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## Rethinking Religious Exemptions from Title IX After Obergefell

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# RETHINKING RELIGIOUS EXEMPTIONS FROM TITLE IX AFTER OBERGEFELL

## I. INTRODUCTION

Ever since same-sex marriage was legalized nationally in the United States in *Obergefell v. Hodges*, the media has drawn attention to a related issue facing the LGBT community: discrimination in higher education.<sup>1</sup> Educational institutions that receive federal aid, or admit students who receive federal aid, are required to comply with Title IX, a federal statute that prohibits sex discrimination.<sup>2</sup> In recent years, case law has included “sexual orientation” and “gender identity” in the definition of “sex” under Title IX, and therefore under the umbrella of Title IX protections.<sup>3</sup>

Title IX exempts religious educational institutions from compliance with all of its requirements to protect First Amendment rights.<sup>4</sup> This religious exemption means that religious educational institutions are legally permitted to discriminate based on sex (now including sexual orientation and gender identity). However, the actual process of granting and applying religious exemptions, based on current Title IX law, is complicated and uncertain. This has led many to ask if the current system for religious exemptions from Title IX is actually working effectively at protecting the rights of all people, including those who identify as part of the LGBT community.<sup>5</sup>

This Note explores the current laws and procedures for

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<sup>1</sup> Sarah Warbelow & Remington Gregg, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, HUMAN RIGHTS CAMPAIGN (Dec. 2015), [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Title\\_IX\\_Exemptions\\_Report.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Title_IX_Exemptions_Report.pdf).

<sup>2</sup> 20 U.S.C. § 1681 *et seq.*

<sup>3</sup> *Title IX Protections from Bullying and Harassment in Schools: FAQs for LGBT or Gender Nonconforming Students and Their Families*, NATIONAL WOMEN'S LAW CENTER (Oct. 2012), [https://nwlc.org/wp-content/uploads/2015/08/lgbt\\_bullying\\_title\\_ix\\_fact\\_sheet.pdf](https://nwlc.org/wp-content/uploads/2015/08/lgbt_bullying_title_ix_fact_sheet.pdf).

<sup>4</sup> 20 U.S.C. § 1687.

<sup>5</sup> Warbelow & Gregg, *supra* note 1.

granting religious exemptions under Title IX and evaluates 1) whether they are working effectively and 2) if not, how they could be improved to protect the rights of both religious groups and LGBT students. Part II lays out the current law and guidelines which specify how to obtain religious exemptions, the application of these guidelines over time, and how they have been applied to sexual orientation specifically. Part III examines similar types of legislation that have attempted to forge a compromise between religious freedoms and protections for LGBT individuals, including language from the Employment Non-Discrimination Act (“ENDA”), the so-called “Utah Compromise,” and anti-discrimination statutes in California. Part IV compares the Title IX regulations explained in Part II to the language in the employment discrimination statutes described in Part III, in order to 1) identify problems within the system for granting religious exemptions to educational institutions and to 2) propose solutions to these problems by drawing upon other proposed and enacted statutes which balanced protections for both religious and LGBT communities.

## II. TITLE IX REGULATIONS FOR RELIGIOUS EXEMPTIONS

Congress passed Title IX in 1972 as part of the Higher Education Amendments to prevent sex discrimination in higher education in the United States.<sup>6</sup> First, this Part will explore the actual language of Title IX, including both the statutory language prohibiting sex discrimination and the “unpublished” language that explains which schools are entitled to a religious exemption from Title IX and how they may obtain said exemption. Then it will describe how this language has been received over time and how it has impacted the granting of religious exemptions. Finally, it will investigate how these religious exemptions are actually granted today, especially in the context of sexual orientation.

### A. *Title IX Language*

Title IX explicitly states that no person shall be subjected to any form of discrimination on the basis of sex “under any education program or activity receiving Federal financial

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<sup>6</sup> 20 U.S.C. § 1681 *et seq.*

assistance.”<sup>7</sup> The statute also outlines an exception to this clause: an educational institution is exempt when 1) it is “controlled by a religious organization,” and 2) prohibiting sex discrimination “would not be consistent with the religious tenets of such [controlling] organization.”<sup>8</sup>

To determine when an educational institution is “controlled by a religious organization” for the purpose of the exemption, the government agency charged with Title IX enforcement—the Office for Civil Rights (“OCR”)—developed a “control test” for internal use by OCR employees.<sup>9</sup> Note that a religious educational institution need meet only one of these requirements to be considered to have a controlling religious organization. The test states that an educational institution is considered to be controlled by a religious organization when 1) it is a “school or department of divinity,” 2) it “requires its faculty, students or employees to be members of or otherwise espouse a personal belief in, the religion of the [controlling] organization,” or 3) its “charter . . . contains explicit statements that it is controlled by a religious organization” or it is “committed to the doctrines of a particular religion, the members of its governing body are appointed by the controlling religious organization, and it receives a significant amount of financial support from the controlling religious organization.”<sup>10</sup> Note that a religious educational institution need meet only one of these requirements to be considered to have a controlling religious organization.

This test originated in 1977 and has remained an internal policy.<sup>11</sup> Additionally, OCR employees who worked with religious exemptions and Title IX were instructed not to contact the purported controlling organizations because this would be considered “too obtrusive” in gathering information (most likely in response to First Amendment complaints).<sup>12</sup> OCR treated the control test as a guideline rather than an

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<sup>7</sup> 20 U.S.C. § 1681(a).

<sup>8</sup> 20 U.S.C. § 1681(a)(3).

<sup>9</sup> Assurance of Compliance with Title IX of Education Amendments of 1972, 42 Fed. Reg. 15,141, 15,142–43 (Mar. 18, 1977), <https://cdn.loc.gov/service/ll/fedreg/fr042/fr042053/fr042053.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 KAN. L. REV. 327, 371–74 (2016).

actual rule.<sup>13</sup>

An internal OCR policy set forth a procedure by which an educational institution could claim an exemption, stating that it 1) “shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution” in which it 2) identifies the specific provisions of Title IX which “conflict with a specific tenet of the [controlling] religious organization.”<sup>14</sup> Note that this policy specifically uses the word “claim” rather than the words “apply for,” as well as the fact that the educational institution must specifically identify which aspect of Title IX (“sex,” i.e. pregnancy status, sexual orientation, etc.) conflicts with a specific tenet of the institution’s controlling religious organization.

