https://perma.cc/XU5J-CWL5].

banned students from "all forms of physical intimacy" with a member of the same sex.[60] That section was removed in early 2020, inspiring a number of members of the campus community to publicly come out as LGBTQ-identifying. However, the elation sparked by this move was short-lived; shortly after, the Church of Jesus Christ of Latter-day Saints clarified that same-sex romantic behavior remains incompatible with official school rules. In a public letter, Church Educational System Commissioner Elder Paul V. Johnson clarified that "[t]he moral standards of the Church did not change with the recent release of the *General Handbook* or the updated Honor Code. . . . Same-sex romantic behavior cannot lead to eternal marriage and is therefore not compatible with the principles included in the Honor Code."[61] This announcement was met with protest, as many students felt like they were experiencing whiplash with regard to the Honor Code—and even felt trapped if they came out while believing themselves to be in a newly-safe environment.[62] It was in the wake of this policy reversal that an unnamed individual filed a complaint with the OCR, alleging that BYU was engaging in discriminatory behavior.

In response to the complaint, the OCR launched a rare investigation into the private religious university. The complaint specifically alleged that BYU "engages in the different treatment of students who are involved in same-sex romantic relationships by stating that such relationships are not compatible with the principles of the University's Honor Code."[63] In a letter dated October 21, 2021, the OCR notified BYU that it was opening an investigation into the individual's complaint. BYU responded on November 19, 2021 by requesting assurance from the U.S. Department of Education that the university is exempt from Title IX and its accompanying implementing regulations.[64] On January 3, 2022, the Department responded by assuring BYU of its exemption from a number of specific regulations under Title IX "to the extent that application of those provisions would conflict with the religious tenets of the University's controlling religious organization"—including regulations involving admission, recruitment,

60. Courtney Tanner, *BYU Students Celebrate as School Removes 'Homosexual Behavior' Section from its Online Honor Code*, SALT LAKE TRIB. (Feb. 19, 2020, 8:08 PM), https://www.sltrib.com/news/education/2020/02/19/byu-appears-remove [https://perma.cc/W5UW-B596].

61. @BYU, X (Mar. 4, 2020, 10:14 AM), https://twitter.com/BYU/status/1235267296970473472/photo/1 [https://perma.cc/8DS8-VWVP].

62. Courtney Tanner, Erin Alberty & Peggy Fletcher Stack, *After BYU Honor Code Change, LDS Church Now Says Same-sex Relationships Are 'Not Compatible' with the Faith's Rules*, SALT LAKE TRIB. (May 27, 2022, 11:36 AM), https://www.sltrib.com/news/education/2020/03/04/after-byu-honor-code [https://perma.cc/99H4-HXRA].

63. Letter from Sandra Roesti, Supervisory Att'y, U.S. Dep't of Educ., Off. for C.R., to Kevin J. Worthen, President, Brigham Young Univ. (Feb. 8, 2022), https://news.byu.edu/0000017e-e090-ddc8-a77f-f8b78c8c0001/final-signed-ocr-decision [https://perma.cc/33MT-PSGM].

64. *Id.*

housing, counseling, financial assistance, athletics, and comparable facilities.[65] Thus, in a letter dated February 8, 2022, the OCR concluded that it lacked jurisdiction to address the individual complainant's allegations. Although it was rare for the OCR to go through the motions of initiating a Title IX investigation into any private religious college for alleged discrimination against LGBTQ+ students, the investigation was ultimately halted prematurely because the religious exemption to Title IX blocked the OCR from exercising jurisdiction over the complaint. If the complaint had been filed against any other educational institution—a public university, or even a private one without a religious affiliation—the OCR would have initiated a fact-finding mission and published the results. This exposes the university to significant liability and serves as a deterrent to the implementation of discriminatory policies that violate Title IX.

Again, the text of the religious exemption to Title IX reads as follows: "[Title IX] does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization."[66] Thus, there are two parts to the religious exemption to Title IX that should be examined separately: (1) Title IX does not apply to an institution "controlled by a religious organization" (with "control" defined very broadly), and (2) institutions are exempt only to the degree that their "religious tenets" conflict with Title IX. Below, I will elaborate on both elements.

