

**THE REVIVAL OF A TWENTY-YEAR CIRCUIT SPLIT  
FEATURING A MEDICAL RESIDENCY PROGRAM TWIST: AN  
ANALYSIS OF *DOE V. MERCY CATHOLIC MEDICAL CENTER* &  
THE APPLICABILITY OF TITLE IX REMEDIES**

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TABLE OF CONTENTS

I. INTRODUCTION .....	458
A. <i>The History and Purpose of Title VII</i> .....	461
B. <i>The History and Purpose of Title XI</i> .....	465
C. <i>What Started the Circuit Split: The Creation of a Private Right of         Action Under Title IX and Subsequent Case Law</i> .....	470
II. ANALYSIS .....	475
A. <i>Doe v. Mercy Catholic Medical Center’s Egregious Facts</i> .....	475
B. <i>District Court’s Analysis</i> .....	479
C. <i>Appeal to the Third Circuit and Subsequent Decision</i> .....	482
1. Title IX’s Applicability to Mercy’s Residency Program .	483
2. The Viability of Doe’s Title IX Causes of Action.....	488
3. The Fate of Doe’s State-law Claims .....	490
III. EVALUATION .....	490
A. <i>Is Title IX Preempted by Title IV and, thus, Not Applicable in Mercy         Catholic Medical Center?</i> .....	490
1. Case Law Reveals Title IX is Not Preempted by Title VII.....	495
2. Title IX’s Language and Statutory Construction Demonstrates It Is Not Preempted by Title VII .....	497
B. <i>How to Define “Education” in Title IX, Section 1681(a)</i> .....	500
C. <i>What Does “Federal Financial Assistance Mean?”</i> .....	503
IV. CONCLUSION .....	505

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## I. INTRODUCTION

“It” occurs all the time—everywhere and every day.<sup>1</sup> Sexual harassment, a present-day monstrosity involving skin-crawling and stomach-turning details and sequences of events, has evolved into a pervasive,<sup>2</sup> yet normalized form of sex discrimination.<sup>3</sup> From the current President,<sup>4</sup> to Hollywood executives, to workplace co-workers and bosses, vulgar behavior constituting sexual harassment has been directed

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1. David Fagin, *Sexual Harassment Is Everywhere, Every Day*, HUFFINGTON POST (Oct. 11, 2017, 2:11 AM), [https://www.huffingtonpost.com/entry/sexual-harassment-is-everywhere-every-day\\_us\\_59dda085e4b0df59e2613d32](https://www.huffingtonpost.com/entry/sexual-harassment-is-everywhere-every-day_us_59dda085e4b0df59e2613d32).

2. As a means to demonstrate the pervasive nature of sexual harassment, particularly in the workplace, a report published by the U.S. Equal Employment Opportunity Commission in 2016 stated that “anywhere from 25% to 85% of women report[ed] having experienced sexual harassment in the workplace.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF SEXUAL HARASSMENT IN THE WORKPLACE 8 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf); see also Melissa Chan, *Nearly Half of the Women Working in America Have Been Harassed on the Job*, TIME (Oct. 30, 2017), <http://time.com/5002182/sexual-harassment-work-me-too/> (reporting that in response to a poll released by NBC News and the Wall Street Journal following the sexual harassment accusations against Harvey Weinstein “[f]orty-eight percent of women who are currently employed in the U.S. [reported] they have experienced either sexual, verbal, or physical harassment in the workplace.”).

3. Sexual harassment has become a normalized behavior because it has been largely chalked up to being just another “part of [one’s] job.” Fagin, *supra* note 1. Victims of sexual harassment, which are overwhelmingly women, are faced with the grim reality that if they come forward with sexual harassment allegations against a co-worker, boss, or employer, the harassers won’t be punished, but rather the victims will be the ones “who will pay the price.” *Id.* Accordingly, a study in 2003 demonstrated that “two-thirds of employees who spoke out against workplace harassment faced some form of subsequent retaliation, either professional or social.” *Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Written Testimony of Lilia M. Cortina*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 15, 2015), [https://www.eeoc.gov/eeoc/task\\_force/harassment/testimony\\_cortina.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm) (citing to Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003)).

4. A month prior to the contentious 2016 Presidential election, a recording from 2005 between President Trump and then *Access Hollywood* host Billy Bush was obtained and published by *The Washington Post*. *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>. In the tape, President Trump is heard using vulgar and derogatory language against women including the now notorious “Grab ’em by the pussy” line. *Id.* Following a seemingly short-lived wave of opposition, Trump’s comments seemed to not be a divisive factor, especially among women, as he was ultimately elected by forty-two percent of women, and fifty-three percent of white women. See Tara Golshan, *The Women Who Helped Donald Trump Win*, VOX, <https://www.vox.com/policy-and-politics/2017/1/20/14061660/women-march-washington-vote-trump> (last updated Jan. 21, 2017, 11:46 AM).

overwhelmingly towards women, but also at men.<sup>5</sup> For the better part of history, sexual harassment has been casually swept under the rug because of our society’s complicit nature and desire to “cocoon[] the perpetrator and incubate[] the degradation and violation of women.”<sup>6</sup> But, the complacent approach adopted by many Americans was dealt a devastating blow by what has become known as #MeToo, a revolutionizing movement that started on social media.

In the wake of sexual harassment and abuse allegations lodged against Harvey Weinstein—a once well-respected Hollywood film producer—in early October 2017, the #MeToo movement was born.<sup>7</sup> A single tweet, asking women to tweet “Me Too” if they had ever been the victims of sexual harassment or assault, was the tweet heard around the world.<sup>8</sup> Within days, as over 1.7 million women and men came together and shared their support and stories via tweets, Facebook statuses, and Instagram posts, the culture of silence surrounding sexual harassment began to shatter.<sup>9</sup>

While the 2017 #MeToo movement was instrumental in exposing incidents of sexual harassment and exposing numerous predators, in the years leading up to this social awakening, countless sexual harassment victims frequently suffered in silence unless they had mustered up the courage to confront their accused harassers.<sup>10</sup> To confront their accused harassers, victims are able to pursue legal recourse against their

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5. See Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm\\_term=.c069b3e0f696](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm_term=.c069b3e0f696).

6. Lisa Kim, *In Case You Missed It, We’re Complicit: Sexual Harassment in the Workplace*, FUTURES WITHOUT VIOLENCE (Oct. 16, 2017), <https://www.futureswithoutviolence.org/complicit-sexual-harassment-workplace/>.

7. See Heather Wilhelm, *The Sexes After Weinstein*, NAT’L REV. (Dec. 28, 2017, 9:00 AM), <https://www.nationalreview.com/2017/12/harvey-weinstein-sexual-harassment-metoo-movement-gender-relations-female-empowerment/>. While the #MeToo movement achieved fame in 2017, the current hashtag was borrowed from the #MeToo Campaign created over a decade ago, in 2006, by activist Tarana Bruke. Alanna Vagianos, *The ‘Me Too’ Campaign was Created by a Black Woman 10 Years Ago*, HUFFINGTON POST (Oct. 17, 2017, 01:44 PM), [https://www.huffingtonpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago\\_us\\_59e61a7fe4b02a215b336fee](https://www.huffingtonpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago_us_59e61a7fe4b02a215b336fee) (reporting that originally, the #MeToo campaign was created “as a grass-roots movement to reach sexual assault survivors in underprivileged communities.”).

8. Schmidt, *supra* note 5 (reporting that the now famous tweet, tweeted by Alyssa Milano, said, “If all the women who have been sexually harassed or assaulted wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem.”).

9. Chan, *supra* note 2.

10. See Schmidt, *supra* note 5.

employer by filing state-law claims, filing a Title VII claim with a state agency or the EEOC, or filing a Title IX suit in federal court.<sup>11</sup>

Now imagine experiencing the following scenario: You are a medical resident at a federally funded hospital who, since the start of your residency program, has been subjected to repeated incidents of sexual harassment from your residency program's director; your complaints outlining the harassing behavior have fallen on deaf ears; you have been blamed for causing the harassing behavior; and you are ultimately terminated from the program and are unable to become a board certified physician after years of working towards this ultimate goal.<sup>12</sup> Unfortunately, this nightmare was a reality for the plaintiff in *Doe v. Mercy Catholic Medical Center*, who, following several years of sexual harassment, filed a Title IX suit against her former medical residency program.<sup>13</sup> But this case is not as black-and-white as it may seem. Not only did this case present a question of first impression for the Third Circuit—whether medical residency programs qualify as “education program[s] or activit[ies]” under Title IX—but it also prompted the revival of a twenty-year circuit split on whether Title VII preempts Title IX claims.<sup>14</sup>

This Note will explore Title IX and determine the viability of its application to cases of sexual harassment and sex-based discrimination in federally funded medical residency programs. Part I offers a succinct summation of the purposes of Title VII and Title IX, as well as an analysis of the judiciary's role in creating extensive litigation rights under Title IX. Part II provides a comprehensive overview of *Mercy Catholic Medical Center*, starting with the case's egregious facts and the district court's handling of the case, and concluding with the Third Circuit's unprecedented holding. Part III critically evaluates both the Title VII-Title IX preemption issue and Title IX's statutory construction and language, as well as expresses why the Third Circuit correctly reasoned that (1) Title VII does not preempt Title IX and that (2) Title IX's coverage over education programs reaches federally funded medical residency programs. Part IV concludes by examining the effects of the Third Circuit's unprecedented opinion, and ultimately argues for the resolution

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11. *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/charge.cfm> (last visited Feb. 20, 2019); *Taking Legal Action Under Title IX: Filing a Title IX Lawsuit*, KNOW YOUR IX, <https://www.knowyourix.org/legal-action/taking-legal-action-title-ix/> (last visited Mar. 3, 2018). For Title VII's statutory language, see *infra* Part I Section A. For Title IX's statutory language, see *infra* Part I Section B.

12. *See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 550–52 (3d Cir. 2017).

13. *Id.* at 552.

14. 20 U.S.C. § 1681(a) (2012). *See Mercy Catholic Med. Ctr.*, 850 F.3d at 552.

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 461

of this circuit split as a means of affording all victims, throughout the country, the ability to pursue Title IX suits.

A. *The History and Purpose of Title VII*

Nearly a century after the tumultuous end of the Reconstruction Era,<sup>15</sup> Congress undertook the challenge of passing the Civil Rights Act of 1964, which is appropriately described as the “most sweeping civil rights legislation” since Reconstruction.<sup>16</sup> Within this expansive piece of civil rights legislation is Title VII.<sup>17</sup> Despite often portrayed as having a “torrid conception, [a] turbulent gestation, and [a] frenzied birth,”<sup>18</sup> Title VII’s enactment was significant as it provides vital and expansive statutory protections for women in the workplace.<sup>19</sup> More specifically, Title VII makes it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex.”<sup>20</sup>

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15. *Reconstruction*, HISTORY, <http://www.history.com/topics/american-civil-war/reconstruction> (last visited Feb. 2, 2018). The Reconstruction era—one of the most progressive eras in the United States, especially for African Americans—only lasted for roughly twelve years from 1865 until 1877. *See id.*

16. *Johnson Signs Civil Rights Act*, HISTORY, <http://www.history.com/this-day-in-history/johnson-signs-civil-rights-act> (last visited Feb. 20, 2019).

17. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Feb. 20, 2019).

18. *Miller v. Int’l Paper Co.*, 408 F.2d 283, 286 n.13 (5th Cir. 1969). Fitting with the above-mentioned descriptions for Title VII’s passage, the Civil Rights Act of 1964, unsurprisingly, sparked the “longest continuous debate in Senate history.” *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm> (last visited Feb. 20, 2019). Furthermore, the only reason “sex” was added as a category to Title VII, at the last minute, was to attempt “to defeat the passage of the law.” MARGARET A. CROUCH, THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED 38 (2001). However, that plan backfired and instead resulted in women being provided with more expansive protections in employment. *Id.*

19. *See Know Your Rights: Title VII of the Civil Rights Act of 1964*, AAUW, <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/title-vii/> (last visited Feb. 20, 2019).

20. 42 U.S.C. § 2000e-2 (2012) (emphasis added). The full text of this section of Title VII states:

It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

When enacting the Civil Rights Act of 1964, Congress intended Title VII to act as a “remedy for discriminatory working conditions” that plagued the workplace.<sup>21</sup> Hence, Congress’s ultimate objective for passing Title VII was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white[, male] employees over other employees.”<sup>22</sup> While Congress recognized that sex had widely been used by employers to discriminate against employees and applicants, Title VII created an expansive definition of sex discrimination, as harassment—including sexual harassment—is covered under this form of discrimination.<sup>23</sup> For instance, not only is it prohibited to treat an employee or applicant “unfavorably because of [his or her] sex,” but it also “unlawful to harass a[n]” employee or applicant “because of [his or her] sex.”<sup>24</sup> Harassment that is prohibited under Title VII takes the shape of both sexual harassment, which includes “unwelcome sexual advances [and] requests for sexual favors,” as well as harassment that is not sexual in nature but involves making “offensive remarks about a person’s sex.”<sup>25</sup> Furthermore, to be actionable under Title VII, harassment must cause “an adverse employment decision” or it must create a hostile work environment by being so severe and frequent.<sup>26</sup>

To accomplish Title VII’s objective and end unlawful sex-based discrimination practices in the workplace, Title VII provided for the creation of the Equal Employment Opportunity Commission (“EEOC”).<sup>27</sup>

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*Id.* While Title VII is evidently applicable to other attributes possessed by an individual, this Note will only focus on the use of an individual’s sex to discriminate in employment. Additionally, though sexual orientation and gender identity are encompassed in sex discrimination, this Note will not focus on these forms of discrimination. *See What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Feb. 20, 2019).

21. CROUCH, *supra* note 18, at 38.

22. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

23. *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Feb. 28, 2018).

24. *Id.*

25. *Id.* An example of harassment that is not sexual in nature, but is still barred under Title VII, is when a co-worker or superior “harass[es] a woman by making offensive comments about women in general.” *Id.*

26. *Id.* (“[A]n adverse employment decision [includes] . . . the victim being fired or demoted.”).

27. *See* 42 U.S.C. § 2000e-4(a) (2012). The EEOC is comprised of five bipartisan commissioners who are “appointed to five-year terms by the President and confirmed by the Senate” and only three commissioners can “be from the same political party.” *The Law*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION,

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 463

The EEOC operates under strict time restrictions and specific administrative requirements, which are often viewed as hurdles because they make the interpretation and operation of Title VII unduly cumbersome.<sup>28</sup> Principally, the largest obstacle endured by victims under Title VII is that they must exhaust all of Title VII's administrative requirements before they are even eligible to receive a "Notice of Right [t]o Sue from [the] EEOC," which is needed to file a federal suit.<sup>29</sup> What is of importance, however, is that the administrative requirements that must be completed by a filing party vary depending on whether a Title VII claim is being brought in a state that has its own local "agency [that] enforces fair employment laws."<sup>30</sup>

Beginning with states that do not have a state or local enforcement agency, Title VII provides that a victim must file a charge directly with the EEOC "within [180] days after the alleged unlawful employment practice occurred."<sup>31</sup> After the charge is filed, the EEOC has 120 days to investigate the claim to determine if "there is reasonable cause to believe" that a violation occurred and/or continues to exist.<sup>32</sup> If the EEOC determines that "reasonable cause" exists, then the EEOC has 180 days to try to "eliminate the violation" by using "informal methods of conference, conciliation, and persuasion."<sup>33</sup> Following this 180-day period, if the EEOC has been unsuccessful in resolving the charge or has determined not to pursue a lawsuit on behalf of the filing party, then the filing party is permitted to request and receive a Notice of Right to Sue from the EEOC.<sup>34</sup> With such a notice in hand, the filing party has ninety days to bring a federal Title VII suit "against the [accused] respondent."<sup>35</sup>

In the event that a victim seeking to file a Title VII charge is in a state that has its own "agency [that] enforces fair employment laws,"<sup>36</sup> the victim must initially file his or her charge with the local agency using

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<https://www.eeoc.gov/eeoc/history/35th/thelaw/index.html> (last visited Feb. 20, 2019) (citing to Equal Employment Opportunity Act, 42 U.S.C. § 2000e-4(a) (2012)).

