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Appeals Court Rejects Challenge to Provision Exempting Religious Schools from Title IX

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The U.S. Court of Appeals for the Ninth Circuit.

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Title IX of the Education Amendments of 1972, a federal law, provides that educational institutions that get federal money may not discriminate in their educational programs "on the basis of sex." Congress included in Title IX a provision that exempts religious

educational institutions from complying with the law if complying would violate their religious tenets. The Biden Administration interprets Title IX to also ban discrimination because of sexual orientation or gender identity, relying on the Supreme Court's definition of employment discrimination "because of sex" under Title VII of the Civil Rights Act of 1964 in the Bostock case in 2020. Some religious educational institutions have cited the exemption provision, however, when refusing to recognize LGBTQ student groups, to take action against bullying or harassment of LGBTQ students or faculty, to refuse to recognize same-sex spouses, or otherwise to prevent or redress LGBTQ-related discrimination.

After Title IX was enacted in 1972, the U.S. Department of Education (DOE) adopted regulations specifying that any educational institution receiving federal money that wanted to invoke the religious exemption needed to file a notice with DOE's Office of Civil Rights (OCR) explaining the basis by specifying the religious tenets upon which they are relying. Few schools did so, as most religious schools traditionally did not get federal money and, prior to the Bostock ruling, it was not clear that Title IX would cover LGBTQ-related discrimination claims. However, in recent years the Supreme Court has loosened the traditional Establishment Clause interpretation to allow more government money to flow into religious educational institutions, inevitably generating some discrimination claims.

After the Bostock decision, however, the Trump Administration, which took the position that the Bostock decision did not apply under Title IX, issued revised rules essentially waiving the requirement that educational institutions submit a written statement justifying a claim for an exemption, and after Bostock, OCR started to get even more

LGBTQ discrimination claims, which the Biden Administration got serious about investigating, reviving controversy about the religious exemption.

The Religious Exemption Accountability Project (REAP) was formed to challenge the constitutionality of the religious exemption and to pressure the government to publicly list institutions that were claiming the exemption, so that the public would know which schools had a policy of not complying with Title IX. REAP filed a federal lawsuit seeking a declaration that the exemption provision and the regulations are unconstitutional. Senior U.S. District Judge Ann L. Aiken of the U.S. District Court in Oregon ruled in 2023 in Hunter v. Department of Education that the exemption and regulations do not violate the constitution.

On Aug. 30, a unanimous three-judge panel of the San Francisco-based Ninth Circuit Court of Appeals upheld Judge Aiken's ruling. The three Circuit Judges on the panel are Milan D. Smith, a George W. Bush appointee, Mark J. Bennett, a Donald J. Trump appointee, and Anthony D. Johnstone, a Joe Biden appointee.

This result is not surprising. There is a long-standing practice of Congress writing religious exemption language into federal statutes whose applications might clash with the tenets of religious organizations that would otherwise be subject to the federal law. For example, Congress wrote an exemption in the National Labor Relations Act exempting religious institutions from recognizing or dealing with labor unions for their employees, and an exemption written into Title VII of the Civil Rights Act provides that religious institutions may require employees to be members of the institution's faith. The Supreme Court has taken the Title VII exemption one step further by ruling that under the First Amendment the federal government may not interfere with personnel decisions involving "ministerial employees," broadly defined as people who are hired to advance and implement the religious mission of the employer. The idea of a "ministerial exemption" has long historical roots, tracing back to a 19th century decision ruling that a church could import a minister from England despite clear language in federal immigration laws against importing labor to perform jobs that could be done by Americans. In addition, of course, there is the long tradition of exempting religious institutions from paying federal and state taxes, and making private donations to religious institutions a basis for reducing the donor's taxable income.

In light of these well-established practices, which had not been held by the courts to violate the Establishment Clause of the First Amendment and which had been seen as advancing the government's obligation not to impair the free exercise of religion, it was not difficult for Judge Aiken and the the Ninth Circuit panel to reject the constitutional challenge.

This outcome could be especially predictable in light of the Supreme Court's recent decision in Kennedy v. Bremerton School District (2022), which substantially weakened the Establishment Clause by formally jettisoning the court's half-century precedent, Lemon v. Kurtzman (1971). Under the "Lemon test," laws intended to favor religion, advance religion, or appear to endorse religion were considered constitutionally suspect, but a series of decisions in recent years had already severely weakened Lemon, and the

Court in the Kennedy case explicitly overruled it. Today, in a contest between the Establishment Clause and the Free Exercise Clause, Free Exercise wins just about every time with the current Supreme Court majority.

Of course, private parties suing educational institutions on LGBTQ discrimination claims under Title IX can continue to file such lawsuits, but the Ninth Circuit decision, expressly rejecting REAP's constitutional claim, will most likely be followed by other courts. It is possible that REAP will seek further review from the full Ninth Circuit bench or from the Supreme Court, but the Supreme Court's recent record in Establishment Clause cases does not give much ground for optimism.