1. "Controlled by a Religious Organization"

Title IX does not apply to an educational institution "controlled by a religious organization." There are six different ways that an educational institution may establish that it is controlled by a religious institution: (1) it is a school or department of divinity; (2) it requires faculty, students, or employees to be members of or espouse personal belief in the religion of the controlling organization; (3) it contains an explicit statement that it is controlled be a religious organization in its charter, the members of its governing body are appointed by the controlling organization, and it receives a significant amount of financial support from the controlling organization; (4) it has a doctrinal statement along with a statement that members of the institutional community must engage in the religious practices of or espouse a personal belief in the statement; (5) it has a published institutional mission that is approved by the governing body of the controlling organization and is predicated on religious tenets; or (6) other sufficient evidence as laid out

65. *Id.*

66. 34 C.F.R. § 106.12(a) (explaining exceptions for educational institutions controlled by religious organizations).

in 20 U.S.C. § 1681(a)(3).[67] This inclusive qualifying language is problematic; with "control" defined so broadly, potentially up to 1,000 colleges are encompassed by the words "controlled by a religious organization."

2. Conflict Between "Religious Tenets" and Title IX

There is an age-old debate in American legal jurisprudence about how to determine whether an action—or inaction—is actually motivated by "religious belief." This question is especially difficult in the context of an organization, not just an individual. If construed too broadly, there is a risk that a religious organization might simply do anything or discriminate against anyone on any basis and then fall back on a loose claim that the action was based on religious belief. Therefore, it is important to know where the line is drawn. The A.S. Singleton memo, written by the Assistant Secretary for Civil Rights at the U.S. Department of Education in 1985, instructs that religious exemption claims be consistent with the requirements of the First Amendment and the Religious Freedom Restoration Act.[68] The Office for Civil Rights purports to follow a special procedure to determine whether a provision of Title IX conflicts with religious tenets, requiring that schools submit a statement reflecting either their religious tenets or religious practices.[69] "A school claiming an exemption may refer to scripture, doctrinal statements, catalogs, statements of faith, or other documents."[70]

When administration officials from educational institutions write to the Department of Education to formally request a religious exemption from Title IX, the Civil Rights Office writes—and publicly publishes—a response letter. In each letter, they note that the requested exemptions must be based on actual religious tenets, and if the "governing organization" does not agree that those are actual religious tenets, the exemptions may not be valid.[71] This

67. *Id.*

68. Memorandum from Marry M. Singleton, Assistant Sec'y for C. R., U.S. Dep't of Educ. (Feb. 19, 1985), https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf [https://perma.cc/RV86-2SRB].

69. *Exemptions from Title IX*, U.S. DEP'T OF EDUC., OFF. FOR C.R. (Mar. 8, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html [https://perma.cc/E3DY-29UK].

70. *Id.*

71. Letter from Sandra Roesti, *supra* note 63. This response to BYU's request for an exemption lists several reasons that BYU argued it should be considered to be controlled by the religious tenets of its controlling organization. (1) "BYU is a religious institution of higher education 'founded, supported, and guided by' the Church of Jesus Christ of Latter-day Saints (Church of Jesus Christ)"; (2) "BYU is 'controlled by' the Church of Jesus Christ, whose governing leaders appoint prophets, apostles, general authorities, and offices of the Church of Jesus Christ as members of BYU's Board of Trustees"; (3) "[a]ll BYU students, faculty, administrators, and staff agree to the Church Educational System Honor Code and thereby 'voluntarily commit to conduct their lives in accordance with the principles of the gospel of Jesus Christ' "; (4) "same-sex romantic behavior cannot lead to eternal marriage and is therefore not consistent

creates the impression that religious exemptions to Title IX must be claimed on the basis of legitimate religious beliefs; however, the reality is that the Court is unwilling to scrutinize such organizational claims. Generally, the Court has thus far shied away from articulating a bright line test for what constitutes a religious belief, seemingly out of fear of being under-inclusive and resulting in the legal condemnation of "religiously-motivated" activities that the Court wishes to protect. This hesitation has had an unfortunate impact on the amount of scrutiny applied to explanations for why religious educational institutions seek to be exempt from Title IX.