### *B. History and Criticism of Title IX Regulations*

The actual procedure for granting exemptions differs greatly from what one might intuit from the statutory language. First, the historical application of the religious exemption’s language suggests that there is some ambiguity as to whether a religious educational institution is entitled to an exemption simply by virtue of being a religious educational institution (i.e. the exemption is self-executed), or whether it is a constitutional right of OCR to require an application or proof of claim prior to recognizing a religious exemption. Second, a controlling organization is not really required. Third, an explanation of a conflict between specific Title IX provisions and specific tenets of the controlling religious organization is not really required, nor is there any investigation into the sincerity of the particular tenets put forth by the educational institution.

There has been a long-standing battle between religious educational institutions and OCR over the constitutionality of the regulations and guidelines controlling religious exemptions from Title IX requirements. As early as 1975, the American Association of Presidents of Independent Colleges and Universities (“AAPICU”) and the U.S. Catholic Conference claimed that having to apply for an exemption and be

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<sup>13</sup> *Id.*

<sup>14</sup> Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,139 (June 4, 1975).

evaluated by the government for eligibility was a violation of the First Amendment on grounds of excessive government entanglement with religion.<sup>15</sup> The AAPICU suggested OCR withdraw its Title IX claim procedure altogether and remove any requirement that a religious institution must claim an exemption or otherwise contact the government.<sup>16</sup> The U.S. Catholic Conference suggested a similar, less radical, proposal: a self-certification procedure, in which the educational institutions simply notify OCR that they would be claiming a religious exemption from all or part of Title IX.<sup>17</sup>

OCR essentially adopted the U.S. Catholic Conference's self-certification suggestion from this point forward, though not formally. Over two hundred claims were submitted to OCR by various religious institutions over the next ten years, but OCR did not respond to any of them.<sup>18</sup> Then, in 1985, OCR took on the massive task of responding to all of these claims within the next nine months.<sup>19</sup> Regional offices were instructed to use a highly deferential standard of review, to the point that OCR did not deny a single religious exemption request, and OCR made little effort to review claims.<sup>20</sup>

Although religious exemptions have been controversial and contested even by the educational institutions themselves, very few students or employees have challenged an educational institution's eligibility for a Title IX exemption. One of the exceptions is *Petruska v. Gannon University*, where a female who was formerly a chaplain at a Catholic university claimed that she was demoted and discharged because of her sex.<sup>21</sup> She had originally filed a claim under Title VII, and then amended

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<sup>15</sup> *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Labor*, 94th Cong., 1st Sess. 409 (1975); *Review of Regulations to Implement Title IX of Public Law 92-138 Conducted Pursuant to Sec. 431 of the General Education Provisions Act*, 228 et seq, 588-91 (U.S. GPO, Washington, 1975).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Ernest L. Wilkinson, Leonard J. Arrington & Bruce C. Hafen, *Brigham Young University: The First One Hundred Years* 309-10 (vol. 4, 1976).

<sup>19</sup> *Id.*

<sup>20</sup> Augustine-Adams, *supra* note 12.

<sup>21</sup> Amanda Bryk, *Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX*, 37 CARDOZO L. REV. 751, 778-79 (2015); *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006).

to include a Title IX claim as well.<sup>22</sup> The district court held that her claim was barred by the “ministerial exception” under the First Amendment.<sup>23</sup> In order for courts to determine whether an employee qualifies for a ministerial exception, the court must use a “totality of the circumstances” analysis, based primarily on the individual’s job description and function.<sup>24</sup> So while she might have had a valid claim under Title IX had it been a different position of employment or had she been a student, the court held that because the position in question was a ministerial position, and because the ministerial exception extended beyond the reach of Title VII to also apply to Title IX—because it is a broad right guaranteed under the First Amendment—she did not have a valid claim in this particular case. This case demonstrates that 1) the ministerial exception applies to Title IX, and 2) a religious educational institution may receive a religious exemption to Title IX *after* a discrimination suit is filed.

In fact, there are multiple examples of religious educational institutions claiming a religious exemption after a Title IX claim has already been brought against them.<sup>25</sup> At George Fox University (“GFU”), a Quaker institution, a transgender student brought a Title IX claim against the university for refusing to allow him to live in the all-male dormitory on campus.<sup>26</sup> After receiving this claim, GFU applied to OCR for a religious exemption based on a conflict between accommodating transgender students and its religious tenets and received an exemption for its policies pertaining to campus housing, restrooms, locker rooms, and athletics.<sup>27</sup> This is not to say that a case could not be successful if brought against a religious educational institution for violation of Title IX prior to the school claiming a religious exemption, but this sort of challenge has not yet occurred. Thus far, in all Title IX cases involving religious exemptions, the courts have presumed that a religious exemption is automatically granted if the institution

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<sup>22</sup> *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006).

<sup>23</sup> *Id.*

<sup>24</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 172 (2012).

<sup>25</sup> See Letter from Thomas E. Cortis, President, Samford University to Assistant Sec’y, Dep’t of Educ., c/o Mr. Archie B. Meyer, Sr., Regional Civil Rights Dir., Office for Civil Rights, Dep’t of Educ. (Apr. 29, 1992).

<sup>26</sup> Bryk, *supra* note 21, at 755.

<sup>27</sup> *Id.*

meets the requirements, regardless of whether it has claimed or applied for an exemption.

### *C. Application of Title IX*

Perhaps even more important than understanding the objections to religious exemptions under Title IX is understanding how the language itself has been consistently applied to educational institutions over time. Not a single educational institution has ever been denied a religious exemption from Title IX.<sup>28</sup> There have been requests for more information, a lack of response, and withdrawn applications; but, never has OCR contacted an educational institution to inform it that it did not meet the requirements for a religious exemption.<sup>29</sup> As mentioned above, there are two major requirements that an educational institution must fulfill according to OCR's policy language: passing the control test and providing the specific religious tenets which conflict with the specific Title IX regulations.<sup>30</sup>

The control test has been applied very loosely. For example, between 1975 and 1977, fifty-three Orthodox Jewish educational institutions claimed the exemption, but did not list a controlling organization in their claim.<sup>31</sup> In simply stating that they were religious institutions, OCR recognized each of the fifty-three claims.<sup>32</sup> Similarly, in 1985, an un-affiliated Christian school, Berea College, claimed its Board of Trustees as its controlling religious organization. OCR agreed and granted the religious exemption.<sup>33</sup> In fact, many Christian schools did not identify a particular controlling religious organization, using instead their Board of Directors or Board of Trustees, statement of faith, or other type of justification to receive their exemption.<sup>34</sup> When schools explicitly stated that they did not have a controlling religious organization, OCR

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<sup>28</sup> Warbelow & Gregg, *supra* note 1.