28. See § 2000e-5(e)(1); Douglas P. Ruth, *Title VII & Title IX = ? : Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J.L. & PUB. POL'Y 185, 188 (1996).

29. Ruth, *supra* note 28, at 188; *After You Have Filed a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/afterfiling.cfm> (last visited Feb. 20, 2019).

30. Ruth, *supra* note 28, at 188.

31. § 2000e-5(e)(1).

32. *Id.* § 2000e-5(b).

33. *Id.*; see also Ruth, *supra* note 28, at 188 (citing 42 U.S.C. § 2000e-5(f)(1) (2012)).

34. See § 2000e-5(f)(1). While a filing party must *generally* give the EEOC "180 days to resolve [his or her] charge," in some instances, the EEOC "may agree to issue a Notice of Right [t]o Sue before the 180 days." *After You Have Filed a Charge*, *supra* note 29.

35. § 2000e-5(f)(1).

36. Ruth, *supra* note 28, at 188.

the “time limits set by local law.”<sup>37</sup> After filing a timely claim with the local agency, that agency investigates and attempts to resolve the claim in sixty days.<sup>38</sup> If the local agency terminates the victim’s claim due to its inability to resolve it, the victim is allowed to file his or her claim with the EEOC “within [300] days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the . . . local agency has terminated the proceedings . . . whichever is earlier.”<sup>39</sup> When the victim files the charge with the EEOC, the claim becomes bound by the same process described in the previous paragraph.<sup>40</sup>

Title VII’s administrative requirements can force a filing party to have to wait upwards of one-year to file a Title VII lawsuit.<sup>41</sup> However, once in federal court, a filing party is entitled to a host of remedies including the court ordering affirmative actions like the “restatement or hiring of employees,” injunctions, back pay, or other appropriate equitable remedies.<sup>42</sup> In addition, victims may be entitled to compensatory and punitive damages, but these forms of relief are subject to limits based on the employer’s size.<sup>43</sup>

Title VII evidently contains numerous administrative requirements that may hinder or be seen as hurdles for many victims seeking relief from sex-based discrimination in their workplace. After reading the next portion of this Note, which describes Title IX in depth, it should become apparent that Title IX affords many victims working in academic institutions, who can also be covered under Title VII, with a more favorable route to litigation and legal remedy than what they would be forced to receive under Title VII.

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37. *Id.* at 189.

38. *Id.* (citing 42 U.S.C. § 2000e-5(e) (1988 & Supp. V 1993)).

39. § 2000e-5(e)(1).

40. Ruth, *supra* note 28, at 188–89.

41. *See* § 2000e-5(f)(1). Unlike Title VII, Title IX allows victims to file a federal lawsuit nearly instantaneously so long as it is filed within the statute of limitations period for that particular state. *See infra* note 142.

42. § 2000e-5(g)(1).

43. *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, (last visited Feb. 28, 2018) <https://www.eeoc.gov/employees/remedies.cfm>. The limits on punitive and compensatory damages are: “[f]or employers with 15-100 employees, the limit is \$50,000”; “[f]or employers with 101-200 employees, the limit is \$100,000”; “[f]or employers with 201-500 employees, the limit is \$200,000”; “[and f]or employers with more than 500 employees, the limit is \$300,000.” *Id.*



*B. The History and Purpose of Title IX*

Eight years after the passage of Title VII, Title IX was enacted by Congress as a part of the Education Act Amendments of 1972.<sup>44</sup> Created as the legislative response that would end “the continuation of corrosive and unjustified discrimination against women [in the educational system],”<sup>45</sup> Title IX is credited for doing for gender what Title VI—its companion statute<sup>46</sup>—did for race.<sup>47</sup> For the purposes of this Note, section 1681(a) of Title IX is most relevant as it states: “[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.”<sup>48</sup>

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44. CROUCH, *supra* note 18, at 70; Ruth, *supra* note 28, at 190.

45. 118 CONG. REC. 5803 (1972). The key provisions that ultimately became known as Title IX were presented “during debate on the Education Amendments of 1972” by Birch Bayh, a Senator hailing from Indiana. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 524 (1982). Though eventually successful in 1972, Senator Bayh and his colleagues in the House of Representatives had worked tirelessly to pass a statute like Title IX, with the protections it afforded, since 1970. *See id.* at 523–24 n.13. In the late 1960s, women’s rights groups began filing lawsuits against academic institutes because “of an industry-wide pattern of sex bias against women who worked in colleges and universities.” *Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations*, JUSTIA [hereinafter *Synopsis of Purpose of Title IX*], <https://www.justia.com/education/docs/title-ix-legal-manual/synopsis-of-purpose-of-title-ix.html> (last visited Feb. 26, 2018). These suits prompted the creation of a “special House Subcommittee on Education” in 1970, which held hearings and gathered testimony about “discrimination against women in employment” and education. *N. Haven*, 456 U.S. at 523 n.13. In 1970, the special Subcommittee failed to have its proposal—aimed at curbing gender discrimination—emerge from committee. *Id.* In 1971, an amendment to the Education Amendments of 1971 to “prohibit[] recipients of federal education funds from discriminating against women” was proposed by Senator Bayh in the Senate, but it failed to “c[o]me to a vote on” the Senate floor. *Id.* at 523 n.13. Thus, while the road to Title IX was long, it ultimately proved to be worthwhile in 1972.

46. The U.S. Supreme Court has recognized Title IX as being “patterned after Title VI.” *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979). First, both statutes possess almost “identical language to describe the benefited class[es],” as Title IX used “sex” to “replace the words ‘race, color, or national origin’ in Title VI.” *Id.* at 694–95. Second, both statutes terminate “federal financial support for institutions engaged in prohibited discrimination” using an identical administrative mechanism. *Id.* at 695–96. Last, neither Title VI nor Title IX contains an expressed “private remedy for . . . person[s] excluded from participation in a federally funded program.” *Id.* at 696.

47. Sabrina Bosse, *Is the Price of Victory Just?: Attorney’s Fees, Punitive Damages, and the Future of Title IX in Mercer v. Duke University*, 13 VILL. SPORTS & ENT. L.J. 319, 327–28 (2006).

48. 20 U.S.C. § 1681(a) (2012) (emphasis added).

While most statutes are heavily debated prior to their enactment,<sup>49</sup> Title IX was surprisingly passed without a significant amount of debate by either Chamber of Congress.<sup>50</sup> However, despite the minimal amount of debate on Title IX, the statute's following two purposes are readily identifiable: (1) "Congress wanted to avoid the use of federal resources to support discriminatory practices;" (2) "[Congress] wanted to provide individual citizens effective protection against those practices."<sup>51</sup> To support Title IX's first purpose, "federal financial assistance" is terminated, according to the procedure outlined in Title IX, if an academic institution is found to employ discriminatory sex-based practices.<sup>52</sup>

Interestingly, agencies possess the power to rescind federal financial support from academic institutions violating Title IX because Title IX was passed under the Spending Clause.<sup>53</sup> Because it was enacted under Congress's spending power, Title IX "is 'in the nature of a contract: in return for federal funds, the [institutions] agree to comply with federally imposed conditions.'"<sup>54</sup> While Title IX is directly enforced by the Department of Education's Office for Civil Rights,<sup>55</sup> twenty-one other federal agencies are vested with the power to "restrict funding from [academic] programs engaging in sex discrimination."<sup>56</sup>

To enforce Title IX in an effective and proper manner, it is imperative to understand what kind of acts Title IX is meant to protect individuals,

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49. See *Landmark Legislation*, *supra* note 18, for an example of a statute being debated on for months by Congress (noting that Title VII was debated by the Senate "for sixty days, including seven Saturdays.").

50. *Synopsis of Purpose of Title IX*, *supra* note 45.

51. *Cannon*, 441 U.S. at 704.

52. 20 U.S.C. § 1681(a), § 1682 (2012); *Cannon*, 441 U.S. at 704.

53. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 552-553 (3d Cir. 2017). The Spending Clause states: "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

54. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181-82 (2005) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (noting further that if an institution is uninformed about the "conditions imposed . . . on its receipt of [federal] funds," then the institution has not knowingly accepted the contract's terms)).

55. *Mercy Catholic Med. Ctr.*, 850 F.3d at 553 (noting that currently, Title IX is the only statute that grants agencies the power to restrict funding from academic "programs engaging in sex discrimination"); CROUCH, *supra* note 18, at 70.

56. *Mercy Catholic Med. Ctr.*, 850 F.3d at 553. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 65 Fed. Reg. 52,861 (Aug. 30, 2000), <https://www.federalregister.gov/documents/2000/08/30/00-20916/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>, for a list of the twenty-one agencies empowered with the ability to enforce Title IX.

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 467

including “[b]oth students and employees of educational institutions,”<sup>57</sup> against. This is where case law has played an instrumental role in shaping Title IX into the expansive and protective statute it is today. While it is clear, from Title IX’s wording, that it was created to address and outlaw “all sex discrimination in education,” there is one question that must be answered before moving forward: *what is actually meant by the term “discrimination”*?<sup>58</sup>

Though “discrimination,” in this context, is typically thought to only bar unfavorable treatment against an individual because of his or her sex,<sup>59</sup> Congress, the Department of Education, and the judiciary, including the U.S. Supreme Court, have found the term “discrimination” to be relatively all-encompassing.<sup>60</sup> For instance, in 1980, the Second Circuit, in *Alexander v. Yale University*, was the first court to rule that “sexual harassment constitute[d] sex discrimination under Title IX.”<sup>61</sup> Furthermore, in *Jackson v. Birmingham Board of Education*, the Supreme Court held that “[d]iscrimination . . . covers a wide range of *intentional* unequal treatment.”<sup>62</sup> Accordingly, sex discrimination

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57. CROUCH, *supra* note 18, at 70.

58. *Id.* Rather broadly, discrimination is defined as “differential treatment of similarly situated groups.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring).

59. *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Feb. 20, 2019). Please note that while I do, at times, use the EEOC’s Guidelines to define terms like “discrimination” in Title IX, this is permitted because of the holding in *Moire v. Temple University School of Medicine*. See *infra* note 66 and accompanying text.

60. See *Sexual Harassment & Title IX*, NCAA, <https://www.ncaa.org/sites/default/files/S%2BHarassment%2BBrochure.pdf> (last visited Oct. 9, 2018).

61. CROUCH, *supra* note 18, at 70.

62. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (emphasis added) (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (holding that because Congress used such a broad term, giving Title IX broad reach, courts “must accord Title IX a sweep as broad as its language” when defining what kinds of claims are covered under the term discrimination)).

includes quid pro quo harassment,<sup>63</sup> retaliation,<sup>64</sup> and hostile environment claims.<sup>65</sup> As a result of the broad nature of the term “discrimination,” the judiciary has also concluded that the EEOC’s guidelines for sex-based discrimination “seem equally applicable to Title IX” and, thus, can be used to define discrimination.<sup>66</sup>

While the case law surrounding Title IX demonstrates that the statute “broadly prohibits sex-based ‘discrimination’ regardless of the form that the discrimination takes,”<sup>67</sup> the judiciary has not always interpreted Title IX so broadly or favorably. In *Grove City College v. Bell*, the U.S. Supreme Court essentially stripped Title IX of all its power and breadth as it declared that Title IX does “not cover entire educational institutions,” and instead “only [covers] those programs directly receiving

63. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 563, 565 (3d Cir. 2017). Quid pro quo harassment occurs when “tangible adverse action results from an underling’s refusal to submit to a higher-up’s sexual demands,” which is inherently “intentional unequal treatment based on sex.” *Id.* at 565 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998)). Furthermore, the U.S. Department of Education defined quid pro quo harassment as occurring when “[a] school employee [or a superior] explicitly or implicitly conditions a student’s [or subordinate’s] participation in an education program or activity or bases an educational decision on the student’s [or subordinate’s] submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.” *Sexual Harassment Guidance 1997: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT OF EDUC. [hereinafter *Sexual Harassment Guidance 1997*], <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited Feb. 8, 2018).

64. Retaliation, such as termination or otherwise discriminatory acts, occurs “against a person because that person has complained of sex discrimination.” *Jackson*, 544 U.S. at 173. See generally Colleen E. Coveney, *How Teachers and Coaches Can Defend Against Sexual Harassment*, KATZ, MARSHALL & BANKS, LLP (June 14, 2016), <http://www.kmblegal.com/whistleblower-employment-law-blog/how-teachers-coaches-can-defend-against-sexual-harassment>.

65. A hostile environment is created when:  
Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee [or superior] . . . or by a third party that is sufficiently severe, persistent, or pervasive to limit a student’s [or subordinate’s] ability to participate in or benefit from an educational program or activity.  
*Sexual Harassment Guidance 1997*, *supra* note 63. Even over two decades later, the definition used by academic institutions to define hostile environment has largely remained the same. *Definitions*, OFF. OF U. COMPLIANCE & INTEGRITY, <http://titleix.osu.edu/sidebar-resources/what-is-title-ix/definitions.html> (last visited Feb. 20, 2019). The only variation in the definition is the following addition: “hostile environment . . . includes any situation in which there is harassing conduct that limits, *interferes with, or denies* educational benefits or opportunities, from both a subjective (the complainant’s) and an objective (reasonable person’s) viewpoint.” *Id.* (emphasis added).

66. *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1366 n.2 (E.D. Pa. 1985).

67. Jennifer Frost, *Title IX of the 1972 Education Amendments*, 6 GEO. J. GENDER & L. 561, 571 (2005).

federal funds.”<sup>68</sup> Thus, the Supreme Court in *Grove City* permitted educational institutions or programs to engage in sex discrimination so long as the specific program did not receive federal funding.<sup>69</sup> Fortunately, in 1988, *Grove City* was effectively nullified when Congress overrode President Reagan’s veto to enact the Civil Rights Restoration Act of 1988.<sup>70</sup> The Civil Rights Restoration Act of 1988 prohibited an entire educational institution from engaging in sex discrimination “if *any part* of the institution received federal funding.”<sup>71</sup> As a result, the Civil Rights Restoration Act of 1988 evidently returned to Title IX the power it needs to address and stifle the growth of sex discrimination incidents in educational institutions.

In the event that an educational institution or its affiliated actors do violate Title IX, Title IX provides various desirable forms of relief for victims of intentional sex discrimination who demonstrate that the discrimination they endured “depriv[ed] [them] of ‘educational’ benefits.”<sup>72</sup> Not only are victims entitled to the administrative remedy afforded under Title IX—to strip the institution engaging in or supporting sex discrimination of its federal funding<sup>73</sup>—but the U.S. Supreme Court has also held that victims are entitled to “individual relief” because it is “necessary to . . . the orderly enforcement of the statute.”<sup>74</sup> Subsequently, an available form of “individual relief” in private Title IX suits for intentional violations is monetary damages, which includes compensatory damages and is not strictly limited to back pay or other forms of monetary relief that are equitable in nature.<sup>75</sup> Because of the remedies available to victims of intentional sex discrimination in Title IX suits and the nearly unencumbered ability of victims to file such lawsuits, many victims, when able to, choose to pursue Title IX claims rather than Title VII claims.

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68. *Grove City Coll. v. Bell*, 465 U.S. 555, 572–75 (1984); *Gender Equality in Athletics and Sports*, FEMINIST MAJORITY FOUND., <http://www.feminist.org/sports/titleIX.html> (last visited Feb. 20, 2019).

69. *Gender Equality in Athletics and Sports*, *supra* note 68.

70. *Id.*

71. *Id.* (emphasis added).

72. *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (2d Cir. 1980) (“[Title IX] recognizes that loss of educational benefits is a significant injury, redressable by law.”).

73. *Title IX Legal Manual: Private Right of Action and Individual Relief Through Agency Action*, JUSTIA, <https://www.justia.com/education/docs/title-ix-legal-manual/private-right-of-action.html> (last visited Feb. 28, 2018) [hereinafter *Private Right of Action and Individual Relief Through Agency Action*].

74. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 705–06 (1979).

75. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72–76 (1992); *Gender Equality in Athletics and Sports*, *supra* note 68. See *infra* Part I Section C for a discussion on the why the U.S. Supreme Court deemed monetary damages a permissible form of relief for intentional violations of Title IX.