II. ARGUMENT AND ANALYSIS

In the following section, I will consider two main aspects of the issue of the constitutionality of discrimination by private religious institutions against LGBTQ+ students: the question of the tax-exempt status of those institutions and the question of those institutions' religious exemptions to Title IX.

Race permeated the *Bob Jones University* case so thoroughly that scholars have struggled to extract any universal principles from it that are separate from race.[72] For one thing, the details of the circumstances surrounding the case involve overt racial discrimination: BJU maintained a policy forbidding interracial dating, a regulation that succeeded an outright ban on African-American students enrolling in the university as a seeming-concession to changing cultural attitudes toward racism.[73] The language of

with the principles included in the Honor Code"; and (5) "any obligation that would require [BYU] to 'allow same-sex romantic behavior' or 'contradict doctrine of the Church of Jesus Christ regarding the distinction between men and women, the eternal nature of gender, or God's laws of chastity and marriage' would violate the religious tenets of the Church of Jesus Christ." Letter from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. For C.R., to Kevin J. Worthen, President, Brigham Young Univ. (Jan. 3, 2022), https://news.byu.edu/0000017e-e0cc-d5b2-abfe-eadc2e240001/2022-01-03-letter-from-catherine-lhamon-to-kevin-worthen-re-byu-religious-exemption-pdf [https://perma.cc/9JPG-MDXK]. For these reasons, BYU's requested religious exemption is considered to be based on its closely-held religious tenets. This same format is followed in all other response letters published by the OCR.

72. In 1970, the U.S. Supreme Court ruled that the IRS shall not grant tax-exempt status to organizations that discriminate on the basis of race in *Green v. Kennedy*. At the time, the number of private religious secondary schools was skyrocketing in the wake of the desegregation efforts tied to *Brown v. Board of Education*. Private religious schools—mostly Christian by affiliation—were cropping up as an alternative for white parents who did not want to send their children to newly segregated schools. It was in this environment that increased scrutiny was placed on private religious schools and their charitable status—specifically, whether discriminatory policies precluded such schools from receiving funding or tax exemption from the government. John B. Parker, *Paving a Path Between the Campus and the Chapel: A Revised Section 501(c)(3) Standard for Determining Tax Exemptions*, 69 EMORY L. J. 321, 336 (2019).

73. "The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race. . . . Since May 29, 1975, the University has permitted unmarried

the majority opinion makes it hard to ignore the racial elements that motivated the Court's decision—especially with an eye to the historical effects of the systematic exclusion of African Americans from the educational system in the United States. However, I propose that the Court's holding in this case is consistent with an extension to include other protected groups of people (specifically, members of the LGBTQ+ community). The most effective way to implement such an extension of legal protection is through the Court granting *certiorari* for a new case that presents a ripe opportunity and then issuing a holding that clarifies the extent of the application of *Bob Jones University*. An appropriate case should follow an IRS action, much like the IRS action taken against BJU; absent those circumstances, a lawsuit like the one REAP filed in 2021 is unlikely to be effective. In *Bob Jones University*, the Court held that as an official extension of Congress's authority, "the IRS has the responsibility, in the first instance, to determine whether a particular entity is 'charitable' for purposes of § 170 and § 501(c)(3). This in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of 'charitable' status."[74] It is the duty of the IRS in this instance to recognize the injustice of discriminatory anti-LGBTQ+ policies at educational institutions. The Court noted that these determinations should be made "only where there is no doubt that the organization's activities violate fundamental public policy."[75] Here, this is obviously the case, exemplified by Executive Orders and legislation forbidding discrimination against LGBTQ+ individuals and U.S. Supreme Court decisions like *Obergefell* and *Bostock.*[76]

Even assuming that such protections are put into place, might these institutions be allowed to side-step any attempted regulation by opting out of receiving federal funds entirely and agreeing to pay federal taxes? A small number of private Christian colleges in the United States have attempted to opt out of federal funds entirely. Hillsdale College, a private Christian college in Michigan, refuses to accept any federal funds, remaining

Negroes to enroll; but a disciplinary rule prohibits interracial dating and marriage." Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983).