<sup>29</sup> Augustine-Adams, *supra* note 12, at 374–75.

<sup>30</sup> See *supra* part II.A.

<sup>31</sup> *Id.* at 368–69.

<sup>32</sup> *Id.*

<sup>33</sup> Letter from Harry M. Singleton, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ., to John B. Stephenson, President, Berea Coll. 1 (Sept. 3, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/berea-college-response-09031985.pdf>.

<sup>34</sup> Augustine-Adams, *supra* note 12, at 369.

sought additional information to essentially posit a controlling religious organization.<sup>35</sup> Interestingly, OCR began using the words “grant” and “request” with increasing frequency beginning in 1975.<sup>36</sup>

Second, the requirement of identifying specific religious tenets which conflict with Title IX has also been ignored in many circumstances. The Orthodox Jewish schools mentioned above were vague about what their religious tenets were and how they conflicted with Title IX. The schools also claimed that the First Amendment excused them from having to meet any of the requirements set by OCR.<sup>37</sup> The OCR then provided them with an exemption.<sup>38</sup>

Similarly, Spring Arbor University, affiliated with the Free Methodist Church, relied on its mission statement rather than on Bible verses—a common practice among other religious universities—to show that accommodation of transgender students was inconsistent with the university’s religious tenets.<sup>39</sup> Again, OCR granted the religious exemption.<sup>40</sup> Additionally, OCR never inquired into the sincerity of religious beliefs or whether they are actually practiced by the controlling religious organization (or claimed religious affiliate).<sup>41</sup> While in theory the government may examine the sincerity with which claimants hold to their religious beliefs (in determining whether an educational institution is eligible for a religious Title IX exemption), some suggest this is not really possible in practice.<sup>42</sup> Additionally, OCR had received many past complaints about infringing upon First Amendment rights with its claim procedure, and likely was wary about doing anything

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<sup>35</sup> See Letter from Harry M. Singleton, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., to James A. Fischer, President, Kenrick Seminary 1 (Aug. 1, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/kenrick-seminary-response-08011985.pdf>.

<sup>36</sup> Letter from William S. Barker, President, Covenant Theological Seminary to Harry M. Singleton, Assistant Sec’y for Civil Rights 3 (Feb. 23, 1983).

<sup>37</sup> Memorandum re Title IX Religious Exemptions from Harry M. Singleton, Assistant Sec’y for Civil Rights, Dep’t of Educ. to Reg’l Dirs., Regions I–X, Office for Civil Rights, U.S. Dep’t of Educ. (Aug. 2, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850802.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> Bryk, *supra* note 21, at 781.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 778.

<sup>42</sup> See Frederick Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA, 85 GEO. WASH. L. REV. 94–151 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657733](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657733).

that might cause more backlash from religious groups and educational institutions.<sup>43</sup>

In the history of the application of the Title IX religious exemption, there are inconsistent opinions about the need to apply for or a right to claim a religious exemption, a general lack of investigation into the existence of a controlling religious organization, and a consistent ignorance on the part of OCR as to which specific tenets religious schools claim conflict with which Title IX regulations. This is a somewhat short history, because Title IX was passed in 1972, but its importance continues to increase as LGBT issues come to the forefront of the public eye.

#### *D. Application of Title IX to Sexual Orientation Discrimination*

As mentioned above, the definition of “sex” in the context of Title IX has been broadened to include discrimination on the basis of pregnancy status, abortion, sexual orientation, gender identity, and others.<sup>44</sup> Sexual orientation was officially included as part of the definition of “sex” under Title IX less than a year ago, based on a ruling in a California District Court in *Videckis v. Pepperdine University*, when two lesbian students who were dismissed from the basketball team and university sued under Title IX.<sup>45</sup> Leading up to and after the landmark *Obergefell* decision, there has been a sharp increase in requests by religious educational institutions for exemptions from the Title IX protections based on sexual orientation and gender identity.<sup>46</sup> In fact, for a span of ten years between 2003 and 2013, there was an average of only one claim for a religious exemption per year.<sup>47</sup> That number spiked in 2013, with fifty-seven claims in a span of two years, starting with the Arcadia School District’s request based on a complaint by a transgender

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<sup>43</sup> *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Labor*, 94th Cong., 1st Sess. 409 (1975).

<sup>44</sup> *Title IX Protections from Bullying and Harassment in Schools*, *supra* note 3.

<sup>45</sup> *Videckis v. Pepperdine University*, 100 F. Supp. 3d 927 (C.D. Cal. 2015).

<sup>46</sup> *Augustine-Adams*, *supra* note 12.

<sup>47</sup> Resolution Agreement between the Arcadia Unified Sch. Dist., the U.S. Dep’t of Educ., Office for Civil Rights, and the U.S. Dep’t of Justice, Civil Rights Div. (July 24, 2013), <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

student.<sup>48</sup> All but one of these fifty-seven claims specified gender identity and/or sexual orientation as the reason for their exemption.<sup>49</sup>

Obviously religious educational institutions may request an exemption to any part of Title IX, but this Note focuses on statutes which prohibit sexual orientation and/or gender identity discrimination in order to better understand and suggest improvements to the current Title IX religious exemption regulations. While the solutions proposed here will protect those who are discriminated against based on sexual orientation and gender identity, it will also improve the system for anyone who is entitled to protection under Title IX.

### III. ENDA, THE UTAH COMPROMISE, AND FEHA

This Note seeks to parse out the weaknesses of the language and application of Title IX religious exemptions, as well as propose solutions to those weaknesses, by finding and comparing similar statutes aimed at the same goal: balancing religious freedom with necessary protection for LGBT individuals. This Part explores the recent changes in various employment and other non-discrimination laws that now include sexual orientation as a protected class. First, this Part will look at the proposed Employment Non-Discrimination Act (“ENDA”), which the legislature introduced as a bill in every Congress but one from 1994 to 2013 and which would have created federal employment non-discrimination protections based on sexual orientation and gender identity. Second, this Part will look at the so-called “Utah Compromise,” a state law enacted in 2015 that increased religious freedom protections while also providing employment and housing protections based on sexual orientation and gender identity. Then third, it will examine the Fair Employment and Housing Act (“FEHA”) enacted in California, which is one of the longest-standing pieces of legislation prohibiting discrimination based on sexual orientation and gender identity.