Title IX has been shaped into the statute it is today as a result of the actions taken by Congress and the judiciary. Acknowledging the history and development of Title IX is fundamental to ultimately understanding the dynamic of Title IX and how it can be applied in conjunction with, or instead of, Title VII without being preempted.

*C. What Started the Circuit Split: The Creation of a Private Right of Action Under Title IX & Subsequent Case Law*

Over the course of twenty-six years, four Title IX cases—*Cannon v. University of Chicago*, *North Haven Board of Education v. Bell*, *Franklin v. Gwinnett County Public Schools*, and *Jackson v. Birmingham Board of Education*—compelled the U.S. Supreme Court to interpret Title IX's scope and applicability.<sup>76</sup> In 1979, seven years after the enactment of Title IX, the first claim brought under this piece of legislation found its way before the U.S. Supreme Court and, subsequently, laid the groundwork for creating a divisive circuit split concerning when Title IX remedies can be used instead of, or in addition to, Title VII remedies.<sup>77</sup>

In *Cannon v. University of Chicago*, the U.S. Supreme Court was tasked with resolving a question of first impression concerning the legal recourse available to plaintiffs—the alleged victims of Title IX violations—under Title IX.<sup>78</sup> There, the plaintiff, a female medical school applicant, brought a Title IX suit against the University of Chicago and Northwestern University's medical schools claiming she had been rejected admission into the medical schools' programs—programs "receiving federal financial assistance at the time of her exclusion"—due to her sex.<sup>79</sup> Despite accepting her factual allegations as true, the Supreme Court was asked to determine whether the plaintiff possessed the legal ability to pursue a private suit since Title IX "does not . . . expressly authorize a private right of action."<sup>80</sup> Specifically, the Supreme Court noted that even though she was alleging "a federal statute ha[d] been violated and s[he had been] harmed [this] does not automatically give rise to a private cause of action in favor of that [harmed] person."<sup>81</sup> Therefore, the Supreme Court was tasked with analyzing the four *Cort* factors to determine whether Congress intended

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76. See *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 561 (3d Cir. 2017).

77. *Id.*

78. See *Cannon*, 441 U.S. at 681–89.

79. *Id.* at 680.

80. *Id.* at 680, 683 (emphasis added).

81. *Id.* at 688.

the plaintiff here, and future plaintiffs like her, to possess a statutory right to bring “a private [Title IX] cause of action.”<sup>82</sup>

After conducting the four-factor *Cort* analysis, the Supreme Court ultimately concluded that Title IX “infer[s] a private cause of action”<sup>83</sup> for victims of prohibited forms of sexual discrimination.<sup>84</sup> As a result of its analysis, the Supreme Court found that because of the striking similarities between Title VI and Title IX,<sup>85</sup> “[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI . . . .”<sup>86</sup> Hence, the Supreme Court decided to construe Title IX as providing a private cause of action since “Title VI had already been construed as creating [such a right].”<sup>87</sup> Moreover, to allege a Title IX claim, the Supreme Court concluded that a plaintiff must demonstrate the following two elements: (1) that he or she was discriminated against “because of [his or] her sex”; and (2) that the “education program w[as] receiving federal financial assistance at the time of [the plaintiff being discriminated against].”<sup>88</sup>

Following the inference of a “private cause of action” in *Cannon*,<sup>89</sup> the next challenge to Title IX undertaken by the U.S. Supreme Court occurred three years later in *North Haven Board of Education v. Bell*.<sup>90</sup>

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82. *Id.* at 688–89. In *Cort v. Ash*, the U.S. Supreme Court developed a four-part test—commonly referred to as the four *Cort* factors—to ascertain “whether a private remedy is implicit in a statute not expressly providing one.” 422 U.S. 66, 78 (1975). The first *Cort* factor is: “is the plaintiff ‘one of the class for whose especial benefit the statute was enacted[?]’” *Id.* (quoting *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)). The second factor is: “is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?” *Id.* The next factor is: “is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?” *Id.* The final factor is: “is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?” *Id.*

83. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 561 (3d Cir. 2017).

84. *Cannon*, 441 U.S. at 709.

85. See *supra* note 46 and accompanying text for a discussion detailing how Title VI and Title IX are companion statutes.

86. *Cannon*, 441 U.S. at 696, 703 (“We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”).

87. *Id.* at 696. Furthermore, the U.S. Supreme Court determined that because Congress created Title IX with Title VI in mind, section 718—a provision contained within the Education Amendments of 1972 that “allow[ed] attorney’s fees under Title IV”—was “certainly envision[ed to provide] private enforcement suits” as a remedy for Title IX violation in addition to the administrative procedures already expressly offered as remedies under Title IX. *Id.* at 706 n.41.

88. *Id.* at 680.

89. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 561 (3d Cir. 2017).

90. *Id.*

The *North Haven* case was initiated by the public school boards of two Connecticut municipalities after the Department of Health, Education, and Welfare began investigating the districts for Title IX violations alleged by employees from the respective districts.<sup>91</sup> The school boards challenged the Department of Health, Education, and Welfare's power to investigate the claims by arguing that "employment practices of educational institutions" were beyond the reach of Title IX.<sup>92</sup>

To resolve the issue presented in *North Haven* and determine the nature of Title IX's scope, the U.S. Supreme Court was compelled to analyze the language of Title IX and its legislative history.<sup>93</sup> Moreover, the Supreme Court decided that affording Title IX "a sweep as broad as its language" was needed to best determine the scope of the Act.<sup>94</sup> Because Congress could have but didn't use "student or beneficiary" in place of "person" in Title IX, the Supreme Court refused to limit the scope of Title IX and instead decided to broaden its applicability to employees of "federally funded education program[s]" as well as "employees . . . who directly benefit from federal grants, loans, or contracts."<sup>95</sup> By determining that qualified employees were protected by Title IX, the Supreme Court blatantly "rejected the argument that Title IX shouldn't extend to private employment because employees have 'remedies other than those available under Title IX,' like Title VII."<sup>96</sup> Thus, the Supreme Court concluded it was necessary to interpret Title IX as protecting and covering both students, as well as employees, that "work[] in a federally funded education program."<sup>97</sup>

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91. 456 U.S. 512, 517 (1982). Please note, *North Haven* was a consolidated case. *Id.* at 519. In the *North Haven* case, a tenured teacher filed a Title IX complaint with the Department of Health, Education, and Wellness, after the North Haven school district "refus[ed] to rehire her after a one-year maternity leave." *Id.* at 517. In the *Trumbull* case, "a former guidance counselor in the Trumbull school district" claimed she was the victim of Title IX violations because she had been "discriminated against . . . on the basis of [her] gender with respect to job assignments, working conditions, and the failure to renew her contract." *Id.* at 518.

92. *Id.* at 517.

93. *Id.* at 520, 522–29.

94. *Id.* at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

95. *Id.* at 520–21.

96. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 561 (3d Cir. 2017) (quoting *N. Haven Bd. of Educ.*, 465 U.S. at 535 n.26) ("[E]ven if alternative remedies are available and their existence is relevant, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." (first citing *Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236–239 (1976); then citing *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975); and then citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47–49 (1974))).

97. *N. Haven*, 456 U.S. at 521.



The next case to expand Title IX's scope was the 1992 case of *Franklin v. Gwinnett County Public Schools*.<sup>98</sup> In *Franklin*, the plaintiff, a former North Gwinnett high school student, pursued a Title IX claim against the school district after she had experienced continual sexual harassment from Andrew Hill, a teacher and coach, and the school had refused to take any action to stop the harassment.<sup>99</sup> In this case, the Supreme Court was tasked with “decid[ing] what remedies are available in a suit brought pursuant to [the] implied [private] right [of action].”<sup>100</sup>

Since the nineteenth century, the U.S. Supreme Court acknowledged that the general rule has been that the federal courts, absent any conflict with Congress's intention, possess the ability “to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”<sup>101</sup> Typically, to determine if Congress meant to overrule the general rule, it is necessary for the court to “evaluate the state of the law when the Legislature passed [it].”<sup>102</sup> Since Congress failed to “alter the traditional presumption in favor of [or awarding] any appropriate relief” in the two amendments to Title IX<sup>103</sup> it passed, the Supreme Court found that Congress had made no effort to “limit[] the remedies available to a complainant . . . under Title IX.”<sup>104</sup> After holding that plaintiffs in Title IX suits are entitled to monetary damages as a remedy,<sup>105</sup> the Supreme Court, towards the end of its opinion in *Franklin*, took the case one step further and broadened Title IX's scope by concluding that “sexual harassment is [a form of] intentional discrimination” encompassed by Title IX's private right of action.<sup>106</sup>

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98. See 503 U.S. 60, 65 (1992).

99. *Id.* at 63–64. As part of her claim, Franklin alleged that Hill had “engaged her in sexually oriented conversations” and asked about her sexual experiences and preferences, “forcibly kissed her on the mouth in the school parking lot,” and that on three separate occasions Hill had removed her from class and coerced her into having sexual intercourse with him in a private office. *Id.* at 63.

100. *Id.* at 65. The issue that the Supreme Court faced in this case was “‘analytically distinct’ from the issue of whether such a[n implied] right exists in the first place.” *Id.* (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979)).

101. *Id.* at 71.

102. *Id.* at 71 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982)).

103. *Id.* at 73. Congress passed two Acts after Title IX: The Rehabilitation Act Amendments of 1986 and the Civil Rights Restoration Act of 1987. *Id.*

104. *Id.*

105. *Id.* at 75. When determining which damages remedy is best, the Supreme Court determined that the proper inquiry is first “whether monetary damages” would serve as “an adequate remedy, and, if not, whether equitable relief would be [more] appropriate.” *Id.* at 76.

106. *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 174 (2005) (quoting *Franklin*, 503 U.S. at 74–75).

Over a decade after its ruling in *Franklin*, in 2005, the U.S. Supreme Court was tasked with deciding its final case concerning the scope of Title IX in *Jackson v. Birmingham Board of Education*.<sup>107</sup> In *Jackson*, the Supreme Court was asked to determine whether an employee's claims of retaliation—which typically arise after an employee voices complaints about sex discrimination—are allowed to proceed under “Title IX’s private right of action.”<sup>108</sup> While recognizing that retaliation is not expressly mentioned in Title IX, the Supreme Court did find that Title IX “broadly prohibits a funding recipient from subjecting any person to ‘discrimination’ ‘on the basis of sex.’”<sup>109</sup> This finding subsequently led the Supreme Court to rule that retaliation claims can be used as the basis for a Title IX suit since they “constitute[] intentional ‘discrimination’ ‘on the basis of sex’” because the victims of retaliation are “subjected to differential treatment.”<sup>110</sup> Therefore, the opinion by the *Jackson* Court once more reveals the Supreme Court’s willingness to expand Title IX’s breadth.

As demonstrated by the above outlined progression of Title IX’s case law, it is evident that the U.S. Supreme Court has played an active role in broadening Title IX’s scope and applicability. Moreover, because litigants became armed with more robust precedent, it can be presumed that many alleged victims began suing federally funded academic institutions for Title IX violations instead of, or in addition to, filing Title VII claims. Subsequently, such actions resulted in the creation of a divisive circuit split concerning whether a plaintiff’s Title IX claims are preempted by Title VII if the plaintiff could have pursued a claim under Title VII.<sup>111</sup>

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107. *Id.* at 167.

108. *Id.* at 174. In *Jackson*, the plaintiff was a high school girls’ basketball coach and physical education teacher. *Id.* at 171. After becoming the girls’ basketball coach at Ensley High School, the plaintiff noticed that his team “was not receiving equal funding and equal access to athletic equipment and facilities,” which made his job as coach especially difficult. *Id.* After noticing the inequity, the plaintiff began complaining to his supervisors to no avail, and he consequently began “receiv[ing] negative work evaluations” and was fired from his coaching position. *Id.* at 171–72. After his termination, he filed suit against the school district for the retaliation he faced after voicing his concerns about the district’s possible Title IX violations. *Id.* at 172.

109. *Id.* at 173 (quoting 20 U.S.C. § 1681(a) (2012)). The U.S. Supreme Court, in *Olmstead v. L.C.*, found that the “normal definition of discrimination [is] differential treatment of similarly situated groups.” 527 U.S. 581, 614 (1999) (Kennedy, J., concurring).

110. *Jackson*, 544 U.S. at 174 (quoting 20 U.S.C. § 1681(a) (2012)). The U.S. Supreme Court was compelled to find that retaliation claims can be pursued under Title IX by the following argument: “Title IX’s enforcement scheme would [have] unravel[ed]” if reported incidents of discrimination and retaliation would have gone unpunished. *Id.* at 180.

111. John Barry & Edna Guerrasio, *A Circuit Split at Intersection of Title VII and Title IX*, LAW 360 (Apr. 20, 2017, 4:30 PM), <https://www-law360->

## II. ANALYSIS

A. *Doe v. Mercy Catholic Medical Center's Egregious Facts*

Like all cases involving a plaintiff experiencing some form of discrimination, *Doe v. Mercy Catholic Medical Center*, necessitates a careful examination of the facts because of its intensely fact-sensitive nature.<sup>112</sup> To some, the facts of this case can be easily summed up as a workplace romance gone wrong and a typical “he-said, she-said” controversy that should be left out of the reach of the judicial system. However, to others, this case marks another example of a nightmare that has now, all too frequently, become a reality that many individuals, particularly women, face in the workplace after rejecting the sexual advances of a colleague or superior.

The facts of *Mercy Catholic Medical Center* are set in a medical residency program<sup>113</sup> at Mercy Catholic Medical Center (“Mercy”), a Philadelphia-based private teaching hospital “affiliated with Drexel University’s College of Medicine.”<sup>114</sup> Mercy possesses “four ACGME-accredited residency programs in” diagnostic radiology, internal medicine, general surgery, and a transitional year residency, while also serving as “Drexel Medicine’s emergency medicine residency[’s]” clinical base.<sup>115</sup> In 2011, Jane Doe entered “Mercy’s diagnostic radiology residency program . . . as a second-year” resident, and pursuant to her residency agreement she was required to:

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com.proxy.law.rutgers.edu/articles/913845/a-circuit-split-at-intersection-of-title-vii-and-title-ix. See *infra* Part III Section A for a discussion on the divisive and revived circuit split on the Title VII-Title IX preemption issue.

112. See generally 850 F.3d 545 (3d Cir. 2017).

113. To provide further background information, medical residency education is a “period of didactic and clinical instruction in a medical specialty during which physicians prepare for independent practice after graduating from medical school.” *Id.* at 550. Didactic instruction is defined as medical teaching through the use of lectures or textbooks, which is to be distinguished from clinical instruction laboratory exercises or patients. *Didactic*, FARLAX MEDICAL DICTIONARY, <https://medical-dictionary.thefreedictionary.com/didactic> (last visited Feb. 20, 2019). Moreover, residency programs are customarily accredited. *Mercy Catholic Med. Ctr.*, 850 F.3d at 550. In *Mercy Catholic Medical Center*, Mercy’s residency program is an ACGME (Accreditation Council for Graduate Medical Education) accredited program and is structured in a manner that allows a physician, upon successful program completion, to be “eligib[le] for board certification.” *Id.* Due to its expensive nature, a residency program’s costs are frequently offset by federal government funding via “direct and indirect graduate medical education payments through Medicare.” *Id.*

114. *Mercy Catholic Med. Ctr.*, 850 F.3d at 550.