74. *Id.* at 597–98.

75. *Id.* at 598.

76. In *Bob Jones University*, the petitioner even brought forth a similar argument to that raised in *Obergefell*. In the former case, BJU maintained that it was not racially discriminatory because it "allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage." *Id.* at 605. Essentially, it maintained that the ban on interracial dating and marriage applies equally to those of all races, so therefore it is not racially discriminatory. *Id.* In *Obergefell*, a similar argument was raised—that bans on same-sex marriage did not discriminate against LGBTQ+ individuals because people of all genders were equally banned from marrying someone of the same sex and the ban did not just apply to gay people. Obergefell v. Hodges, 576 U.S. 644 (2015).

independent on principle.[77] Would Hillsdale College or another similar institution thus be allowed to discriminate against their LGBTQ+ students? One of the main arguments of this Note has been that acceptance of federal funding and tax-exempt status creates a legal responsibility for educational institutions to abide by generally-applicable laws, including civil rights laws. But is the inverse true? Does independence from taxpayer dollars immunize an institution from punishment for refusing to follow federal rules? This question forces us to turn to the second major issue of this Note: Title IX.

The complaint filed by REAP in *Hunter v. Department of Education* suggests that religious exemptions to Title IX are blanketly unconstitutional. However, this stance is unlikely to be adopted in the current political climate, in which religious freedom is highly prized and anti-LGBTQ+ discrimination is not at the forefront of most Americans' minds. I predict that the Court will be unwilling to find that religious exemptions to Title IX are blanketly unconstitutional and the next step is to challenge the legality of the process by which such exemptions are granted. Automatic exemptions should be presumptively suspect. A better process would be for colleges to be required to request exemptions and have them formally approved. This would place the right to consider the reasoning behind the exemption requests and their validity in the hands of the executive branch—the Department of Justice. Though it is important to consider the applicability of Title IX to institutions that opt out of the public sphere, we must keep in mind the likelihood of many colleges adopting this approach. Even though a small handful of institutions have been able to stay afloat without federal funds—albeit for a short period of time—federal funds still constitute the lifeblood of most educational institutions in the United States. I find it unlikely that this "independence" movement will catch on past the small ranks that it claims today.

As I briefly mentioned above, before any legal action may be taken to protect the vulnerable LGBTQ+ population at educational institutions that are abusing the tax-exempt status they enjoy as charitable organizations, the source that holds the authority to take action must be identified. The Court considered this question in *Bob Jones University*. Given that Congress is the source of IRS authority, it has the discretion to modify IRS rulings. However, in the "first instance," the IRS is responsible for construing the IRC, which courts then exercise review over. "Since Congress cannot be expected to

77. "As a matter of principle, Hillsdale doesn't accept any federal or state subsidy to fund its operations, not even indirectly in the form of federal student aid. . . . Our independence allows us to maintain the integrity of our classical liberal arts curriculum, and to remain true to our founding mission." *Scholarships & Financial Aid,* HILLSDALE COLL., https://www.hillsdale.edu/admissions-aid/financial-aid [https://perma.cc/LV43-VK9G].

anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will."[78] This proper order of operations is demonstrated in the successful alteration of rules that govern tax-exempt status in the *Bob Jones University* case. It was the IRS that first acted, modifying the IRC to exclude organizations that discriminate on the basis of race from the definition of "charitable." This is why I argue that it would be most practical and effective for legal action to start with the IRS and proceed from there with an inevitable challenge before the judicial branch.