#### A. ENDA

ENDA, though never passed by Congress, represents a

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

years-long effort by lawmakers to reach a nationwide compromise between LGBT and religious communities to ensure that the freedoms and liberties of all Americans are protected in a way that is as fair and just as possible.<sup>50</sup> ENDA can serve as a partial model for updating Title IX religious exemption language and applications, especially since it would have amended Title VII, which is often referred to as a synonymous standard with Title IX.<sup>51</sup>

First, this Subpart will lay out the basic language of ENDA, as well as the language found in Title VII, with regard to religious exemptions in the specific context of education. Then, this Subpart will evaluate the differing perspectives on ENDA and why it was ultimately retired for good, largely due to *Burwell v. Hobby Lobby Stores, Inc.*<sup>52</sup> Finally, this Subpart will briefly discuss how identical language has been applied in certain states and how that has impacted the protection of religious freedoms and LGBT individuals in those states.

### 1. *Language of ENDA*

The ENDA language discussed in this Note will be that of the most recent bill proposed in 2013 to the 113th Congress. While the bill did not pass Congress, several states adopted the exact language of ENDA, including Delaware and Nevada, the two states this Note will address.<sup>53</sup> The basic purpose of ENDA was to “prohibit employment discrimination on the basis of sexual orientation or gender identity.”<sup>54</sup> The actual language of the bill encompassed failing or refusing to hire, firing, or otherwise discriminating against any employee because of his or her “actual or perceived sexual orientation or gender identity.”<sup>55</sup>

Just as in Title IX, an exemption is provided for religious organizations in ENDA’s text, as well as specific acknowledgement of religious educational institutions in that

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<sup>50</sup> Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4 (2013).

<sup>51</sup> *Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577 (D. Md. 2016), *motion to certify appeal denied*, No. CV RDB-15-0627, 2016 WL 3906640 (D. Md. July 19, 2016) (holding that in evaluating Title IX claims, the Court of Appeals for the Fourth Circuit looks to case law interpreting Title VII).

<sup>52</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014).

<sup>53</sup> Del. Code Ann. Tit. 19, § 711 (West); Nev. Rev. Stat. Ann. § 613.330 (West); Nev. Rev. Stat. Ann. § 613.350 (West).

<sup>54</sup> Employment Non-Discrimination Act of 2013, *supra*, note 50.

<sup>55</sup> *Id.*

exemption. ENDA states that the entirety of the Act shall not apply to any organization or “educational institution or institution of learning” that is already exempt from the religious discrimination provisions of Title VII.<sup>56</sup> This would ensure that not only are religious exemptions already provided for educational institutions under Title VII, but that they are explicitly also acknowledged in reference to sexual orientation.

The Title VII language on religious exemptions works as a different version of the “control test” mentioned above under Title IX, and it even refers specifically to educational institutions. In describing educational institutions, Title VII includes a longer list than Title IX of the types of institutions that might be eligible for an exemption, including a “school, college, university, or other educational institution or institution of learning.”<sup>57</sup> The Title VII control test requires that the educational institution 1) must be “in whole or in part, owned, supported, controlled, or managed by a particular religion” or religious organization, or 2) must have a curriculum “directed toward the propagation of a particular religion.”<sup>58</sup>

The other language in Title VII, which defines “religious employer” for purposes of applying the religious exemption under ENDA, states that an exemption is granted to those religious organizations (including educational institutions) in the employment of individuals who adhere to the particular religion of their organization and are performing work “connected with the carrying on” of the religious organization.<sup>59</sup> This language applies to anyone who might receive a religious exemption when it comes to employment law, not just institutions of higher education, and suggests that when an employee of a religious organization is performing work which by its nature requires him or her to be of that particular faith, the organization is exempt from Title VII with regard to that individual’s employment status.

## 2. *Criticism of ENDA*

There were several specific criticisms of ENDA which

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<sup>56</sup> *Id.* at § 6.

<sup>57</sup> 42 U.S.C. § 2000e-2(e).

<sup>58</sup> *Id.*

<sup>59</sup> 42 U.S.C. § 2000e-1(a).

helped lead to its ultimate demise before Congress scrapped it entirely. Conservatives and religious groups tended to be the most likely to criticize ENDA, whereas those who supported increased protection for the LGBT community were largely supportive of ENDA.

For example, the United States Conference of Catholic Bishops critiqued ENDA on five grounds:

- 1) Lack of an exception for a “bona fide occupational qualification” (“BFOQ”) which exists under every other category of discrimination under Title VII except for race;
- 2) Lack of a distinction between homosexual inclination and conduct;
- 3) Support for redefinition of marriage;
- 4) Protection of “gender identity” allows individuals to select their own sex in opposition with their biological sex at birth; and
- 5) Religious liberty could be threatened by punishing the religious or moral disapproval of same-sex conduct while protecting only certain religious employers (i.e. protecting only those who are part of an actual religious organization, rather than religious individuals operating businesses unrelated to their religious beliefs).<sup>60</sup>

These points reflect concerns that likely would have been held by many other religious freedom groups. When looking at all of the critiques together, it appears that the overarching concern was a threat of losing control over their own organizations and the right to exclude (other than the redefinition of marriage, which now would no longer be relevant in light of *Obergefell*).<sup>61</sup> Also, the concern that religious individuals who run businesses unrelated to religion would not be protected was well founded. Once the Supreme Court issued the *Hobby Lobby* decision, LGBT advocacy and liberal groups pulled out their support of ENDA.<sup>62</sup>

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<sup>60</sup> United States Conference of Catholic Bishops, *Questions and Answers About the Employee Non-Discrimination Act*, <http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/enda-background-2013.pdf> (last visited May 11, 2016).

<sup>61</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

<sup>62</sup> Jennifer Bendery & Amanda Terkel, *Gay Rights Groups Pull Support for ENDA Over Sweeping Religious Exemption*, THE HUFFINGTON POST (July 8, 2014, 8:28 PM), <http://www.huffingtonpost.com/2014/07/08/enda-religious->

In fact, initially many LGBT advocacy and liberal groups supported ENDA, including the American Civil Liberties Union (“ACLU”), the National Center for Lesbian Rights, the National Gay and Lesbian Task Force, the Transgender Law Center, and Lambda Legal, but these groups abandoned support after *Hobby Lobby*.<sup>63</sup> This ruling held that the sincerely held religious beliefs of a corporation’s owners are properly attributed to the corporation as a whole.<sup>64</sup> ENDA (and Title VII) exemptions for religious corporations, associations, educational institutions, or societies could then potentially exempt any non-religious corporation or entity whose owners held sincere religious beliefs from protections based on sexual orientation or gender identity, leaving the exemption much broader than originally intended.