115. *Id.*

attend[] daily morning lectures presented by faculty and afternoon case presentations given by residents under faculty or attending physicians' supervision[,] . . . t[ake] a mandatory physics class taught on Drexel's campus, attend[] monthly radiology lectures and society meetings, join[] in interdepartmental conferences, and s[it] for annual examinations to assess her progress and competence.<sup>116</sup>

Early on in her residency program, Doe expressed that Dr. James Roe, Mercy's residency program director, took a particular interest in her after learning, by means of prying, personal conversations with Doe, that she was separated from her husband.<sup>117</sup> After Dr. Roe found and made ways to "see and speak with" Doe more frequently than was expected for interactions between a resident and program director and suggestively looked at her multiple times, Doe wrote Dr. Roe an email and several text messages expressing her concerns about his persistence to pursue a romantic relationship and firmly stated that she "wanted their relationship to remain professional."<sup>118</sup> Dr. Roe subsequently reported Doe's messages to Mercy's human resources department, which scheduled a meeting with Doe where she revealed more details about Dr. Roe's inappropriate conduct, including "how he'd touch[] her hand at work" and how "his unwelcome sexual attention was negatively affecting her training."<sup>119</sup>

Though the human resource department's referral to see a psychiatrist was optional, Doe felt pressured, given her complaints about her superior, and attended three sessions where she continued to "complain[] . . . about Dr. Roe's conduct."<sup>120</sup> Doe's multiple complaints seemingly fell on deaf ears as Mercy's human resource department never followed up on her complaints.<sup>121</sup> After reporting Doe to Mercy's human resource department, Dr. Roe apologized to Doe for doing so,<sup>122</sup> yet Doe alleged that her medical training continued to suffer as a result of Dr. Roe's actions because "two male faculty members . . . close with Dr. Roe, trained her significantly less than they had before."<sup>123</sup>

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 550–51.

120. *Id.* at 551.

121. *Id.*

122. *Id.* According to Doe, Dr. Roe reported her to Mercy's human resource department because he feared being "reprimanded for having an inappropriate relationship with her." *Id.*

123. *Id.*

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 477

In the fall of 2012, Dr. Roe’s sexual and “romantic” advances intensified after learning of Doe’s impending divorce.<sup>124</sup> Dr. Roe once again sought a romantic relationship with Doe,<sup>125</sup> but this unsuccessful pursuit proved to be the falling domino in a sequence of events that would lead to Doe’s termination from Mercy’s residency program. As Doe’s third-year was a critical year in her medical education, she began the process of searching for a post-residency fellowship and, therefore, sought recommendation letters from an unnamed faculty member and Dr. Roe.<sup>126</sup> Both wrote run-of-the-mill, superficial letters, and moreover, Dr. Roe told a director of a fellowship that “Doe was a poor candidate” as a way to “teach her a lesson.”<sup>127</sup>

Yet again, Doe began voicing her grievances concerning Dr. Roe’s conduct, which this time landed her a meeting with Dr. Roe and Mercy’s vice president, Dr. Arnold Eiser.<sup>128</sup> Dr. Eiser’s sole remedy was to “escort[] her to Mercy’s psychiatrist.”<sup>129</sup> Moreover, Dr. Eiser was misinformed about Doe performing poorly on an in-service exam—that she had actually done well on—which he used as leverage to essentially force Doe to “agree to a corrective plan” to “remain in [Mercy’s residency] program.”<sup>130</sup>

Following an ineffectual meeting with Dr. Eiser, Dr. Roe’s conduct and advances toward Doe escalated and continued into the spring of 2013.<sup>131</sup> Doe recalls several of these undesired, one-sided advances in detail: The first incident Doe recalls occurred while she and Dr. Roe were sitting alone at a computer and “reviewing radiology reports.”<sup>132</sup> There,

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124. *Id.* Dr. Roe’s advances this time around proved more extreme because he was also getting divorced. *Id.* Dr. Roe suggested that the two “go shooting and travel together” and that he felt both “uncomfortable with her going to dinner for fellowships interviews and unhappy about her leaving Philadelphia post-residency.” *Id.*

125. *Id.*

126. *Id.* While it is not expressly explained in the case why Doe sought a letter of recommendation from Dr. Roe—which seemed disaster-prone from the start given their turbulent history after her multiple rejections of his sexual and “romantic” advances—it can be assumed that Doe *needed* a recommendation letter from Dr. Roe as part of her fellowship application. Richard Alewis, MD et al., *Guidelines for a Standardized Fellowship Letter of Recommendation*, 130 AM. J. MED. 606, 606 (2017), [http://www.amjmed.com/article/S0002-9343\(17\)30116-X/pdf](http://www.amjmed.com/article/S0002-9343(17)30116-X/pdf). Particularly, a recommendation letter from a program director has been found to be “one of the [three] most important factors for deciding whom to interview [for a fellowship position] and how to rank” applicants because such recommendation letters are meant to “provide an accurate, fair assessment of a[n] . . . applicant’s capabilities.” *Id.*

127. *Mercy Catholic Med. Ctr.*, 850 F.3d at 551.

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.*

132. *Id.*

Dr. Roe “reached across [Doe’s] body and placed his hand on hers to control the mouse, pressing his arm against her breast in the process,” which Doe responded to by “push[ing] herself back in the chair, st[anding] up, and protest[ing.]”<sup>133</sup>

A short time later, in April of 2013, the final incident between Doe and Dr. Roe occurred.<sup>134</sup> This time, after Dr. Roe “told another resident to remove Doe’s name as a coauthor from a research paper she’d contributed to,” Dr. Roe responded to Doe’s subsequent complaints with allegations of her “acting unprofessionally and ordered her to attend another meeting with Dr. Eiser.”<sup>135</sup> At this meeting, after allowing Doe to recount Dr. Roe’s conduct towards her during the course of the past year, Dr. Eiser concluded that “the other residents loved Dr. Roe” and that Doe must “apologize to him.”<sup>136</sup> Though Doe did apologize to Dr. Roe, he refused to accept what he believed to be an insincere apology, which prompted Dr. Eiser to “suspend[] Doe [and] recommend[] another visit to the psychiatrist.”<sup>137</sup>

On April 20, 2013, after her final meeting with Dr. Eiser, Doe received a termination letter from Mercy, which outlined her right to appeal her termination to an appeals committee.<sup>138</sup> Four days later, an appeals committee heard from both Doe and Dr. Roe—Doe described Dr. Roe’s sexual advances and inappropriate behavior to the appeals committee, while Dr. Roe advocated for Doe’s dismissal from Mercy’s residency program.<sup>139</sup> The appeals committee ultimately sustained Doe’s dismissal, and Doe declined her right to appeal the committee’s decision.<sup>140</sup> Subsequently, Mercy permitted Doe to officially resign from the residency program, and Doe’s medical career has been sidelined as she has been unable to become a fully licensed, practicing physician since no other residency program has been willing to accept her.<sup>141</sup>

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133. *Id.* Additionally, Doe recalled and detailed an incident where Dr. Roe not only became jealous after another doctor “expressed interest in [her],” but also included him telling her that “she shouldn’t date” the other doctor. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* Doe claims that Dr. Roe only advocated for her dismissal to the appeals committee because he was exacting revenge on her after she had consistently rejected his sexual and romantic advances. *Id.* Additionally, it is important to note that Doe did not claim that Dr. Roe “made sexualized comments or touched her in a sexual way” at the appeals committee hearing. *Id.* at 566.

140. *Id.* at 551.

141. *Id.* at 552.

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 479

On April 20, 2015—“exactly two years after”<sup>142</sup> receiving her termination letter from Mercy—Doe filed a six-count suit against Mercy in the U.S. District Court for the Eastern District of Pennsylvania.<sup>143</sup> In her suit, Doe sought both equitable relief and damages for three claims “under Title IX—retaliation, *quid pro quo* [harassment], and hostile environment—and three [claims] under Pennsylvania law.”<sup>144</sup> Doe conceded that she did not pursue any claims pursuant to Title VII as a means of relief for her alleged discrimination.<sup>145</sup>

*B. District Court’s Analysis*

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Mercy filed a motion to dismiss on the ground that its residency program does not qualify as an “education program or activity” covered under Title IX.<sup>146</sup> Tasked with tackling this divisive issue—which could potentially render all similarly situated medical residency programs in the Third Circuit under the purview of Title IX—the district court itself admitted that it

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142. *Id.* Unlike Title VII claims in Pennsylvania, which must be filed either (1) with the Pennsylvania Human Relations Commission (“PHRC”) within 180 days of the date of the alleged discrimination or (2) with the Equal Employment Opportunity Commission (“EEOC”) within 300 days of the date of the alleged discrimination, Title IX claims can be filed at later dates because of the statute of limitations for Title IX claims. *See Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 77–78 (3d Cir. 1989); *Filing a Discrimination Claim—Pennsylvania*, WORKPLACE FAIRNESS, [https://www.workplacefairness.org/file\\_PA](https://www.workplacefairness.org/file_PA) (last visited Jan. 19, 2018). In *Bougher*, the Third Circuit ruled that similar to section 1983 and section 1985 claims, Title IX claims possess a “two-year statute of limitations period.” 882 F.2d at 78. The two-year period begins running “when the plaintiff knew or should have known of the injury upon which its action is based.” *Doe v. Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d 256, 258 (E.D. Pa. 2016) (quoting *Shine v. Bayonne Bd. of Educ.*, 633 Fed. Appx. 820, 823 (3d Cir. 2015)). Even so, “the *continuing violations doctrine*” provides litigants with an “equitable exception to the timely filing requirement” so that courts are able to provide “relief for the earlier related acts that would otherwise be time barred.” *Id.* (quoting *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001)) (emphasis added). Therefore, if “a defendant’s conduct is part of a continuing practice,” a suit is timely under the continuing violations doctrine “so long as the last act evidencing the continuing practice falls within the limitations period.” *Id.* (quoting *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001)). Though the district court would have readily applied the continuing violations doctrine, on appeal, the Third Circuit reported that courts around the nation differ on “whether th[e] doctrine applies under Title IX,” and thus held it to be an “open question” in the Third Circuit. *Mercy Catholic Med. Ctr.*, 850 F.3d at 566.

143. *Id.* at 552.

144. *Id.* The three claims that Doe filed pursuant to Pennsylvania state law were: “contract-based sex discrimination, wrongful termination, and breach of the covenant of good faith and fair dealing.” *Id.*

145. *Id.* Furthermore, because she did not file any Title VII claims, Doe admitted that she never “filed a charge with the Equal Employment Opportunity Commission.” *Id.*

146. *Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d at 257; *see* 20 U.S.C. § 1681(a) (2012).

was handling an issue of “first impression in t[he Third] Circuit.”<sup>147</sup> Ultimately, the district court’s decision—in favor of Mercy—rested on interpreting both Title IX and its elusively undefined term of “education” narrowly so as to exclude medical residency programs from becoming covered “education program[s] or activit[ies]” under Title IX.<sup>148</sup>

In ruling in Mercy’s favor, the district court first looked to “Title IX’s statutory text” and “plain language interpretation” principles.<sup>149</sup> In this portion of its opinion, despite finding that “education” included both broad and narrow definitions,<sup>150</sup> the court effectively confined Title IX’s scope by defining “education programs *in the sense of schooling*.”<sup>151</sup> the court effectively confined Title IX’s scope by defining “education programs *in the sense of schooling*.”<sup>152</sup> Doing so enabled the district court to wholly adopt Mercy’s argument that medical residency programs are not “education program[s]” because medical residents are only “employees of a hospital . . . paid for their services, are responsible for patient care[,] and are protected by labor laws.”<sup>153</sup> Furthermore, while the court acknowledged that “medical residents are . . . receiving valuable training in their chosen medical specialty or sub-specialty[,]” the following “fundamental difference between medical school” and “a

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147. *Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d at 257, 261 (“To interpret Title IX to cover Defendant’s residency program would, by judicial fiat, extend Title IX coverage to over thousands of individuals serving in medical residencies at hundreds of institutions.”).

148. § 1681(a); *Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d at 259. The district court was compelled to decide in Mercy’s favor because of “[1] Title IX’s statutory text [and] concepts of plain language interpretation, [2] Title IX’s legislative history, and [3] the principles of judicial restraint.” *Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d at 259.

149. *Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d at 259.

150. *Id.* In defining “education,” the district court relied on two definitions in the American Heritage Dictionary: (1) “the knowledge or skill obtained or developed by a learning process; an instructive or enlightening experience” (the broad definition); and (2) “a program of instruction of a specified kind or level” (the narrow definition based on a “more formalized system of importing knowledge or skills.”) *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY (4th ed. 2009)).

151. *Id.* at 260 (emphasis added). Here, the court found Doe’s argument—medical residency programs contain educational aspects—to be one “lead[ing] to an endless road.” *Id.* Accordingly, the court felt compelled to reject Doe’s argument because if it had not, then “Title IX would govern any interaction in which one party could potentially learn something,” which the court determined was not the appropriate scope for Title IX. *Id.*

152. *Id.* at 260. Here, the court found Doe’s argument—medical residency programs contain educational aspects—to be one “lead[ing] to an endless road.” *Id.* Accordingly, the court felt compelled to reject Doe’s argument because if it had not, then “Title IX would govern any interaction in which one party could potentially learn something[,]” which the court determined was not the appropriate scope for Title IX. *Id.*

153. *Id.* at 259. Mercy’s argument rested heavily on differentiating between medical residents and medical students because it wanted the court to find that residents are employees and not students, which would subsequently only allow residents to be entitled to Title VII relief. *See id.* at 259–60.



2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 481

medical residency program” precluded the court from finding medical residency programs to be “education program[s] or activit[ies]” under Title IX.<sup>154</sup>

[M]edical school, which for consideration (i.e., tuition) *educates students* to become doctors and awards an appropriate degree at the conclusion of its (usual) four year program . . . [whereas i]n a residency program, the resident (for consideration, i.e., *a salary*) provides care to patients . . . . The fact that residents or hospitals may themselves consider the training received in residency as including “education” does *not ipso facto* . . . turn a residency program into an education program[.]<sup>155</sup>

After defining “education” and subsequently finding that “[a]pplying Title IX to [Mercy’s] residency program” would be unfitting, the court next turned to analyzing “Title IX’s legislative history” to bolster its finding.<sup>156</sup> By doing so, the district court determined that “Title IX was passed to remove an exemption in Title VII for employment discrimination occurring in educational institutions.”<sup>157</sup> Furthermore, the court was able to extrapolate that “private sector employer[s] like [Mercy],” were already exclusively covered “by Title VII when Title IX was enacted.”<sup>158</sup> Thus, the court ultimately concluded that “Title VII should be the *exclusive* avenue for relief . . . when . . . the employer is not an educational institution,” and, in turn, that Doe was impermissibly “attempting to use Title IX to circumvent Title VII’s administrative requirements.”<sup>159</sup> This conclusion by the district court, which made the preemption issue ripe on appeal for the Third Circuit, would go on to revive a twenty-year old circuit split.

Last, the district court reasoned that Doe’s suit effectively asked the court to act in a manner that was both inconsistent with and contrary to the “function[s] of a judge” and “of the judicial branch.”<sup>160</sup> Because Doe was seeking to be included “within the scope of a statute [(Title IX)] when there is no clear language requiring inclusion and no legislative history

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154. *Id.* at 260; *see also* 20 U.S.C. § 1681(a) (2012).

155. *Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d at 260.

156. *Id.* at 260–61.

157. *Id.* at 261.

158. *Id.*

159. *Id.* Furthermore, during a hearing, the district court learned from Doe’s counsel that Doe’s decision to pursue a Title IX claim turned on her inability to “make the required [Title VII] administrative filing [with the EEOC or PHRC] within the requisite timeframe[.]” which effectually barred her from recovering under Title VII. *Id.*

160. *Id.*

supporting such an interpretation,” the court refused to impermissibly rewrite Title IX for Doe’s benefit.<sup>161</sup>

Ultimately, the district court dismissed Doe’s Title IX claims—with prejudice—because it found that the Defendant was not an entity that could be held liable under Title IX.<sup>162</sup> However, in the alternative, had Title IX been applicable to this case, the district court still would have dismissed Doe’s hostile environment claim because it was time-barred.<sup>163</sup> On this claim, Doe failed to “allege an actionable event of hostile [work] environment harassment within the [two-year] limitations period.”<sup>164</sup> Though the continuing violations doctrine would ordinarily have been invoked, the court did not find the doctrine applicable because the only two timely events Doe could rely on—(1) her termination on April 20, 2013 and (2) Dr. Roe’s “advocating for [her] dismissal at the appeal hearing on April 24”<sup>165</sup>—failed to demonstrate conduct indicative of an ongoing “pattern of hostile environment harassment.”<sup>166</sup> Because none of Doe’s federal claims survived the court’s scrutiny, the district court dismissed Doe’s remaining three state-law claims by exercising its discretion to not employ “supplemental jurisdiction over [those] claims.”<sup>167</sup>

### C. *Appeal to the Third Circuit and Subsequent Decision*<sup>168</sup>

Following the district court’s dismissal of Doe’s case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,<sup>169</sup> Doe appealed the

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161. *Id.*

162. *Id.*

163. *Id.* at 261, 263.