The current iteration of the U.S. Supreme Court, the Roberts Court, has skewed dramatically toward religious organizations and the free exercise of religious beliefs. According to a 2022 *New York Times* article, the Roberts Court "has ruled in favor of religious organizations in orally argued cases 83 percent of the time"—which is far more than any other recent Court.[79] This trend is especially pronounced when the religious organization in question is Christian, as there is a substantial Christian majority currently sitting on the Court, both Catholic and Protestant. Beyond the Court's favoring of religion, the U.S. Congress is also very reluctant to take any steps to limit religious freedom or take away power from religious organizations (like powerful private religious educational institutions). Thus, even if the Court were willing to uphold a law seeking to hold private religious educational institutions accountable for discrimination, such a law would likely not even make it through both chambers of Congress in the first place. With regard to religious exemptions to Title IX, the same political forces are likely relevant here, creating another practical roadblock. One potential way that this roadblock may be overcome is a change in the social and political climate in the United States. This was crucial to how the *Bob Jones University* case ended up with the outcome that it did—the Court was motivated by the confidence that a majority of the American public despised racial discrimination and would support eradicating it from the educational system to whatever extent possible. Though BJU maintained its racially discriminatory policies, it was very much in the minority among its peer institutions. The legality of anti-miscegenation laws was put to the test in 1967, when the Court struck down a Virginia state law that banned interracial marriage.[80] BJU maintained policies forbidding interracial marriage almost two decades later. The public opinion had reached a tipping point such that religious freedom was not accepted as an excuse for overt racial

78. *Bob Jones Univ.*, 461 U.S. at 597.

79. Ian Prasad Philbrick, *A Pro-Religion Court*, N.Y. TIMES (June 22, 2022), https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html [https://perma.cc/GN3M-5G2G].

80. Loving v. Virginia, 388 U.S. 1 (1967).

discrimination and a ban on interracial marriage was much less widely accepted by that time. However, I believe that today, the United States has yet to reach this tipping point regarding religious freedom and LGBTQ+ discrimination.

This unwillingness to protect vulnerable LGBTQ+ individuals from religiously-motivated discrimination is exemplified by some of the Court's decisions over the past five years. In 2017, the U.S. Supreme Court heard a case called *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, in which the owner of a cake shop refused to make a wedding cake for a same-sex couple. The Court invalidated a ruling by the Colorado Civil Rights Commission that the cake shop had violated the civil rights of the same-sex couple; here, the Court clearly stood on the side of religious liberty and free exercise over the protection of civil rights.[81] In 2021, the Court heard a case called *Kennedy v. Bremerton School District,* holding that a public school football coach was not prevented by the First Amendment from praying on the field with his players in what the court called "a personal religious observance."[82] Here, the Court continued to plow forward in carving out new rights to the free exercise of religious belief, which it had previously not recognized. In 2022, the Court heard *303 Creative v. Elenis*, in which an individual Christian business owner challenged a Colorado law that banned businesses from discriminating against LGBTQ+ customers. During oral arguments, Justice Alito drew a distinction between discrimination on the basis of race and on the basis of sexual orientation, which would be consistent with a position that seeks to distinguish the *Bob Jones University* precedent from the *Hunter v. Department of Education* case.[83] These recent cases are among a series of examples of the Court demonstrating a strong preference for religion over other concerns—civil rights laws, anti-discrimination laws, etc.[84]

One of the reasons that I advocate for either the revocation of tax-exempt status from private religious institutions that discriminate against

81. Mark Satta, *Masterpiece Cakeshop: A Hostile Interpretation of the Colorado Civil Rights Commission*, HARV. C.R.—C.L. L. REV. 1 (Apr. 12, 2019), https://journals.law.harvard.edu/crcl/masterpiece-cakeshop-a-hostile-interpretation-of-the-colorado-civil-rights-commission [https://perma.cc/HDP7-SD3N].

82. Kennedy v. Bremerton Sch. Dist., 597 U.S. 1, 31 (2022).

83. Amy Howe, *Conservative Justices Seem Poised to Side with Web Designer Who Opposes Same-Sex Marriage*, SCOTUS BLOG (Dec. 5, 2022, 7:18 PM), https://www.scotusblog.com/2022/12/conservative-justices-seem-poised-to-side-with-web-designer-who-opposes-same-sex-marriage [https://perma.cc/6CH7-BGNC]. The Court decided this case in June 2023, siding with the religious web designer and continuing its jurisprudential campaign toward expanding religious freedom at the expense of civil rights.

84. Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court,* N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html [https://perma.cc/LQ2L-T2LC].