Now ENDA is no longer an option for federal protections in employment based on sexual orientation and gender identity, mostly because *Hobby Lobby* broadened the exemptions included in the bill to the point that the effect of the bill itself completely changed. While this led to disapproval from both sides, the removal of ENDA as a viable option for protecting both religious and LGBT groups has opened the door to creating an entirely new, and possibly better, solution.

### 3. Application of ENDA

While Congress never enacted ENDA, both Nevada and Delaware have “control tests” for higher education religious exemptions identical to ENDA’s control test.<sup>65</sup> In 2002, when ENDA was still under consideration, some were concerned that caseloads would increase.<sup>66</sup> However, the Congressional Budget Office estimated that the case load for the Employment Opportunity Commission would only rise by 5 to 7% as a result of ENDA.<sup>67</sup> This was confirmed by the results in Delaware and Nevada, where caseloads increased only minimally, based on a

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<sup>63</sup> *Id.*

<sup>64</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014).

<sup>65</sup> Del. Code Ann. Tit. 19, § 711 (West); Nev. Rev. Stat. Ann § 613.330 (West); Nev. Rev. Stat. Ann. § 613.350 (West); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4 (2013).

<sup>66</sup> 23 No. 12 Ind. Emp. L. Letter 4.

<sup>67</sup> *CBO Cost Estimate: S. 1284 Employment Non-Discrimination Act of 2002*, CONGRESSIONAL BUDGET OFFICE (June 13, 2002), <https://www.cbo.gov/publication/13753>.

lack of cases on record.

Delaware included sexual orientation as a protected class in various non-discrimination laws, enacted the language of ENDA's "control test" for higher education in 2009, and added gender identity in 2013.<sup>68</sup> This included discrimination in employment, housing, public accommodations, and other areas.<sup>69</sup> Nevada added a prohibition of discrimination based on sexual orientation in employment and public accommodations in 1999, and added gender identity in 2011.<sup>70</sup> In Delaware and Nevada, both of which have language identical to ENDA's with regard to higher education, there are not any recorded cases brought which challenge the religious exemption statute, nor even any discrimination claims based on sexual orientation or gender identity at all.<sup>71</sup>

This lack of contesting the religious exemption requirement/control test language that was identical to ENDA might show that the protections are working how they should and are balancing religious liberties and LGBT protections in a way that works for nearly everyone. It might also indicate a lack of knowledge on the part of the general public, and particularly of young students, of their right to protection and the requirements that a school must meet in order to be exempt from these requirements so as to have the "right" to differentiate against them.

### B. *The Utah Compromise*

The Utah Compromise was a ground-breaking piece of legislation, mostly because Utah, which is headquarters to The Church of Jesus Christ of Latter-day Saints ("the LDS Church"), has historically been a very conservative and anti-gay state.<sup>72</sup> The LDS Church worked with legislators to help

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<sup>68</sup> S.B. 121, 145th Gen. Ct. (Del. 2009).

<sup>69</sup> *Id.*

<sup>70</sup> Ed Vogel, *Sandoval signs transgender job discrimination bill*, LAS VEGAS REVIEW JOURNAL (May 24, 2011, 1:39 PM), <http://www.reviewjournal.com/news/government/sandoval-signs-transgender-job-discrimination-bill> (last visited May 11, 2016).

<sup>71</sup> Del. Code Ann. Tit. 19, § 711 (West); Nev. Rev. Stat. Ann. § 613.330 (West); Nev. Rev. Stat. Ann. § 613.350 (West); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4 (2013).

<sup>72</sup> Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Utah "Compromise" to Protect LGBT Citizens from Discrimination is No Model for the Nation*, SLATE (Mar. 18, 2015, 3:18 PM),

develop a bill that would protect religious freedom while also expanding protection to LGBT individuals in employment and housing.<sup>73</sup> First, this Subpart will explore the language of the bill. It will then examine the support and criticism that the Utah Compromise has received from various groups. Finally, it will explore the actual application of this new legislation and how it has impacted the people of Utah.

### 1. *Language of the Utah Compromise*

The “Utah Compromise” was a modification of the current Utah Antidiscrimination and Fair Housing Acts (“the Acts”). Both “gender identity” and “sexual orientation” were added to the lists of protected classes (race, gender, etc.) in the Acts. This meant that both sexual orientation and gender identity were “prohibited bases for discrimination in employment” as well as in housing, though not considered protected classes in general or in other legal contexts.<sup>74</sup>

Prior to these modifications, the Acts already had a unique way of providing a substitute for a “religious exemption” to religious groups. Instead of having a section detailing which organizations qualify for a religious exemption, as ENDA did and most other states do, the Utah Antidiscrimination Act simply excluded religious groups from the definition of “employer” altogether.<sup>75</sup> The Utah Compromise added additional exemptions from the definition of “employer” and therefore increased the number of persons and entities not subject to anti-discrimination laws.<sup>76</sup>

The current language of the Utah Antidiscrimination Act—after the passage of the amendments listed in the Utah Compromise—excludes the following from the definition of “employer”: 1) any religious organization or religious educational institution, including any religious leader “when that individual is acting in the capacity of a religious leader,”

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[http://www.slate.com/blogs/outward/2015/03/18/gay\\_rights\\_the\\_utah\\_compromise\\_is\\_n\\_o\\_model\\_for\\_the\\_nation.html](http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_n_o_model_for_the_nation.html).

<sup>73</sup> Linsey Bever, *Utah—yes, Utah—passes landmark LGBT rights bill*, WASHINGTON POST (Mar. 12, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/?utm\\_term=.5f2ab1b54930](https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/?utm_term=.5f2ab1b54930).

<sup>74</sup> S.B. 296, 60th Gen. Ct. (Utah 2015).

<sup>75</sup> Utah Code Ann. § 16-61-102 (West).