164. *Id.* at 262.

165. *Id.*

166. *Id.* First, the district court found that Doe’s termination could not serve as the “basis for [her] hostile [work] environment claim,” because the termination was a discrete event actionable itself only “as retaliation or quid pro quo harassment.” *Id.* (first citing *Yan Yan v. Pa. State Univ.*, No. 4:14-CV-01273, 2015 WL 3953205, at \*13 (M.D. Pa. June 29, 2015); then citing *Santee v. Lehigh Valley Health Network, Inc.*, No. 13-3774, 2013 WL 6697865 1, 7 (E.D. Pa. 2013)). Second, because Doe did not contend that Dr. Roe “made [any] sexualized comments or that he touched her in a sexual way at the [appeals committee] hearing,” the district court concluded that his conduct “was not similar to the alleged pattern of harassment and therefore c[ould not] be considered a continuing violation.” *Id.* at 262–63.

167. *Id.* at 263.

168. The following section and subsection follows the layout used by the Third Circuit court in its opinion, as I found the layout to be particularly effective at helping the reader understand all the issues that were at play in the case.

169. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 552 (3d Cir. 2017). A Rule 12(b)(6) dismissal is granted when the proponent of the 12(b)(6) motion successfully demonstrates

dismissal to the Third Circuit.<sup>170</sup> The Third Circuit, after accepting Doe’s recollection of the facts as entirely true and declaring that Title VII did not preempt her Title IX claims,<sup>171</sup> was tasked with answering the following three questions: “whether Title IX applies to Mercy, whether Doe’s private causes of action are cognizable under Title IX, and what to do about Doe’s state law claims.”<sup>172</sup> Recognizing that it was determining a question of first impression—whether a medical residency program constitutes an “education program or activity” under Title IX—the Third Circuit treaded carefully through its analysis of Title IX and its subsequent application of Title IX to Doe’s claims.<sup>173</sup>

### 1. Title IX’s Applicability to Mercy’s Residency Program

Beginning with this question of first impression,<sup>174</sup> the Third Circuit first undertook the arduous challenge of determining what exactly is an “education program or activity” according to Title IX.<sup>175</sup> To do so, the court was forced to examine the difference between Title IX’s section 1687 “definition of a ‘program or activity,’ . . . [and section] 1681(a)’s” use of “education program or activity.”<sup>176</sup>

Subsequent to the U.S. Supreme Court’s decision in *Grove City*,<sup>177</sup> Congress adopted the “Civil Rights Restoration Act [“CRRA”] of 1987. . . . to define the phrase ‘program or activity’ broadly in [the] provisions of four civil rights statutes,” which included section 1687 of

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that the other party has “fail[ed] to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6).

170. See *Mercy Catholic Med. Ctr.*, 850 F.3d at 552.

171. See *infra* Part III Section A for a discussion on why Title VII does not preempt Title IX claims.

172. *Mercy Catholic Med. Ctr.*, 850 F.3d at 552.

173. 20 U.S.C. § 1681(a) (2012); see *Mercy Catholic Med. Ctr.*, 850 F.3d at 552.

174. In its opinion, the Third Circuit indicates that this question of first impression not only reaches “one ex-[medical] resident’s private lawsuit,” but that it also “touches on the Executive’s very power to address gender discrimination in [medical] residency programs under existing federal law.” *Mercy Catholic Med. Ctr.*, 850 F.3d at 552. Therefore, it was of the utmost importance that the Third Circuit thoroughly analyze Title IX’s framework, as its decision would possess precedential value in this area of law moving forward.

175. § 1681(a); see *Mercy Catholic Med. Ctr.*, 850 F.3d at 552.

176. *Mercy Catholic Med. Ctr.*, 850 F.3d at 553 (emphasis omitted).

177. In *Mercy Catholic Medical Center*, the Third Circuit noted that the U.S. Supreme Court in *Grove City College v. Bell* interpreted the phrase “education program or activity” narrowly, as it found “that the receipt of federal funds by a particular program within an institution ‘does not trigger institution wide coverage’ under Title IX.” *Id.* (quoting *Grove City Coll. v. Bell*, 465 U.S. 555, 573 (1984)) (emphasis added). Congress proceeded to overrule the Supreme Court’s narrow interpretation in 1987. See *id.*

Title IX.<sup>178</sup> Accordingly, section 1687 now defines “program or activity” as:<sup>179</sup>

[C]olleges, universities, postsecondary institutions, public systems of higher education . . . and ‘other’ school systems . . . ‘entire’ corporations, partnerships, ‘other’ private organizations, and sole proprietorships *if* assistance is extended to them ‘as a whole’ *or* they’re ‘principally engaged in the business of providing education, health care, housing, social services, or parks and recreation,’ . . .<sup>180</sup>

However, despite defining “program or activity” in section 1687, Congress not only failed to define the modifier “education” in section 1681(a), but it also failed to provide guidance on how to resolve the difference between section 1687’s broader language and section 1681(a)’s narrower language.<sup>181</sup> Subsequently, the Third Circuit was forced into uncharted territory as it set to decipher the gaping hole left by Congress.

The Third Circuit found Doe’s interpretation of “education program or activity” most persuasive and legally sound.<sup>182</sup> Doe successfully argued

178. *Id.*

179. The full list of entities covered under section 1687’s definition of “program or activity” is as follows:

[S]tate or local government entities, 20 U.S.C. § 1687(1); colleges, universities, postsecondary institutions, public systems of higher education . . . and ‘other school systems, § 1687(2); ‘entire’ corporations, . . . ‘other’ private organizations, and sole proprietorships *if* assistance is extended to them ‘as a whole’ *or* they’re ‘principally engaged in the business of providing education, health care, housing, social services or parks and recreation,’ § 1687(3)(A); ‘entire’ plants or other ‘comparable, geographically separate’ facilities in the case of ‘any other’ corporation . . . private organization, or sole proprietorship not described in subsection (3)(A), § 1687(3)(B); and ‘any other entity’ established by ‘two or more’ entities described in subsections (1) through (3), § 1687(4).

*Mercy Catholic Med. Ctr.*, 850 F.3d at 553–54; 20 U.S.C. § 1687 (2012).

180. *Mercy Catholic Med. Ctr.*, 850 F.3d at 553 (emphasis in original) (citing 20 U.S.C. § 1687(2)–(3)(A) (2012)).

181. *See Mercy Catholic Med. Ctr.*, 850 F.3d at 554; 20 U.S.C. §§ 1681(a), 1687 (2012).

182. *See Mercy Catholic Med. Ctr.*, 850 F.3d at 555; § 1681(a). The Third Circuit rejected both the district court’s and Mercy’s interpretations of “education program or activity” for a variety of reasons. *See Mercy Catholic Med. Ctr.*, 850 F.3d at 554 (quoting 20 U.S.C. § 1681(a) (2012)). Beginning with the district court’s interpretation, the Third Circuit found the district court’s decision to combine section 1681(a)’s language with section 1681(c)—“which defines an ‘educational institution’”—particularly problematic. *Id.* By taking such an approach, the district court attempted to demonstrate that Title IX covered only “education programs ‘in the sense of schooling,’” and that, therefore, Mercy’s degree-holding medical residents were effectively disqualified from Title IX protection. *Doe v. Mercy Catholic Med. Ctr.*, 158 F. Supp. 3d 256, 260 (E.D. Pa. 2016). The Third Circuit

that the phrase “education program or activity” should be interpreted more broadly than the approaches set forth by the district court and Mercy because the U.S. Supreme Court has determined that Title IX’s scope and reach is to be “as broad as its language.”<sup>183</sup> As a result, the Third Circuit held that “a ‘program or activity’ under [section] 1687 is an ‘education program or activity’ under [section] 1681(a) if it has ‘features such that one could reasonably consider its mission to be, at least in part, educational.’”<sup>184</sup> Furthermore, because the Third Circuit determined that Congress intended Title IX to have boundaries due to the inclusion of the word “education’ in [section] 1681(a),” the court held that the following are features of an “education program or activity”:

a program is incrementally structured through a particular course of study or training, whether full- or part-time;

a program allows participants to earn a degree or diploma, qualify for a certification or certification examination, or pursue a specific occupation or trade beyond mere on-the-job training;

a program provides instructors, examinations, an evaluation process or grades, or accepts tuition; *or*

the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature.<sup>185</sup>

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renounced this approach by deciding that different meanings are intended “[w]here Congress use[s] specific language in one part of a statute but different language in another.” *Mercy Catholic Med. Ctr.*, 850 F.3d at 554. Next, the Third Circuit rejected Mercy’s attempt to persuade it to “ignore the words ‘health care, housing, social services, or parks and recreation’” and to instead “hold that Title IX applies only to private entities ‘principally engaged in the business of providing education.’” *Id.* (emphasis in original). Therefore, under its interpretation of sections 1681 and 1687(3)(A), Mercy argued that “[a] private hospital like [it] that employs physicians in its own residency program is ‘quite plainly’ not principally engaged in the education business.” *Id.* However, the Third Circuit readily rejected Mercy’s argument as its limited interpretation violates the fundamental “interpretive rule that a statute is to be construed so that effect is given to *all* its provisions, so no part will be inoperative or superfluous, void or insignificant.” *Id.* at 555 (emphasis in original) (citing to *Corley v. United States*, 556 U.S. 303, 314 (2009)).

183. *Mercy Catholic Med. Ctr.*, 850 F.3d at 555 (citing to *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)); *see* § 1681(a).

184. *Mercy Catholic Med. Ctr.*, 850 F.3d at 555 (quoting *O’Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997)).

185. § 1681(a); *Mercy Catholic Med. Ctr.*, 850 F.3d at 554, 556 (emphasis added).

Ultimately, the Third Circuit decided that “whether *the defendant-entity’s* questioned program . . . has educational characteristics” under Title IX will be a question of both law and fact.<sup>186</sup>

In the present case, the Third Circuit pinpointed two reasons for its finding that Mercy’s medical residency program falls squarely within the definition of a Title IX “education program or activity.”<sup>187</sup> First, the court found that Mercy’s mission was “at least in part[] educational” because it was primarily “engaged in the business of providing healthcare,” which included its management and operation of a medical residency program that possessed ACGME-accreditation.<sup>188</sup> The court found that not only did Mercy advertise its programs as being “educational in nature,”<sup>189</sup> but the source of Mercy’s accreditation, ACGME, also identifies “residency programs [as] ‘structured educational experience[s].’”<sup>190</sup> Furthermore, the Third Circuit recognized that not only have courts recognized and accepted that medical residency programs have educational qualities

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186. *Mercy Catholic Med. Ctr.*, 850 F.3d at 556 (emphasis in original).

187. § 1681(a); *Mercy Catholic Med. Ctr.*, 850 F.3d at 556.

188. *Mercy Catholic Med. Ctr.*, 850 F.3d at 556 (citing 20 U.S.C. § 1687(3)(A)(ii) (2012)).

189. *Id.* at 557. One aspect of Mercy’s residency program that made it “educational in nature” was that “required [Doe] to learn and train under faculty members and physicians, attend lectures and help present case preparations under supervision, participate in a physics class on [Drexel’s] campus, and sit for annual exam[s].” *Id.* at 556. What also made the program “educational in nature” was that Doe would have been eligible for certification by the American Board of Radiology had she completed Mercy’s residency program and passed the certification exam. *Id.* Additionally, for an explanation of why Doe, as a medical resident, was also deemed to be an employee at Mercy, see *supra* Part II subsection B.

190. *Mercy Catholic Med. Ctr.*, 850 F.3d at 557. Because both Mercy and ACGME describe residency programs as “educational in nature” and place them within the realm of education, the Third Circuit concluded that Doe’s allegations satisfied the “General Rules of Pleading” codified in Rule 8 of the Federal Rules of Civil Procedure. *Id.* (citing to FED. R. CIV. P. 8(a)(2) (a party’s pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”)). To better understand the general rules of pleading, it is imperative to analyze the cases of *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*, which created the framework for analyzing the doctrine of sufficient pleadings governed by Rule 8. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556–59 (2007). To overcome a motion to dismiss, the Supreme Court has determined that a party’s “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” to withstand a motion to dismiss. *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). To be facially plausible, a plaintiff must plead a claim with “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). Therefore, if a plaintiff’s complaint is only a “recita[ti]on of the elements of a cause of action, supported by mere conclusory statements,” the plaintiff has failed to make a sufficient pleading under Rule 8(a)(2). *Id.*

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 487

that warrant identifying a medical resident as a student,<sup>191</sup> but also that Congress has taken the same approach.<sup>192</sup>

Second, by relying on the cases of *Lam v. Curators of the University of Missouri at Kansas City Dental School* and *O'Connor v. Davis*,<sup>193</sup> the Third Circuit found that Mercy's residency program was "at least in part[] educational" because of Mercy's institutional affiliation with Drexel Medicine, a graduate-level medical school presumably falling under Title IX.<sup>194</sup> The court found it plausible that Mercy was affiliated with Drexel Medicine because the court believed it was reasonable to infer that "an agreement binding" the two institutions existed, which enabled the "sharing of staff and funds."<sup>195</sup> To make the inference that an affiliation existed and that "Mercy's residency program inured 'some benefit' to Drexel Medicine (and vice versa)," the Third Circuit took into account the evidence of Doe being required to take "a physics class 'taught on Drexel's campus,'" and that Mercy supplied "Drexel Medicine's emergency medicine residency" with clinical bases.<sup>196</sup> Ultimately, these findings encouraged the Third Circuit to reasonably infer that there was an affiliate connection between Mercy and Drexel, which subsequently caused Mercy's mission to satisfy section 1681(a) and be "at least in part, educational under Title IX."<sup>197</sup>

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191. *Mercy Catholic Med. Ctr.*, 850 F.3d at 557 (citing *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1992) (finding that a medical resident is "both an employee and a student."); see also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994) (noting that since residents "learn both by treating patients and by observing other physicians do so, [residency] programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom."); *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 525 (1994) (finding that "[m]edical residencies are a vital component of medical education").

192. *Mercy Catholic Med. Ctr.*, 850 F.3d at 557 (citing 15 U.S.C. § 37(b)(1)(B)(i) (2012)) (Specifically, in the antitrust context of medical residency matching programs, Congress has declared that a "graduate medical education program" is a "residency program" for "medical education and training.").

193. *Id.* at 557; see also *Lam v. Curators of the Univ. of Mo. at Kan. City Dental Sch.*, 122 F.3d 654, 656 (8th Cir. 1997) (holding that an education program is one that is "controlled by and inure[s] some benefit to the institution."); *O'Connor v. Davis*, 126 F.3d 112, 118 (2d Cir. 1997) (holding that an education program can be imputed onto a hospital if there is evidence that there is an institutional affiliation between the two entities, "there is [a] written agreement binding the two entities in any way," the two entities' staffs are shared, or if "funds are circulated between them.").

194. *Mercy Catholic Med. Ctr.*, 850 F.3d at 557.

195. *Id.* at 558 (quoting *O'Connor*, 126 F.3d at 118).

196. *Id.*

197. *Id.*

## 2. The Viability of Doe's Title IX Causes of Action

The Third Circuit found the district court's dismissal of Doe's retaliation and quid pro quo harassment claims to be ill-considered and ultimately incorrect, which prompted it to remand these claims back to the district court.<sup>198</sup> Beginning with Doe's retaliation claim, the Third Circuit found the claim legally cognizable under Title IX because it qualifies as a form of intentional discrimination.<sup>199</sup> Furthermore, the Third Circuit held that Title IX retaliation claims are governed by "Title VII's . . . retaliation framework."<sup>200</sup> As to the timeliness of Doe's retaliation claim, the Third Circuit found that there is a two-year temporal requirement, which essentially confines her retaliation claim to her dismissal on April 20, 2013 and "Dr. Roe's advocating for her dismissal at her appeal hearing on April 24, 2013."<sup>201</sup> Despite finding Doe's retaliation claim cognizable, to "establish [her] *prima facie* retaliation case" on remand, Doe will have to successfully navigate the following burden-shifting mechanism: first, Doe will have to "prove she engaged in activity protected by Title IX, she suffered an adverse action, and there was a causal connection between the two;" the burden will then shift to Mercy to assert a "legitimate, nonretaliatory reason for its conduct;" and, ultimately, the burden will shift back to Doe to prove that "Mercy's proffered explanation was false and that retaliation was the real reason for the adverse action against her."<sup>202</sup>

Next, the Third Circuit also found Doe's quid pro quo harassment claim to be viable under Title IX. While recognizing that the U.S. Supreme Court had not yet stretched *Cannon's* "private [cause of] action"<sup>203</sup> to "quid pro quo claims in the private employment setting,"<sup>204</sup> the Third Circuit was compelled to extend *Cannon* over quid pro quo harassment because of the definition of "discrimination."<sup>205</sup> The term "discrimination," in Title IX case law, has been broadly construed to

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198. *Id.* at 564–65.