LGBTQ+ students or the enforcement of Title IX (over claimed "religious exemptions" by those institutions) is that tax-exempt status and government funding should be considered a privilege, not an automatic and irrevocable guarantee. Clearly, charitable tax-exempt status was originally intended to protect the money collected by charities from being reduced through government taxation, thereby increasing the amount of good that a not-for-profit organization may do with it. However, in the modern era, tax-exempt 501(c)(3) status organizations have grown to incredible sizes, with private religious institutions reporting endowments topping $1 billion.[85] These institutions are able to avoid enormous tax bills through the privilege of tax-exempt status, which is now practically automatic—especially when you combine the status as an educational institution with the almost-untouchable status as a religious institution. Free exercise absolutists in the United States have begun to argue that religious organizations should be completely free from any scrutiny by the government, lest the government be considered to be interfering in religious affairs that it ought not be involving itself in. However, there is a difference between restricting free exercise (through banning a practice or criminally punishing those who engage in a practice) and simply withholding a privilege from those who have proven themselves unworthy of receiving American citizens' hard-earned tax dollars. The Court made this clear in its holding in the *Bob Jones University* case, in which a religious institution was stripped of the privilege of tax-exempt status because of its refusal to obey universally applicable civil rights anti-discrimination laws. The Court did not force BJU to integrate or to change its policies on interracial marriage, actions which would be more constitutionally suspect as infringing on the university's religious freedom. Indeed, the Court did not approve the use of a "stick" as a punishment; rather the Court approved the use of a "carrot" as an incentive. The solution advocated for in this Note is of the same fundamental nature, and thus should pass constitutional muster for the same reasons. Any view that would characterize the Court's holding as infringing on BJU's freedom to exercise its religious beliefs is unnecessarily absolutist in nature and sets a far different trajectory for First Amendment jurisprudence than I believe was intended or is practical. The First Amendment to the Constitution is deservedly revered for its guarantee that the free exercise of religion may be protected from government interference, harassment, or persecution;

85. In 2018, Liberty University's endowment was reportedly $1.5 billion, and it is affiliated with the Southern Baptist Convention. At the same time, Brigham Young University's endowment was reportedly $1.98 billion, and it is affiliated with the Church of Jesus Christ of Latter-day Saints. University of Notre Dame's endowment was reportedly $11.1 billion, and it is affiliated with the Roman Catholic Church. Digest of Education Statistics, *Endowment Funds of the 120 Degree-Granting Postsecondary Institutions with the Largest Endowments, by Rank Order: Fiscal Year 2018*, NAT'L. CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d19/tables/dt19_333.90.asp [https://perma.cc/6HAG-J5GJ].

however, it should be correctly interpreted as conferring a negative right (the right to be free from persecution) rather than a positive right (the right to guaranteed access to tax dollars and exemption from taxation).

I have mentioned more than once the practical difficulties of enforcing Title IX over claimed religious exemptions, even of conducting any investigation at all into allegations of misconduct. There are also practical difficulties involved in the revocation of the tax-exempt status of private religious universities that are often wealthy, powerful, and politically well-connected.[86] Thus, I will briefly address a few solutions beyond what I have proposed as the ideal. For one thing, the recent decision in *Bostock* may have implications on how sex discrimination is interpreted by both the executive and judicial branches. If the executive branch adopts a definition of sex discrimination that is consistent with the Court's definition in *Bostock*—especially if this is paired with public opinion that tilts the scales in favor of civil rights protections for LGBTQ+ people over absolute unchecked rights for religious organizations—this may pave the way for expanded protections. In March 2021, the Civil Rights Division of the U.S. Department of Justice issued a memo explaining the application of the decision in *Bostock v. Clayton County* to Title IX.[87] The memo references an executive order issued by the Biden administration—Executive Order 13988—that pairs well with the holding in *Bostock*, holding that "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."[88] The memo indicates that the Civil Rights Division has determined that "the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."[89] On its face, this seems to be a significant civil rights victory for the LGBTQ+ community, ensuring that Title IX includes robust protections for individuals in that community. However, one blatant roadblock stands in the way from this having made much of a measurable impact yet: the religious exemption to Title IX. This is a

86. According to a 2015 letter from IRS Commissioner John Koskinen, it is currently the official position of the IRS that *Obergefell* does not extend civil rights protections implied by *Bob Jones University* to the LGBTQ+ community. The letter states, "[t]he IRS does not view *Obergefell* as having changed the law applicable to section 501(c)(3) determinations or examinations. Therefore, the IRS will not, because of this decision, change existing standards in reviewing applications for recognition of exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations." Letter from John A. Koskinen, Dep't. of the Treasury, Internal Revenue Serv., to E. Scott Pruitt, Okla. Att'y Gen. (July 30, 2015), http://mediad.publicbroadcasting.net/p/kgou/files/201508/irs_response_letter_obergefell.pdf [https://perma.cc/6BHF-R57Z].