<sup>76</sup> *Id.*

and 2) any organization considered to be an affiliate or subsidiary of any religious organization and affiliate.<sup>77</sup> The main difference in the amended text from the original statute was the addition of “religious leader” as excluded from the definition of “employer.”

The inclusion of “religious leader” also required the addition of its definition to the amended statute. The statute now states that a “religious leader” is any individual who “is associated with, and is an authorized representative of” a religious organization, including members of the clergy and other generally recognized types of religious leaders (priest, pastor, rabbi, etc.). “Affiliate” is defined as a person who either controls or is controlled by another specified person or in this case, by a religious organization.<sup>78</sup>

Another addition to the statutes increased specific protections for religious groups. The text dictating the addition of these protections states that employees may express their religious beliefs in the workplace as long as it is done in a “reasonable, non-disruptive, and non-harassing way” and is on equal terms with other similar types of expression of beliefs allowed by the employer in the particular workplace. There is an exception to this rule if the expression of beliefs would be “in direct conflict with the essential business-related interests of the employer.”<sup>79</sup>

In addition to protecting employees’ specific “right” to express their moral beliefs and commitments in the workplace, a section of the bill specifically creates protections for employees who express their convictions outside of the workplace.<sup>80</sup> This section states that employers may not fire, demote, refuse to hire, or otherwise discriminate in relation to the employment of individuals based on their “lawful expression or expressive activity” which occurs outside of the workplace, unless that expression “is in direct conflict with the essential business-related interests of the employer.”<sup>81</sup> It also states that this type of expression includes “convictions about marriage, family, or sexuality.”<sup>82</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

The specific language mentioned above is not found in any other state statute, and represents the greatest difference between the Utah Compromise and legislative actions taken in other states in that it not only provided additional protection against discrimination based on gender identity and sexual orientation, but also increased protection of religious freedom and expression.

In addition to the amended language included in the above paragraphs, which were part of bill SB 296, SB 297, introduced at the same time and in conjunction with SB 296, included still more protections for religious groups.<sup>83</sup> The language in SB 297 is not necessarily relevant to the particular analysis in this Note, but it is relevant to understanding what the LDS Church and other conservative/religious groups in Utah required in exchange for their support of extensions to anti-discrimination protections to LGBT individuals.<sup>84</sup>

Among other things, SB 297 exempted clergy from officiating at weddings, exempted religious organizations from providing wedding services, protected conscientious objectors from private suits and government penalties, exempted religious marriage counseling courses and retreats, allowed adoption/foster agencies to maintain existing placement policies, required only willing clerks to issue marriage licenses, disallowed revocation of professional/business license for expression in a nonprofessional setting, and proactively protected the character of religious buildings and wedding services.<sup>85</sup> Much of this legislation had previously been passed in a variety of other states, though the requirement that only willing clerks must issue marriage licenses had only been passed in Delaware. The protections regarding professional/business licenses in nonprofessional settings and protecting the character of religious buildings and wedding services are unique to Utah.<sup>86</sup>

The language of the Utah Compromise is unique. It increased protection for religious groups and for the LGBT community at the same time, though in very different ways. From a reading of the language and an analysis of the specific

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<sup>83</sup> S.B. 297, 60th Gen. Ct. (Utah 2015).

<sup>84</sup> Bever, *supra*, note 73.

<sup>85</sup> Robin Fretwell Wilson, *Summary of the Utah Compromise* (Mar. 24, 2015), <http://ssrn.com/abstract=2584543>.

<sup>86</sup> *Id.*

protections granted to religious groups and the LGBT community, it appears that the Utah Compromise balances the burdens and protections placed on both groups.

## 2. *Criticism of the Utah Compromise*

It is difficult to balance opposing interests and to evaluate different procedures for balancing those interests. Many groups expressed their support or criticism of the Utah Compromise. Both sides offered criticism, but also support, particularly those who tended to be more moderate in their approach to these particular issues.

Particularly noteworthy is that the ACLU supported the Utah Compromise, despite the sweeping increase in protection for religious groups.<sup>87</sup> However, it supported only SB 296, which it believed was “crafted with the intent of delicately balancing the rights of all Utahns to be treated fairly and equally in housing and employment with the rights of religious organizations to express beliefs.”<sup>88</sup> The ACLU did not support SB 297, because the ACLU believed it gave far too many “protections” to religious groups and individuals at the expense of LGBT individuals, and in a way that was fundamentally unbalanced.<sup>89</sup> In fact, Equality Utah—a prominent LGBT advocacy group in Utah—stated that it was not even consulted on SB 297, as it was on SB 296.<sup>90</sup> Additionally, SB 297 affords religious groups and individuals the ability to discriminate on any grounds (i.e. not just based on gender identity or sexual orientation, but also including race, gender, and all otherwise protected classes).<sup>91</sup> The ACLU encouraged Utah to reject SB 297, though it ultimately passed.<sup>92</sup>

Additionally, a group of law professors from Brooklyn Law School and the University of Virginia Law School wrote an op-ed piece criticizing the Utah Compromise in its entirety.<sup>93</sup> They

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<sup>87</sup> *ACLU of Utah and Equality Utah Celebrate SB 296, Reject the Harmful Provisions of HB 322*, AMERICAN CIVIL LIBERTIES UNION (Mar. 12, 2015), <https://www.aclu.org/news/aclu-utah-and-equality-utah-celebrate-sb-296-reject-harmful-provisions-hb-322?redirect=lgbt-rights-religion-belief/aclu-utah-and-equality-utah-celebrate-sb-296-reject-harmful-provisions-h>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Tebbe, et al., *supra*, note 72.

pointed out that many groups that withdrew support from ENDA after *Hobby Lobby*—such as the ACLU and other LGBT advocacy groups—did so because “it contained broad religious exemptions similar to the ones in the Utah law.”<sup>94</sup> They claimed that this was probably because Utah already had significantly fewer anti-discrimination protections in general prior to the proposal of the Utah Compromise, and therefore the inclusion of gender identity and sexual orientation as protected classes in employment and housing seemed like a much bigger step than it really was.<sup>95</sup> They opined that this amendment to the Utah Antidiscrimination Act merely brings sexual orientation and gender identity up to the already sub-par protections given to other classes (such as gender, race, etc.) and that because the Utah Compromise only protects LGBT individuals in employment and housing, and appears to actually increase the protections afforded to religious groups and individuals to discriminate against them in any other setting, this was a step backward for the LGBT community in Utah.<sup>96</sup> They concluded by expressing that the Utah Compromise was a step in the right direction and will increase protections for LGBT individuals to an extent, but it should not be considered a foundation or example for other states in forming religious freedom and LGBT protection legislation.<sup>97</sup>

Unsurprisingly and somewhat ironically, many religious leaders in the United States also felt that the protections afforded here were not sufficient.<sup>98</sup> These religious leaders expressed concern over the same issues as the law professors mentioned above: the Utah Compromise does not address “whether individual business owners, based on their religious beliefs, can refuse service to gay people or gay couples—for example, a baker who refuses to make a cake for a gay wedding.”<sup>99</sup> These leaders include Russell Moore, president of the Ethics and Religious Liberty Commission of the Southern

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, THE NEW YORK TIMES (Mar. 12, 2015), [http://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?\\_r=1](http://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?_r=1).