199. *Id.* at 563–64.

200. *Id.* at 564.

201. *Id.*

202. *Id.*

203. *Id.* at 561.

204. *Id.* at 564.

205. *Id.* at 565. The Third Circuit also found that other courts have "recognized Title IX quid pro quo claims," albeit in other contexts. *Id.*; see also *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 88–89 (2d Cir. 2011) (holding that "Title IX provides a remedy to a student who is subjected to sexual harassment by a teacher or professor."); *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 507, 510 (6th Cir. 2001) (finding that quid pro quo harassment is a claim that can be asserted by a former college athlete against her coach and university).



mean “intentional unequal treatment,” which the Third Circuit has reasoned quid pro quo harassment is.<sup>206</sup> Similar to retaliation claims, the Third Circuit also found that Title IX quid pro quo harassment claims are generally governed by “Title VII’s quid pro quo framework.”<sup>207</sup> Thus, to prove that the unwanted sexual advances and acts amounted to quid pro quo harassment, Doe must prove that: “(A) [Her] submission to that conduct [was] made either explicitly or implicitly a term or condition of her education or employment experience in a federally-funded education program, or (B) submission to or rejection of that conduct [was] used as the basis for education or employment decisions that affect[ed] [Doe].”<sup>208</sup> Furthermore, as to fulfilling the temporal requirement for quid pro quo harassment claims, the Third Circuit held the same result as it did for Doe’s retaliation claims—only the two aforementioned incidents fall within the two-year statute of limitations period for this claim.<sup>209</sup>

Though the Third Circuit remanded two of Doe’s Title IX claims, Doe’s hostile environment claim did not experience the same fate.<sup>210</sup> Agreeing with the district court, the Third Circuit concluded that Doe’s hostile environment claim failed to be legally viable because it was time-barred.<sup>211</sup> Because Doe filed her claim on April 20, 2015, only her dismissal on April 20, 2013, and “Dr. Roe’s appearance at her April 24, 2013[,] appeal hearing” occurred within the claim’s statute of limitations period.<sup>212</sup> Consequently, the Third Circuit concluded that those two incidents did not satisfy the definition for hostile environment.<sup>213</sup> Furthermore, the Third Circuit refused to “invoke the continuing-violation doctrine” for this claim because it held that the two relevant incidents would have failed to establish a link showing a pattern of behavior that constituted a hostile environment.<sup>214</sup> Thus, the Third

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206. *Mercy Catholic Med. Ctr.*, 850 F.3d at 565 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)).

207. *Id.*

208. *Id.* Furthermore, when a plaintiff is “seeking damages for quid pro quo harassment,” he or she needs to “prove that an ‘official who at a minimum’ had ‘authority to address the alleged discrimination and to institute corrective measures’ . . . had ‘actual knowledge of discrimination in the recipient’s programs’ and failed adequately to respond.” *Id.* at 565–66 (quoting *Gebser v. Lago Vita Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (noting that “[a] response is inadequate if the officer failed to provide one or if she proved one amounting to deliberate indifference.”)).

209. *Id.* at 566.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*; see *supra* note 65 for a definition of hostile environment.

214. *Mercy Catholic Med. Ctr.*, 850 F.3d at 566; see *supra* note 142 for a discussion on the continuing violations doctrine and when it is applicable.

Circuit was forced to affirm the dismissal of Doe's hostile environment claim.<sup>215</sup>

### 3. The Fate of Doe's State-Law Claims

After dismissing all three of Doe's Title IX claims, the district court refused to exercise its discretion and extend supplemental jurisdiction over her three remaining state law claims, which subsequently resulted in their dismissal.<sup>216</sup> Though the district court had the authority to do so,<sup>217</sup> as it had already dismissed the Title IX claims it had original jurisdiction over, the Third Circuit moved to overturn the district court's dismissals.<sup>218</sup> By determining that Doe's Title IX retaliation and quid pro quo harassment claims were legally viable claims that must be examined by the district court, the Third Circuit consequently reversed the dismissal of Doe's "state law claims and remanded them" to the district court to be considered for the first time.<sup>219</sup>

## III. EVALUATION

### A. *Is Title IX preempted by Title VII and, thus, not applicable in Mercy Catholic Medical Center?*<sup>220</sup>

The Circuits are Split—Does Title VII Preempt Title IX?

During the late 1980s and into the 1990s, several federal circuit courts weighed in on whether Title VII preempts, and therefore discharges, Title IX claims in their respective jurisdictions.<sup>221</sup> For example, the Fifth and Seventh Circuits held that Title VII preempted Title IX because Title IX claims were deemed to not be independent of

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215. *Mercy Catholic Med. Ctr.*, 850 F.3d at 566.

216. *Id.* at 567.

217. *Id.* The district court's authority to take this course of action is found in 28 U.S.C. Section 1367(c)(3), which states that a district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3) (2012).

218. *Mercy Catholic Med. Ctr.*, 850 F.3d at 567.

219. *Id.*

220. To be preempted means that Congress, by passing a certain statute, has effectively "occupied [that] field," which makes any other statute inapplicable over that particular area. *Preemption Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/p/preemption/> (last visited Feb. 20, 2019).

221. See generally *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988).

Title VII.<sup>222</sup> In contrast, the First and Fourth Circuits came to the exact opposite conclusion and declared that Title IX is “not preempted by Title VII.”<sup>223</sup> Now, the Third Circuit, in *Mercy Catholic Medical Center*, brought the twenty-year circuit split back to life by “joining the opinion of the First and Fourth Circuits.”<sup>224</sup>

To comprehensively examine the divisive and revived circuit split, it is imperative to analyze each circuit’s decisions and respective reasoning. Beginning with the Fifth Circuit case of *Lakoski v. James*, the University of Texas Medical Branch was sued by the plaintiff, Professor Dr. Joan Lakoski, for violating Title IX.<sup>225</sup> Dr. Lakoski alleged that she experienced “intentional sex discrimination” after she was denied tenure and ultimately terminated from her “tenure-track assistant professor” position with the University’s Pharmacology Department.<sup>226</sup> After Dr. Lakoski appealed the district court’s dismissal of her Title IX claims, the Fifth Circuit affirmed the dismissal by finding that “Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”<sup>227</sup> Moreover, the Fifth Circuit qualified its holding by stating that it was limited “to individuals seeking money damages under Title IX.”<sup>228</sup>

The Fifth Circuit’s decision in *Lakoski* was governed by its finding that “Congress intended Title VII to exclude a damage remedy under Title IX for” those claiming sex-based discrimination in employment.<sup>229</sup> Because Title IX had been enacted such a short time after Title VII had been extended “to state and local governmental employees,” the Fifth Circuit found it unreasonable to conclude that Congress intended Title IX to be used as a “bypass of Title VII’s administrative procedures.”<sup>230</sup> Furthermore, the Fifth Circuit reasoned that Congress intended only to “bolster the enforcement of the pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions” when it

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222. John P. Barry & Edna D. Guerrasio, *Third Circuit Endorses Title IX and Title VII Claims of Medical Resident*, PROSKAUER (Mar. 21, 2017), <http://www.proskauer.com/publications/client-alert/third-circuit-recognizes-title-ix-and-title-vii-claims-of-medical-resident/>.

223. *Id.* (emphasis added).

224. *Id.*

225. *Lakoski*, 66 F.3d at 752.

226. *Id.* During trial, the plaintiff introduced evidence suggesting that when she was being evaluated for tenure and promotion, the University had “employed standards by which male faculty members were not judged.” *Id.* at 753.

227. *Id.*

228. *Id.*

229. *Id.* at 755.

230. *Id.* at 756.

passed Title IX.<sup>231</sup> Therefore, because the Fifth Circuit was convinced that allowing Title IX claims to proceed in such instances “would disrupt [Title VII’s] carefully balanced remedial scheme for redressing employment discrimination,” it was compelled to conclude that Title VII preempted Title IX claims and consequently dismissed Dr. Lakoski’s claim.<sup>232</sup>

Similarly, in *Waid v. Merrill Area Public Schools*, the Seventh Circuit joined the Fifth Circuit by holding that “Title VII preempted any of” the plaintiff’s equitable relief claims under Title IX.<sup>233</sup> In *Waid*, the plaintiff initially filed an employment discrimination claim under Wisconsin’s fair employment law, with a state agency, alleging that she had been “denied . . . the full-time position because of her sex.”<sup>234</sup> Even though the state agency had ruled in Waid’s favor and granted her the available state law remedies, she filed a Title IX suit in federal district court to obtain additional remedies.<sup>235</sup> After the district court effectively dismissed Waid’s Title IX claims by granting the defendant’s motion for summary judgment, Waid appealed to the Seventh Circuit.<sup>236</sup>

By essentially echoing the Fifth Circuit’s decision in *Lakoski*, the Seventh Circuit here held that Title VII was the “only way by which Waid could obtain . . . relief,” because “Title VII preempted any of Waid’s claims for equitable relief under . . . Title IX.”<sup>237</sup> Though Waid had not pursued any Title VII claims, the Seventh Circuit reasoned that by pursuing claims under Wisconsin law, she had effectively pursued “any claims that she might have had under Title VII.”<sup>238</sup> On the issue of preemption, the

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231. *Id.* at 757 (“[I]n enacting Title IX, Congress chose two remedies for the same right, not two rights addressing the same problem. Title VII provided *individuals* with administrative and judicial redress for employment discrimination, while Title IX empowered *federal agencies* that provided funds to educational institutions to terminate that funding upon the finding of employment discrimination.”).

232. *Id.* at 754, 758.

233. *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996), *abrogated by* *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009). Though *Waid*’s finding was abrogated by the U.S. Supreme Court in *Fitzgerald*, *Waid* remains a relevant case in terms of the Title VII-Title IX preemption circuit split.

234. *Id.* at 860. The state agency that the plaintiff filed with was the Equal Rights Division of Wisconsin’s Department of Industry, Labor, and Human Resources. *Id.*

235. *Id.* After finding that the defendant had discriminated against Waid because of her sex, the state agency ordered the defendant to “give Waid the next available position for which she was qualified and that it pay her the sum that she would have earned as a full-time teacher between the beginning of the 1991–1992 school year and the date of her eventual employment, plus . . . interest,” as well as to pay for Waid’s attorneys’ fees. *Id.* In her Title IX claim, Waid sought compensatory and punitive damages “for pain and suffering.” *Id.*

236. *Id.*

237. *Id.* at 862.

238. *Id.*

Seventh Circuit found that because Congress had created Title VII with “a comprehensive statutory scheme for protecting rights against discrimination in employment,” it is, therefore, “impliedly express[ed] . . . that this scheme should be” the “exclusive way to vindicate [this] right.”<sup>239</sup>

In stark contrast to the decisions held by the Fifth and Seventh Circuits, the First, Fourth, and now the Third Circuits have conclusively held that Title IX claims are not preempted by Title VII.<sup>240</sup> The First Circuit, in *Lipsett v. University of Puerto Rico*, was the first court to indicate that Title IX claims were independent of Title VII claims.<sup>241</sup> In *Lipsett*, the plaintiff, a former surgical resident in “the General Surgery Residency Training Program at the University of Puerto Rico School of Medicine,” filed a Title IX suit against the University and its agents claiming that “she was sexually harassed while in the Program and . . . dismissed from [it] because of her sex.”<sup>242</sup> Though Lipsett’s claim was initially dismissed after the defendant’s motion for summary judgment was granted, the First Circuit reversed the district court’s ruling after finding that Lipsett’s “claim of discriminatory treatment . . . g[a]ve rise to . . . a cause of action under Title IX” for quid pro quo sexual harassment, hostile work environment, and discriminatory discharge.<sup>243</sup>

Though not expressly charged with deciphering and ruling on the Title VII-Title IX preemption issue, the First Circuit clearly found that Title VII did not preempt the plaintiff’s Title IX claims.<sup>244</sup> Throughout its opinion, the First Circuit not only made it apparent that the plaintiff was legally permitted to bring Title IX claims, but it also made clear that her Title IX claims were shaped and governed by “Title VII case law and EEOC Guidelines.”<sup>245</sup> The First Circuit concluded that it had “no difficulty extending the Title VII standard to discriminatory treatment by a supervisor in [a] mixed employment-training context,” where the

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239. *Id.* at 861–62.

240. *See generally* *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 561–63 (3d Cir. 2017); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896–97 (1st Cir. 1988); Barry & Guerrasio, *supra* note 222.

241. Barry & Guerrasio, *supra* note 222.

242. *Lipsett*, 864 F.2d at 884. In this case, the plaintiff alleged that because “the predominant professional view of surgery as a medical field [was that it was] appropriate only for men,” she found it “difficult, and at times impossible . . . to gain acceptance and respect in the Program.” *Id.* at 886–87.

243. *Id.* at 896, 909–14.

244. *See id.* at 914–15.

245. *Id.* at 897.

plaintiff is “both an employee and a student,”<sup>246</sup> because it determined that such a standard “should apply to claims of sex discrimination arising under Title IX.”<sup>247</sup>

Comparably, in *Preston v. Commonwealth of Virginia ex rel. New River Community College*, the Fourth Circuit took a virtually identical stance, on the Title VII-Title IX issue, as the First Circuit did in *Lipsett*. In *Preston*, the plaintiff filed Title VII and Title IX claims against New River Community College.<sup>248</sup> In her claims, she alleged that the College had “retaliated against her for filing a claim of employment discrimination” with the EEOC and the Department of Education’s Office of Civil Rights in 1984.<sup>249</sup> *Preston* appealed to the Fourth Circuit after the jury, at the district court trial, concluded that she was not entitled to any relief, even though “the College . . . discriminated against [her],” because she would not have been awarded the position even if she had not been discriminated against.<sup>250</sup>

Similar to the First Circuit’s decision in *Lipsett*, it is evident that the Fourth Circuit did not find that Title VII preempted the plaintiff’s Title IX claims.<sup>251</sup> Throughout its opinion, the Fourth Circuit openly compared Title VII precedent to Title IX claims, which seemingly compelled it to declare that “Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX.”<sup>252</sup> Had the First or Fourth Circuits thought that the plaintiffs’ Title IX claims were preempted by Title VII, these circuits would not have (1) conducted such extensive analyses into the similarity between the statutes, nor would they have (2) ultimately concluded that VII standards are applicable to

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246. *Id.* In the context of Title IX and the *Mercy Catholic Medical Center* case, it is important to repeat that the judiciary has recognized medical residents to be “both an employee and a student.” *Id.* at 897. Such a status, therefore, permits a medical resident to file a Title IX suit against his or her residency program for sex discrimination that has proven to be detrimental to his or her medical education. See *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (2d Cir. 1980) (“In a Title IX suit, it is the deprivation of ‘educational’ benefits which, once proven, allows the courts to afford relief [because the] . . . loss of educational benefits is a significant injury, redressable by law.”).

247. See *Lipsett*, 864 F.2d at 897. Moreover, because “Title VII prohibits the identical conduct prohibited by Title IX,” the First Circuit ruled that Title VII is to be considered “the most appropriate analogue when defining Title IX’s substantive standards.” *Id.* at 896 (quoting *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987)).

248. *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 204 (4th Cir. 1994).

249. *Id.* at 204–05. The plaintiff claimed she was retaliated against for her filings by not being awarded “the position of activities counselor” after she had applied for it. *Id.* at 205.