87. Memorandum from Principal Deputy Assistant Att'y Gen. Pamela S. Karlan, U.S. Dep't of Just., C.R. Div., to Fed. Agency C.R. Dirs. and Gen. Couns., (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download [https://perma.cc/S9FQ-X6X7].

88. Exec. Order No.13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

89. Memorandum from Principal Deputy Assistant Att'y Gen. Pamela S. Karlan, *supra* note 87.

welcome policy interpretation overall—protecting students at a great number of colleges throughout the United States that are not religiously affiliated; however, given that the religious exemption is so robust and the process so lacking in oversight, even the aforementioned change in how Title IX is interpreted does not protect minority students at private religious institutions, where students are most likely to encounter discriminatory treatment.

Another potential respite for LGBTQ+ students at private religious institutions may be the Equality Act, which "prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities [and] education."[90] It does so by expanding the definition of "public accommodations," authorizing the Department of Justice to intervene in equal protection matters in federal court that relate to sexual orientation or gender identity, and amending the Civil Rights Act to include "sex, sexual orientation, and gender identity" in the prohibited categories of discrimination.[91] Notably, the Act explicitly states that it trumps the Religious Freedom Restoration Act ("RFRA"), meaning that an individual or institution sued for discrimination under the Equality Act would be unable to rely on RFRA as a defense. As the bill currently stands, it may provide a cause of action for students; the Religious Education Accountability Project endorses it, stating that it "ensures strong protections for LGBTQ students attending religious colleges—ensuring that no institution is permitted to claim religious exemptions in order to discriminate against its LGBTQ students while still receiving taxpayer money."[92] The measure passed in the House of Representatives in February 2021, but has yet to be taken up in the Senate. It faces strong opposition from absolutist proponents of religious liberty, who have even proposed language be inserted into the Act that would explicitly carve out another religious exemption for religious colleges and universities.

Another possibility is private enforcement by large associations or organizations that these private religious institutions are members of and rely on. For example, the National Collegiate Athletic Association ("NCAA") wields extensive power among colleges that want to participate in competitive athletics—as do the individual conferences that the schools belong to. The Pac-10, a major athletic conference that includes several universities on the west coast, has overlooked Brigham Young University, a

90. Equality Act, H.R. 5, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/5 [https://perma.cc/K35F-95BJ].

91. *Id.*

92. *How Does REAP's Work Relate to the Equality Act?*, RELIGIOUS EXEMPTION ACCOUNTABILITY PROJECT (June 7, 2021), https://www.thereap.org/post/how-does-this-relate-to-the-equality-act [https://perma.cc/92NS-38DF].

private university affiliated with the Church of Jesus Christ of Latter-day Saints, in a number of league expansions over the past few decades. Reportedly, this is because BYU is seen as "not a good cultural fit" for the conference.[93] Effective in 2023, BYU will be admitted to the Big 12 conference, a move that attracted harsh criticism from groups like Athlete Ally, which released a statement saying that "acceptance to an athletic conference is an honor and privilege, and . . . there should be standards of equality and inclusion that schools must meet to be included."[94] Pressure from the NCAA or athletic conferences to adopt non-discriminatory policies may be an attractive option, given that there would be much less possibility of a religious freedom claim when the action is taken by a private association rather than the government. The First Amendment provides protection from government intervention, not absolute protection for religious groups against *any* hardship.