<sup>99</sup> *Id.*

Baptist Convention, as well as Roman Catholic Bishops.<sup>100</sup> In fact, the conclusions drawn are strikingly similar to those of the law professors who believed LGBT protections were not sufficient, with Dr. Russell Moore concluding that this bill should not have been supported or passed, and absolutely should not serve as a model going into the future for other states or for the nation.<sup>101</sup>

These opposing sets of criticisms demonstrate the divide that still exists between religious and LGBT advocacy groups, but perhaps also indicate that this was an effective compromise. It seems that generally both sides were happy with what was accomplished, but felt that there was still much left unsaid and left to be determined.

### 3. *Application of the Utah Compromise*

After the passage of the Utah Compromise, there appeared to be an impact on Utahns in many different ways. Although the question of whether individual business owners could refuse to serve individuals based on their sexual orientation or gender identity has not yet been answered, there were still various positive outcomes that resulted from this legislation.

While there are not yet any reported claims brought under the Compromise, the press has reported the story of a transgender woman personally impacted by the law.<sup>102</sup> Angie Rice, an elementary school teacher, had already gone through the male to female transition process, but only openly lived that transition at home.<sup>103</sup> While she was at school, she had to conceal her identity as a female for fear of losing her job as a special education teacher.<sup>104</sup> After the passage of the Utah Compromise, she was then able to be open about her gender identity at her workplace and finally felt like she could truly be herself in a place where she spent a majority of her day and

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Compromise's Effect on a Transgender Woman*, THE WALL STREET JOURNAL (Nov. 10 2015, 6:16 PM), <http://www.wsj.com/articles/utah-compromise-has-both-sides-seeing-a-way-forward-1447196349>; see also *Utah's Complicated "Compromise" on Gay, Religious Rights*, THE WALL STREET JOURNAL (Nov. 10 2015, 8:09 PM), <http://www.wsj.com/video/utahs-complicated-compromise-on-gay-religious-rights/88DEAF1A-5C60-45ED-A5DD-9C1FC357BEE4.html>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

interacted with students and co-workers.<sup>105</sup>

The lack of court cases and controversy could most likely be construed as a positive outcome of this legislation, as it shows that there has generally not been too much public opposition against it or a situation that would be considered legally dubious. It is likely that there are others, like Rice, who previously feared loss of a job or eviction from their homes, who were finally able to be open about their sexual orientation and/or gender identity while feeling assured that the law was protecting them.

The Utah Compromise increased religious liberties and LGBT protections at the same time, which allowed both sides to feel more at ease, and hopefully achieved the result of creating a less dichotomous society, but one that is supportive of rights to live as one chooses and to believe as one wants to believe.

### *C. The California Fair Employment and Housing Act*

This Subpart will examine the employment and housing anti-discrimination laws in the state of California, also known as the Fair Employment and Housing Act (“FEHA”), because California has been consistently ahead of the curve in passing anti-discrimination legislation, and therefore has much more foundation in case law and history to demonstrate the effectiveness of FEHA, as compared to other states. First, this Subpart will lay out the text of FEHA, then will examine some of the support and criticisms of FEHA, and finally will examine the case law and other results that have come from the enactment of this law.

#### *1. Language of FEHA*

The earliest version of FEHA passed on September 18, 1959.<sup>106</sup> Then in 1979, California became the second state to protect against employment discrimination based on sexual orientation in state employment, which then expanded to all areas of employment in 1992.<sup>107</sup> California became the third state to include gender identity as a protected class in all

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<sup>105</sup> *Id.*

<sup>106</sup> ROBERT D. LINKS, CAL. CIV. PRAC. CIVIL RIGHTS LITIGATION § 13:5 (2017).

<sup>107</sup> *Id.*

employment under FEHA in 2003.<sup>108</sup> FEHA has also been changed and amended over time, particularly in the sections discussing religious exemptions. While it has more case law than other states, there still is not much in the way of claims brought based on religious exemptions alone—even outside the scope of sexual orientation and gender identity.

FEHA begins by stating that it will apply to all employment practices, unless they are “based upon a bona fide occupational qualification.”<sup>109</sup> FEHA then prohibits discrimination based on “sex, gender, gender identity, gender expression . . . [and] sexual orientation . . . .”<sup>110</sup> It then uses very simple language within the actual text to explain the grounds for a religious exemption, which is simply that the term “‘employer’ does not include a religious association or corporation not organized for private profit” except as provided elsewhere in the statutory definitions.<sup>111</sup>

In the definitions section of FEHA, a religious corporation is defined as any corporation which was formed as a nonprofit or religious nonprofit under the laws of formation of California, or any “corporation that is formed primarily or exclusively for religious purposes” under the laws of another state “to administer the affairs of an organized religious group and that is not organized for private profit.”<sup>112</sup> Interestingly, it is further clarified in the definitions that the term “employer” *does* include a religious corporation when referring to employees of a religious corporation who “perform duties, other than religious duties, at a health care facility” which is operated by such religious corporation “that is not restricted to adherents of the religion that established the association or corporation.”<sup>113</sup> Meaning, if a healthcare employer would otherwise be considered a religious corporation or association, it does not receive an exemption to FEHA if it caters to members outside of its own religion and in application to its employees who do not serve a religious function.

This particular definition section of FEHA also states that any nonprofit public benefit corporation which is “formed by, or

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<sup>108</sup> *Id.*

<sup>109</sup> Cal. Gov’t Code § 12940 (West).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Cal. Gov’t Code § 12926.2 (West).