250. *Id.* at 204–05.

251. *Id.* at 208.

252. *Id.* at 207.

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 495

the Title IX claims brought by each respective plaintiff. Therefore, it is evident that both the First and Fourth Circuits found that Title IX was its own independent claim and, thus, “not preempted by Title VII.”<sup>253</sup>

After over two decades of silence on this issue, the circuit split was revived in 2017 by the Third Circuit’s ruling in *Mercy Catholic Medical Center*.<sup>254</sup> Though the Third Circuit deemed the preemption issue to be a “matter of ‘policy’ [best] left for Congress,” it did ultimately side with the First and Fourth Circuits because it seriously questioned the continued viability of the Fifth and Seventh Circuits’ position on the matter of preemption.<sup>255</sup>

### 1. Case Law Reveals Title IX is *Not* Preempted by Title VII

Over the course of almost six decades, Congress has enacted “a variety of remedies, at times overlapping,” to eliminate the occurrence of employment discrimination.<sup>256</sup> Because of such acts by Congress, the courts have, in turn, been tasked with deciphering the appropriate applicability of each statute. A prominent example of this is the judiciary having to determine when Title VII and Title IX claims can be asserted. Although it is claimed that “whether Title VII preempts a Title IX claim to recover damages for employment discrimination” remains an unsettled question, case law from all levels of the judiciary conclusively demonstrates that Title IX is “not preempted by Title VII.”<sup>257</sup>

Beginning with the case of *Johnson v. Railway Express Agency, Inc.*, the U.S. Supreme Court was afforded its first opportunity to directly tackle Title VII’s seemingly too expansive scope.<sup>258</sup> In *Johnson*, after examining Title VII’s legislative history, the U.S. Supreme Court found that Congress intended Title VII to permit a plaintiff “to pursue independently *his rights under* both Title VII and *other applicable* state and *federal statutes*.”<sup>259</sup> Furthermore, the Court unequivocally declared

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253. Barry & Guerrasio, *supra* note 222.

254. *See id.*

255. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 562–63 (3d Cir. 2017). The Third Circuit was unable to side with the Fifth and Seventh Circuits because the Court found it be extremely problematic that “*Lakoski* and *Waid* were decided a decade before . . . *Jackson*, which explicitly recognized an employee’s private claim under *Cannon*.” *Id.* at 563.

256. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982).

257. *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756, 773 (M.D. Pa. 2016); Barry & Guerrasio, *supra* note 222.

258. *See* 421 U.S. 454, 459 (1975). Although *Johnson* dealt with whether Title VII preempted section 1981 claims, the U.S. Supreme Court’s analysis and subsequent narrowing of Title VII’s scope continues to remain relevant, particularly when analyzing Title VII in the context of whether it preempts Title IX claims. *Id.* at 461.

259. *Id.* (emphasis added) (internal quotations omitted) (quoting *Alexander v. Garner-Denver Co.* 415 U.S. 36, 48 (1974)).

that a plaintiff is “not deprived of other remedies he possesses and is not limited to Title VII” just because of “Title VII’s range and its . . . comprehensive solution for . . . invidious discrimination in employment.”<sup>260</sup>

After the U.S. Supreme Court essentially nullified any argument that Title VII could preempt other viable claims in *Johnson*, other U.S. Supreme Court precedent has been employed by courts to demonstrate that Title VII simply cannot preempt Title IX claims. In *Burton v. Board of Regents of the University of Wisconsin System*, the Court concluded that Title VII does not preclude a professor from bringing a Title IX retaliation claim because the U.S. Supreme Court, in *Jackson*, expressly allowed retaliation claims by school employees to be viable claims under Title IX.<sup>261</sup>

In addition, other courts have used a variety of reasons to demonstrate why Title VII cannot bar legally cognizable Title IX claims. For example, in *Winter v. Pennsylvania State University*, the court concluded that Title VII simply could not be “the exclusive remedy for gender-based employment discrimination claims.”<sup>262</sup> There, the court found that if Congress had wanted Title VII to preempt Title IX claims, then “it could have drafted Title IX, which was enacted *after* Title VII, to state as much.”<sup>263</sup> Ultimately, the court in *Winter* held that Congress intended for Title IX to serve “as an additional safeguard against gender-based discrimination in . . . federally funded education programs,” and that both Title IX and Title VII could provide remedies to victims of discrimination.<sup>264</sup>

The judiciary has also declared that Title VII is unable to preempt Title IX claims because these statutes can operate in completely different realms. For instance, in *Wilborn v. Southern Union State Community College*, the court concluded that Title VII could not preempt the

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260. *Id.*

261. *Burton v. Bd. of Regents of the U. of Wis. Sys.*, 171 F. Supp. 3d 830, 840 (W.D. Wis. 2016) (noting that plaintiff, a tenured associate professor, brought Title VII and Title IX claims alleging she had been subjected to retaliation after she had “advocated for a student who complained of sexual harassment at the hands of another [university] professor.”); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005).

262. *Winter*, 172 F. Supp. 3d at 775 (noting that former tenured male professor alleged he was subjected to sex discrimination in violation of Title IX before he was terminated).

263. *Id.* Additionally, even though Congress had two chances to discuss the issue of preemption, in the Civil Rights Remedies Equalization Act Amendment of 1986 and the Civil Rights Restoration Act of 1987, it decided to stay silent on the issue, which presumably implies that Congress had not thought Title IX should be, or was, preempted by Title VII. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 61 (1992).

264. *Winter*, 172 F. Supp. 3d at 775 (quoting *AB ex rel. CD v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 153 (S.D.N.Y. 2004)).



plaintiff's Title IX claims because her facts demonstrated that she experienced "discrimination with respect to her *education*, not her employment."<sup>265</sup> Since Title VII cannot be used to allege sex-based "discrimination that interferes with an individual's education," the *Wilborn* court reasoned that Title VII, therefore, could not be read as "preempting . . . a [Title IX] claim."<sup>266</sup>

As demonstrated by the case law above, the judiciary has seemingly resolved the preemption question by repeatedly holding that Title IX claims are simply "not preempted by Title VII", and, therefore, plaintiffs are permitted to bring a Title VII claim, a Title IX claim, or both when appropriate.<sup>267</sup>

## 2. Title IX's Language and Statutory Construction Demonstrates It is *Not* Preempted by Title VII

After Title IX protections were extended to instances of "employment discrimination in federally funded education programs,"<sup>268</sup> the judiciary became tasked with determining whether Title IX protections and remedies can be afforded in place of those granted under Title VII. To decide if Title IX is preempted by Title VII, and therefore not applicable, it is imperative to examine the language used in both statutes. After conducting such an analysis, it becomes noticeably apparent that Title IX's distinctive statutory construction serves as yet another reason why Title IX is not, and cannot be, "preempted by Title VII."<sup>269</sup>

Beginning with Title VII, Section 2000e-2(a)(1) states, "[i]t shall be an unlawful employment practice for an *employer*—to fail or refuse to hire or to discharge an individual, or otherwise discriminate against any individual . . . because of [his or her] . . . sex."<sup>270</sup> As a result of its narrow construction, Title VII names a specific actor—"an employer"<sup>271</sup>—and subsequently focuses on the actions of that actor in the context of

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265. 720 F. Supp. 2d 1274, 1283, 1304 (M.D. Ala. 2010) (noting that plaintiff, "the lone female participant" in a "Tractor-Trailer Truck Driver Program," brought both Title VII and Title IX suits alleging she had been subjected to sex discrimination, sexual harassment, and retaliation throughout the course of her participating in the program).

266. *Id.* at 1304.

267. Barry & Guerrasio, *supra* note 222.

268. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535–36 (1982).

269. Barry & Guerrasio, *supra* note 222.

270. 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

271. According to Title VII, an "employer" is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." § 2000e(b). Additionally, an "employee" is defined as "an individual employed by an employer." § 2000e(f).

employment.<sup>272</sup> Because it expressly specifies who the statute is to be enforced against—discriminating employers—Title VII’s scope is significantly more limited than Title IX’s. Therefore, Title VII can only be invoked when dealing with an employer engaging in or allowing sex-based discrimination to occur against employees or potential employees.

In stark contrast, the terms used in Title IX and the way in which they are used clearly demonstrate the broader nature of Title IX. Accordingly, section 1681(a) of Title IX states, “[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>273</sup> On its face, Title IX undeniably exhibits a more expansive reach than Title VII because it does not specifically name an actor “who must undertake the discrimination.”<sup>274</sup> Consequently, Title IX is principally concerned with “prohibit[ing] any person from being discriminated against, *however that happens*.”<sup>275</sup>

Title IX’s unique statutory construction, which has been labeled as constituting passive sentence structure,<sup>276</sup> has caught the eye of U.S. Supreme Court Justice, Justice Stevens.<sup>277</sup> In his dissent in *Gebser v. Lago Vista Independent School District*, Justice Stevens begins by noting “Title IX’s use of passive verbs [focuses] on the victim of the discrimination rather than the particular wrongdoer.”<sup>278</sup> To better ascertain the textual significance of Title IX’s use of passive verbs, Justice Stevens cites to and relies on Judge Rovner’s dissenting opinion from the Seventh Circuit, which reasoned that:

Title IX is drafted from the perspective of the person discriminated against. That statute names no actor, but using passive verbs, focuses on the setting in which the

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272. *See id.*

273. 20 U.S.C. § 1681(a) (2012) (emphasis added).

274. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER, 217, 241 (2005).

275. *Id.* (emphasis added).

276. Even though David S. Cohen describes Title IX as “speak[ing] in the passive voice” because the statute begins with “[n]o person,” such an interpretation is not entirely accurate as it misinterprets what qualifies as passive voice. *Id.* Instead, it is more accurate to state that Title IX possesses a passive sentence structure because, due to its placement in the statute, “[n]o person shall” cannot be acted on by the verb, which is how passive voice is defined and identified. *More About Passive Voice*, OWL PURDUE ONLINE WRITING LAB, <https://owl.english.purdue.edu/owl/resource/539/03/> (last visited Feb. 20, 2019).

277. Cohen, *supra* note 274, at 242.

278. *Id.* (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting)).

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 499

discrimination occurred. In effect, the statute asks but a single question—whether an individual was subjected to discrimination under a covered program or activity.<sup>279</sup>

Because of the statute’s passive sentence structure, the judiciary has interpreted Title IX to apply to a wide range of individuals in the applicable educational setting, including students (or subordinates), faculty, and employees/staff (or superiors).<sup>280</sup>

In addition to the conclusions drawn about Title IX’s applicability due to its passive sentence structure, it is critical to examine Congress’s strategic use of the sweeping term “person” in Title IX.<sup>281</sup> By using “person,” it can be inferred that Congress did not seek or intend to exclude any kind of individual, such as an employee, from the protections and remedies afforded under Title IX. Had Congress wanted to restrict the scope of Title IX, it “easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person,’” but it is significant that Congress failed to do so.<sup>282</sup> Moreover, it is also noteworthy that Congress could have but did not list “employees of educational institutions” as a specific exception to Title IX’s coverage.<sup>283</sup> Ultimately, Congress’s decision to word Title IX broadly by using the term “person” demonstrates that Title IX’s “beneficiaries plainly include *all* those . . . subjected to ‘discrimination’ ‘on the basis of sex’”<sup>284</sup> such as employees and students, and not just those “individuals who can’t bring Title VII claims.”<sup>285</sup>

Ultimately, after conducting an analysis of Title IX’s breadth, it is evident that Title IX is not, and cannot, be occupying the same “field” as Title VII.<sup>286</sup> Though it may seem like Title VII and Title IX occupy the same “field” because the statutes may overlap since both can apply to workplaces, employers and employees, such a shallow analysis fails to grasp Title IX’s broadly worded nature.<sup>287</sup> When enacting Title IX, Congress not only clearly found “federally funded education programs” to be distinct from all other environments for employment, but it also

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279. *Id.* (quoting *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting)).

280. *A Basic Guide to Title IX*, NAT’L WOMEN’S L. CTR. 2, <https://www.nwlc.org/wp-content/uploads/2015/08/ABasicGuidetoTitleIX.pdf> (last visited Feb. 28, 2018).

281. *Id.*

282. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

283. *Id.* at 521–22; see 20 U.S.C. § 1681 (a)(1)–(9) (2012), for the complete list of the exceptions to Title IX’s coverage.

284. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 n.3 (2005) (emphasis added).

285. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 563 (3d Cir. 2017) (citing to *Jackson*, 544 U.S. at 171).

286. *Preemption Law and Legal Definition*, *supra* note 220.

287. *Id.*

wanted to provide coverage to more than just employees since it used the all-encompassing term “person.”<sup>288</sup> It is undoubtedly clear that Title IX is broader and required to occupy a different “field” than Title VII, which, therefore, demonstrates that Title IX is “not preempted by Title VII.”<sup>289</sup>

*B. How to Define “Education” in Title IX Section 1681(a)*

As Title IX is “not preempted by Title VII,”<sup>290</sup> it is imperative to first understand how Title IX must be construed, in order to then grasp why Title IX applies to medical residency programs like the one seen in *Mercy Catholic Medical Center*. A fundamental component of Title IX is its focus on, and strict applicability to, “any education program[s] or activit[ies].”<sup>291</sup> However, despite its now obvious importance to the statutory interpretation and implementation of Title IX, the term “education” has not been defined by Congress in the past four decades.

Congress’s failure to define “education” in this statute is nothing short of puzzling, particularly given Congress’s willingness to define other important phrases within Title IX, such as “educational institution”<sup>292</sup> and “program or activity.”<sup>293</sup> For instance, an “educational institution,” is defined as “any institution of . . . higher education,” as well as “each . . . school, college, or department” in an administratively separated educational institution.<sup>294</sup> Meanwhile, “program or activity” means “all of the operations of . . . (2)(A) a college, university, or other post-secondary institution, or a public system of higher education.”<sup>295</sup> Although it is tempting to simply input the definitions for “educational institution” and “program or activity” to define “education,” doing so is strongly cautioned against as these terms are not interchangeable or equivalent, or else Congress would have noted so.

However, even though Congress has failed to define “education” in the Title IX context, the judiciary is not without any available recourse, as is evidenced by the courts taking the unsurprising step of attempting to define the term “education.”<sup>296</sup> For instance, in *Mercy Catholic Medical Center*, though the Third Circuit did not out define the term “education” outright, it did find that a program or activity can be deemed an

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288. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535–36 (1982).

289. *Preemption Law and Legal Definition*, *supra* note 220; Barry & Guerrasio, *supra* note 222.

290. Barry & Guerrasio, *supra* note 222.

291. 20 U.S.C. § 1681(a) (2012).

292. § 1681(c).

293. 20 U.S.C. § 1687 (2012).

294. § 1681(c).

295. § 1687.

296. § 1681(a); *see Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 556 (3d Cir. 2017).

“education program or activity” under Title IX if it possesses all, or a majority, of the following features: (1) it has an “educational” mission, (2) it has an “incrementally structured . . . course of study or training,” (3) it “provides instructors, exam[s], . . . grades, or accepts tuition,” (4) it permits “participants to earn a degree or diploma, [or] qualify for a certification,” and (5) “the entit[y] offering, [or] accrediting . . . [the] program hold[s] it out as educational in nature.”<sup>297</sup> The framework created by the Third Circuit to define “education program or activity”<sup>298</sup> not only seems reasonable and sensible, as it appears to be easily adjustable depending on the specifics of a program, but it also allows medical residency programs like Mercy’s to fall squarely into a Title IX “education program or activity.”

Despite the reasonable nature of the Third Circuit’s definition of “education program or activity,” it does not get to the root of the problem, which is that the term “education”<sup>299</sup> still remains largely undefined. Even though having to define the term “education” in Title IX seems simplistic and trivial, a consistent definition would provide the judiciary with a baseline foundation to work from when dealing with complex scenarios, such as the one in *Mercy Catholic Medical Center*.