Finally, I would like to consider the likelihood of success for the aforementioned potential avenues of protection for LGBTQ+ students at private religious institutions. It has been a somewhat encouraging development that the Department of Justice has demonstrated a recent willingness to initiate investigations into claims of civil rights violations against LGBTQ+ students. As I mentioned above, in 2021, the DOJ announced a somewhat unprecedented investigation into BYU. However, this enforcement mechanism may not have any teeth after all because the investigation was subsequently dropped when BYU asserted its religious exemption based on relevant religious tenets consistent with its affiliation with the Church of Jesus Christ of Latter-day Saints.[95] It would surely be notable if the DOJ thoroughly investigated colleges for allegedly "over-extending" their exemptions, actually engaging in sufficient fact-finding and being willing to flex their enforcement muscles. It would be quite a development if these investigations were able to turn up anything substantial—and even more so if the Biden administration's justice department categorically revoked the exemptions.

93. Eddie Dzurilla, *Brigham Young University Not Wanted in Pac-10 Due to Discrimination*, BLEACHER REP. (May 28, 2010), https://bleacherreport.com/articles/398103-byu-is-not-wanted-in-the-pac-10-due-to-discrimination [https://perma.cc/NWZ6-9CH6].

94. *Athlete Ally Responds to BYU Inclusion in Big 12*, ATHLETE ALLY (Oct. 1, 2021), https://www.athleteally.org/byu-inclusion-in-big-12 [https://perma.cc/4T9K-TKVX].

95. *U.S. Department of Education Dismisses Title IX Complaint Against BYU*, BYU (Feb. 10, 2022), https://news.byu.edu/us-doe-dismisses-complaint [https://perma.cc/5BB6-D2M6].

CONCLUSION

In this Note, I have considered the practicality and effectiveness of the argument that it is constitutionally impermissible to grant tax-exempt status and distribute any government funding to private educational institutions that engage in discrimination against LGBTQ+ students. I have concluded that the approach taken by the plaintiffs in *Hunter v. Department of Education* is unlikely to be successful. It is important to remain practical: a bright line rule consistent with this position would likely be impossible to implement, especially in the current political environment. The *Hunter v. Department of Education* lawsuit is still in the early stages of litigation; though it represents the best opportunity thus far presented in federal court, it is not a guaranteed win. Recently, a very unwelcome development spells trouble for the plaintiffs and the LGBTQ+ students they represent: the court ordered that the Department of Justice, over its objections and assurances that it would be able to effectively defend the suit itself, will be joined by intervening parties in the defense of the religious exemption to Title IX. Three Christian universities—Western Baptist University, William Jessup University, and Phoenix Seminary—along with the Council for Christian Colleges & Universities ("CCCU") sought to intervene in the lawsuit. In the filing, CCCU adopts sweeping and broad language that the DOJ may be unlikely to adopt itself—that "the Title IX exemption is constitutionally *required*."[96] On October 8, 2021, the court issued an order allowing this intervention and therefore opening up the suit to the much more hard-lined and sweeping rhetoric of the intervenors. There is some chance of victory—albeit small—for the plaintiffs at the lower court level. However, the chances of victory would wane even more if the case were to be elevated to the Supreme Court; I do not see a path to victory for the plaintiffs in front of the current conservative-supermajority Court.

It is noteworthy that the first time the scope of the religious exemption to Title IX was adjudicated, the court ruled against the civil rights of LGBTQ+ students—in favor of the free exercise rights of religious institutions. In *Maxon v. Fuller Theological Seminary,* plaintiffs brought a Title IX case against Fuller Theological Seminary because they were expelled for violating "school policies against same-sex marriage and extramarital sexual activity."[97] In November 2019, a motion to dismiss was granted in federal district court, as the court held that the religious exemption to Title IX was valid and applied in the case. Although this is a discouraging

96. Proposed Defendant-Intervenor CCCU's Motion to Intervene and Memorandum in Support at 27, Hunter v. U.S. Dep't of Educ., No. 6:21-cv-00474-AA (D. Or. filed May 12, 2021).

97. Order Re: Motion to Dismiss at 1, Maxon v. Fuller Theological Seminary, No. 2:19-cv-09969-CBM- MRW (C.D. Cal. 2021).

step, this was only a district court, and the Supreme Court has yet to issue a final authoritative word on the issue.