To get to the root of the problem—defining “education” in Title IX—the judiciary must afford “[the term] its ‘ordinary meaning.’”<sup>300</sup> Accordingly, “[t]he ordinary meaning of education is very broad,” which grants the judiciary the opportunity to use greater discretion when defining “education.”<sup>301</sup> To afford “[the term] its ‘ordinary meaning,’” the

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297. § 1681(a); *Mercy Catholic Med. Ctr.*, 850 F.3d at 556, 558. Though the Third Circuit did not outright define the term “education,” the Court seemingly intertwined the dictionary definition of education into each part of its framework; essentially, each feature in the framework is built on the premise that students gain knowledge by participating in a formal and structured process of learning. Moreover, by fashioning its multi-part framework in the manner that it did, the Third Circuit essentially eliminated any possibility that a volunteer, such as a candy striper, at a hospital could bring a cognizable claim under Title IX because. Such individuals would simply be unable to show that they were participating in an “education program or activity” at the hospital because their volunteer work, which involves no significant educational component, is not comparable to a structured education program, where the participants are constantly gaining knowledge through coursework and clinical work, like a medical residency program. § 1681(a).

298. *Mercy Catholic Med. Ctr.*, 850 F.3d at 556, 558.

299. § 1681(a).

300. *Id.*; *Mercy Catholic Med. Ctr.*, 850 F.3d at 556 (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012)).

301. *Roubideaux v. N. Dakota Dep’t of Corr. & Rehab.*, 570 F.3d 966, 977 (8th Cir. 2009). However, despite “education” possessing an ordinary meaning that is rather broad, “by . . . including th[is] word . . . Congress signified that Title IX has *some* boundary.” *Mercy Catholic Med. Ctr.*, 850 F.3d at 556. Thus, “education” should not be read as “encompass[ing] every experience of life.” *Id.* at 555–56 (quoting *Roubideaux*, 570 F.3d at 977). However, the judiciary must be mindful of a finite number of programs that have been

judiciary must, therefore, employ the common understanding of “education” in its definition, which usually compels courts to adopt the word’s dictionary definition.<sup>302</sup> According to Webster’s New World Dictionary, education is defined as “the process of training and developing the knowledge, skill, mind, character, etc., esp[ecially] by formal schooling; teaching; training.”<sup>303</sup> By using the dictionary definition of education in the Title IX context, courts would be able to define “education” in a consistent manner, albeit modifying the definition depending on the kind of education program at issue in a particular case.

Next, to insulate the definition of “education” from challenges, it is imperative for the judiciary to ensure that the definition aligns with Title IX’s legislative history. Though Title IX’s legislative history does not explain why Congress left “education” undefined, it does shed light as to how to limit Title IX to education.<sup>304</sup> More specifically, the 1988 Senate Report for the Civil Rights Restoration Act (“CRRA”) features the following hypothetical that depicts how Title IX’s “program or activity”<sup>305</sup> coverage “will be limited to education:”

If a private hospital corporation is extended federal assistance for its emergency rooms, all the operations of the hospital, including for example, the operating rooms, the pediatrics department, admissions, discharge offices, etc. are covered by Title VI . . . . Since Title IX is limited to education programs or activities, it would apply only to the students and employees [or faculty] of education programs operated by the hospital, if any.<sup>306</sup>

While the hypothetical does not explicitly define “education,” it does demonstrate that Congress expressly intended Title IX’s protections to reach both “students and employees” of a hospital’s education programs.<sup>307</sup>

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exempted by Congress from Title IX. *Id.* at 555. For example, “military academies, religious schools, and sororities” have been “exempted . . . from Title IX’s reach.” *Id.*; see 20 U.S.C. § 1681(a) (2012), for a more detailed list of exempted programs.

302. *Mercy Catholic Med. Ctr.*, 850 F.3d at 556 (quoting *Taniguchi*, 566 U.S. at 566).

303. *Id.* (quoting WEBSTER’S NEW WORLD DICTIONARY 444 (2d ed. 1970)).

304. See *Title IX Legal Manual*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/title-ix#III.%C2%A0%20Scope%20of%20Coverage> (last visited Feb. 20, 2019). Because both Title IX and the Civil Rights Restoration Act were “designed to eradicate sex-based discrimination in education programs operated by recipients of federal financial assistance . . . all determinations as to the scope of coverage under these statutes must be made in a manner consistent with this important congressional mandate.” *Id.*

305. § 1681(a). The CRRA’s definition of “program or activity” was adopted into section 1687 of Title IX. § 1687.

306. *Title IX Legal Manual*, *supra* note 304 (quoting S. REP. NO. 100-64, at 17 (1988)).

307. See *id.*

Therefore, by combining the legislative history of the CRRRA—an Act passed to strengthen Title IX—with the dictionary definition of education, the judiciary is provided with a reasonable, and adaptable, definition of “education” as it appears in Title IX. Though the Third Circuit’s approach was not completely inappropriate, had it defined “education” using its dictionary definition, the framework it created to identify when a program is an “education program or activity” under Title IX would have been more sound, as Mercy’s medical residency program falls squarely into the dictionary definition of education.<sup>308</sup> Ultimately, by first establishing a robust and consistent definition of “education,” supported by legislative history and a dictionary definition, courts will more easily be able to conduct the “fact-specific inquir[ies necessary to] . . . determine” which programs are “covered by Title IX.”<sup>309</sup>

*C. What Does “Federal Financial Assistance” Mean?*

After demonstrating that a program or activity is an “education program or activity,” the last step in the Title IX analysis is whether that program or activity received “Federal financial assistance” at the time the alleged discriminatory acts occurred.<sup>310</sup> Despite being an integral part of the analysis into Title IX’s applicability, the Third Circuit did not rule on whether Mercy received “Federal financial assistance.”<sup>311</sup> Instead, because Mercy failed to argue that it did not receive “Federal financial assistance” under Title IX at the district court level, the Third Circuit assumed the hospital received “Federal financial assistance” and remanded this issue to the district court.<sup>312</sup>

While the Third Circuit took the appropriate course of action by remanding the issue of whether Mercy received “Federal financial assistance,”<sup>313</sup> it is necessary to resolve this remaining issue to determine whether Mercy’s medical residency program can be reached by Title IX. First, to determine whether a program or activity received “Federal financial assistance” at the time the alleged discriminatory acts occurred, the “entire entity or whole organization” must be examined.<sup>314</sup> “Federal

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308. § 1681(a).

309. *Title IX Legal Manual*, *supra* note 304.

310. *See* § 1681(a); *Title IX Legal Manual*, *supra* note 304.

311. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 558 (3d Cir. 2017).

312. *Mercy Catholic Med. Ctr.*, 850 F.3d at 558. The Third Circuit’s course of action follows legal precedent because it is well established that, “[t]heories not raised squarely [at the district court] cannot be surfaced for the first time on appeal.” *Id.* (citing *Lesende v. Borrero*, 752 F.3d 324, 333 (3d Cir. 2014)).

313. 20 U.S.C. § 1682 (2012); *Mercy Catholic Med. Ctr.*, 850 F.3d at 558.

314. § 1682; *Mercy Catholic Med. Ctr.*, 850 F.3d at 557 (citing §§ 1681(a), 1687); *Title IX Legal Manual*, *supra* note 304.

financial assistance” must typically be received “directly,” though such assistance can also be received indirectly through the “award or grant of” federal financial aid to students, who then use those federal funds to pay their tuition.<sup>315</sup> Additionally, an entity can be deemed to have received such assistance even if it did “not show a ‘financial gain, in the sense of a net increment in its assets.’”<sup>316</sup>

On appeal, Mercy argued that it did not receive “Federal financial assistance”, and thus Title IX could not be applied to it, because Medicare payments are only “contracts of insurance” and therefore do not qualify as federal financial assistance.<sup>317</sup> Mercy likely put forth this argument because it is widely known that “Title IX specifically . . . does not apply to contracts of insurance.”<sup>318</sup> However, even though Medicare is in its purest form a type of insurance, in the present context, Medicare funds do qualify as “federal financial assistance.”<sup>319</sup>

Medicare funds are a type of “[f]ederal financial assistance” because Medicare is the “largest single program providing explicit support,” by covering both direct and indirect costs, “for graduate medical education.”<sup>320</sup> More specifically, this form of “Federal financial assistance” is known as Medicare DGME funding and is available to “[e]very hospital that trains residents in an approved residency program,” like the programs housed at Mercy.<sup>321</sup> Medicare DGME funding, which is also known as a Medicare training subsidy, comes in the following two parts:

The first is officially for the “direct” costs of training new doctors (like their salaries, benefits, and teaching costs). The second, larger part is officially supposed to pay for the “indirect” costs

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315. § 1682; *Title IX Legal Manual*, *supra* note 304 (“Federal financial assistance” can also come in the form of “nonmonetary” assistance, however, such assistance must be scrutinized before it is determined to indeed be “federal financial assistance.”).

316. § 1682; *Title IX Legal Manual*, *supra* note 304.

317. § 1682; *Mercy Catholic Med. Ctr.*, 850 F.3d at 558.

318. *Title IX Legal Manual*, *supra* note 304 (citing § 1682).

319. § 1682; *Medicare Benefits*, SOC. SECURITY ADMIN., <https://www.ssa.gov/medicare/> (last visited Oct. 16, 2018).

320. 20 U.S.C. § 1681(a) (2012); ASS’N OF AM. MED. COLLEGES., MEDICARE PAYMENTS FOR GRADUATE MEDICAL EDUCATION: WHAT EVERY MEDICAL STUDENT, RESIDENT, AND ADVISOR NEEDS TO KNOW 2 (2013), <https://members.aamc.org/eweb/upload/Medicare%20Payments%20for%20Graduate%20Medical%20Education%202013.pdf> [hereinafter MEDICARE PAYMENTS FOR GRADUATE MEDICAL EDUCATION].

321. § 1681(a); MEDICARE PAYMENTS FOR GRADUATE MEDICAL EDUCATION, *supra* note 320, at 4. For more information regarding Mercy Catholic Medical Center’s ACGME accreditation, and, thus, its subsequent qualification for Medicare DGME funding, see *Mercy Catholic Med. Ctr.*, 850 F.3d at 550.



that hospitals and health care centers incur because trainees are expected to be slow, inefficient, and otherwise generally increase the cost of care.<sup>322</sup>

It is, therefore, evident that Medicare funds are a kind of “federal financial assistance” received by medical residency programs as such funds are made largely available for the payment of “scholarships, loans, grants, or wages” to those enrolled at such residency programs.<sup>323</sup> If a medical residency program is able to prove that it does not receive Medicare funds in the form of Medicare DGME funding, then it may have a more persuasive case in demonstrating that it does not receive “federal financial assistance.”<sup>324</sup> Because Mercy has demonstrated that it in fact did receive Medicare funds at the time of the alleged discrimination, it is likely that on remand the district court will find that this prong of the Title IX analysis is successfully satisfied.<sup>325</sup>

#### IV. CONCLUSION

*Doe v. Mercy Catholic Medical Center* must be recognized as a significant case in Title IX jurisprudence for two principal reasons. First, not only did the Third Circuit’s opinion prompt the revival of a twenty-year circuit split, but the Third Circuit also effectively dismantled the formerly even split on the issue by joining the First and Fourth Circuits in holding that Title VII does *not* preempt Title IX claims.<sup>326</sup> Second, the Third Circuit extended Title IX’s coverage over federally funded medical residency programs, which undeniably qualify as “education program[s] or activit[ies]” under Title IX.<sup>327</sup>

As demonstrated by the Third Circuit’s opinion, allowing medical residents to file Title IX claims against their residency programs in response to enduring sexual harassment or discrimination during residency, is a *legally sound* form of relief. Furthermore, in a broader sense, it is also *right* and *just*, as it provides victims with an additional tool to use in the fight against sex-based discrimination in residency

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322. Catherine Rampell, *How Medicare Subsidizes Doctor Training*, N.Y. TIMES (Dec. 17, 2003, 10:00 AM), <https://economix.blogs.nytimes.com/2013/12/17/how-medicare-subsidizes-doctor-training/>. Typically, Medicare training subsidies “for graduate medical educational total about \$10.1 billion annually, [which is] an average of \$112, 642 per resident.” *Id.*

323. *Title IX Legal Manual*, *supra* note 304; § 1681(a).

324. § 1681(a).

325. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 558 (3d Cir. 2017).

326. Barry & Guerrasio, *supra* note 222.

327. *Mercy Catholic Med. Ctr.*, 850 F.3d at 555–58; § 1681(a).

programs. Had the Third Circuit ruled that either Title IX claims were “preempted by Title VII”<sup>328</sup> or that medical residency programs did not qualify as “education program[s] or activit[ies]” under Title IX,<sup>329</sup> medical residents seeking relief, such as Doe, would only have two options: (1) silence or (2) file a Title VII claim with the EEOC or a state agency.<sup>330</sup> But, confining victims of sex discrimination to Title VII as their sole form of actionable relief, would only be beneficial for those who have suffered such incidents of discrimination within the most recent 180 days and have the courage to report it.<sup>331</sup> As the #MeToo movement has shown, victims of sexual harassment and discrimination rarely break their silence even years after the incident,<sup>332</sup> so a 180-day window is simply too short and unrealistic. Instead, by affording plaintiffs the ability to file Title IX suits, which typically possess a two-year statute of limitations period—the period may be extended to cover incidents occurring over two years prior to the filing of a suit if the continuing violations doctrine applies—Title IX grants victims more time, which may give them the courage to pursue legal claims against their alleged harassers.

Ultimately, *Doe v. Mercy Catholic Medical Center* is about more than just providing justice to one former medical resident. As shown by the #MeToo movement, more victims may come out of the shadows with legally viable Title IX claims and, if timely, should not be prohibited from seeking justice for the harassment they endured in their residency programs.<sup>333</sup> The time to act and confront sexual harassment and discrimination in qualifying Title IX education programs, including medical residency programs,<sup>334</sup> is *now*. The U.S. Supreme Court must

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328. Barry & Guerrasio, *supra* note 222.

329. § 1681(a).

330. Ruth, *supra* note 28, at 188–89.

331. *Time Limits for Filing a Charge*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Feb. 20, 2019).

332. *See* Schmidt, *supra* note 5.

333. *Id.*

334. As recently as February 27, 2018, a case involving a medical resident who filed Title VII and Title IX claims against her residency program was decided by the District Court for the Eastern District of Texas. *Slabisak v. U. of Tex. Health Sci. Ctr. at Tyler & Good Shepherd Med. Ctr.*, Civ. Action No. 4:17-CV-597, 2018 U.S. Dist. LEXIS 30884, at \*1 (E.D. Tex. Feb. 27, 2018). In *Slabisak*, the plaintiff alleged that she had been “subjected to a hostile . . . environment” in violation of Title IX because she “experienced continuous verbal, physical, and sexual harassment by . . . her supervising resident.” *Id.* at 1–2. Moreover, after the plaintiff reported these incidents to her residency program director and the Human Resources department, she was “suspended . . . indefinitely from the residency program.” *Id.* at \*2. Unsurprisingly, because this district court is in the Fifth Circuit’s jurisdiction, *Slabisak*’s Title IX claim was dismissed because the Fifth Circuit had previously held in *Lowery v. Texas A & M U. Sys.*, 117 F.3d 242 (5th Cir. 1997), that “Title VII ‘preempts a private right of action for employment discrimination under Title IX.’”

2018] *DOE V. MERCY CATHOLIC MEDICAL CENTER* 507

step in to end this circuit split and afford all victims of sexual harassment and discrimination in qualifying medical residency programs the right to bring suit under Title IX.<sup>335</sup>

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Slabisak, 2018 U.S. Dist. LEXIS 30884, at \*6 (quoting *Lowery*, 117 F.3d at 248 (emphasis omitted)). The result in *Slabisak* demonstrates the need for the U.S. Supreme Court to finally resolve the Title VII-Title IX preemption issue because it is inherently unjust for a medical resident in one part of the country, such as Slabisak, to have her Title IX claims be preempted and dismissed, while a medical resident, such as Doe, from a different part of the country is not preempted and is instead granted the opportunity to plead her Title IX claims. Such inherently unjust practices within the judiciary must be resolved promptly by the U.S. Supreme Court.

335. See *Supreme Court Criteria*, GOLDSTEIN & RUSSELL, P.C., <http://www.goldsteinrussell.com/pro-bono/supreme-court-criteria/> (last visited Feb. 20, 2019).