<sup>113</sup> *Id.*

affiliated with, a particular religion” and “operates an educational institution as its sole or primary activity” is permitted to “restrict employment, including promotion, in any or all employment categories to individuals of a particular religion.”<sup>114</sup> Notably, this gives religious educational institutions the ability to discriminate on the basis of employment, but only in the form of religious discrimination—not sexual orientation or gender identity. Any other exemptions to FEHA, beyond religious discrimination, for religious educational institutions must meet the other requirements identified above for a “religious corporation.”

## 2. Criticism of FEHA

There are various opinions about whether FEHA is providing enough protection to LGBT individuals, and whether the construction in FEHA of a religious corporation is too narrow to provide sufficient protection for religious groups, employers, and individuals. Similar to the Utah Compromise, there is criticism from both sides of the spectrum.

In a law review article featured in the *Journal of Catholic Legal Studies*, the author describes California’s statute as defining religious corporations too narrowly.<sup>115</sup> While in this case she is specifically referring to contraception exemptions, the arguments she provides apply in all situations.<sup>116</sup> To her, firstly, it is an insult to Catholics to narrowly define religious institutions and corporations because it ignores the fact that a Catholic’s religious beliefs are pervasive in every part of their lives.<sup>117</sup> She specifically refers to work in hospitals, nursing homes, schools, and other public interest entities as being religious work for those who identify as Catholic, rather than a secular activity.<sup>118</sup> She claims that requiring a primary purpose of inculcating religious values or beliefs completely separates acts of charity, a part of the Catholic faith, from consideration as a religious activity worthy of protection.<sup>119</sup>

Additionally, her second argument is for the Catholic, the

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<sup>114</sup> *Id.*

<sup>115</sup> Susan Stabile, *When Conscience Clashes with State Law & Policy: Catholic Institutions*, 46 J. CATH. LEGAL STUD. 137 (2007).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

definition of a religious corporation—particularly under the healthcare exception, the requirement that the institution only serve members of their own faith—is of particular concern.<sup>120</sup> Part of the Catholic belief system states that they are to go out in the world and “spread the Gospel of Christ.”<sup>121</sup> The article’s author believes that narrowing the application of the religious exemption to only institutions which serve their own community ignores that part of their religious mission is to create religious institutions which then inculcate Catholicism in their employees and those who patronize the institution.<sup>122</sup>

In a law review article published in the *Boston College Journal of Law & Social Science*, Erik S. Thompson argues just the opposite.<sup>123</sup> In fact, he points to the “healthcare exception” in FEHA as a perfect example of how religious exemptions should be framed on a federal level.<sup>124</sup> He points out that this protects anyone who identifies as LGBT who works in a religious healthcare facility so long as he or she is not acting in a pastoral or doctrinal function, and recommends that this be extended beyond healthcare to include any other types of religious organizations which offer “secular public services, including secondary and postsecondary education, humanitarian services, and adoption services.”<sup>125</sup>

These criticisms demonstrate that there is still room to improve protection for both groups, but also that reaching a resolution becomes increasingly difficult as legislators get closer to a more perfect balance.

### 3. *Application of FEHA*

There have been several cases brought in light of the religious exemption provided by FEHA, though all resulted in a ruling for the benefit of the defendant religious corporations, rather than the plaintiff. For example, in *Bohnert v. Roman Catholic Archbishop Corporation*, a Catholic high school teacher brought a claim against the school based on a hostile

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Erik S. Thompson, *Compromising Equality: An Analysis of the Religious Exemption in the Employment Non-Discrimination Act and its Impact on LGBT Workers*, 35 B.C. J.L. & SOC. JUST. 285 (2015).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

work environment when students took a picture underneath her skirt.<sup>126</sup> However, she failed to state a claim that the religious exemption to FEHA did not apply because she herself considered the Catholic high school to be a division of the religious organization the Roman Catholic Archbishop Corporation under FEHA's definition of a religious corporation.<sup>127</sup> Because she did not claim that she was employed by a separate non-religious organization or that the Roman Catholic Archbishop Corporation was not a religious organization, the battle was over before it began.<sup>128</sup>

Then in *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, a preschool teacher brought a claim against the school for wrongful termination based on unmarried cohabitation.<sup>129</sup> However, because the church operated the school as part of its ministry and the school had no independent legal status apart from the church, the preschool was lumped in with the church and was considered exempt from FEHA.<sup>130</sup> The court once again ruled that there was a failure to state a claim.<sup>131</sup>

Finally, in *Silo v. CHW Medical Foundation*, an employee of a religiously affiliated hospital brought suit against the hospital for attempting to censor her religious speech.<sup>132</sup> The court held that because the conduct which had occurred in her workplace was prior to the addition of the "healthcare exception" to the religious exemption as stated above, the employer had not been properly put on notice and there was no cause of action.<sup>133</sup>

There is little in California which demonstrates the actions of a plaintiff arguing that a particular employer does not qualify for the religious exemption, and even when they have done so, they have failed. However, presumably because of cases like *Silo*, California decided to include a specific exception to religious exemptions for healthcare institutions, which has broadened the protections for those who are

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<sup>126</sup> *Bohnert v. Roman Catholic Archbishop of San Francisco*, 67 F. Supp. 3d 1091 (N.D. Cal. 2014).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1045 (2011).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Silo v. CHW Med. Found.*, 27 Cal. 4th 1097 (2002).

<sup>133</sup> *Id.*

employees of religiously affiliated employers beyond the typical scope of flat state religious exemption laws. Because of this healthcare exception, employees who seek to perform secular work at a religious institution are afforded the protections against discrimination that would be provided in a secular workplace, rather than narrower standards of protection that are afforded to employees of religious corporations and institutions.

#### IV. ANALYSIS AND COMPARISON OF TITLE IX WITH ENDA AND STATE STATUTES

This Note has analyzed the language, criticism, and application of Title IX, ENDA, the Utah Compromise, and FEHA regarding religious exemptions. While there are twenty states—other than Utah and California—which currently have employed anti-discrimination laws protecting individuals based on sexual orientation and/or gender identity, this Note seeks to draw conclusions from ENDA, the Utah Compromise, and FEHA as these each respectively represent 1) a culmination of work on the federal level; 2) a recent compromise which partly appeased both religious and LGBT advocacy groups in a culturally conservative state; and 3) a more detailed religious exemption requirement enacted in a traditionally progressive state. This Part will compare current Title IX regulations with ENDA, the Utah Compromise, and FEHA to parse out what has been effective and ineffective, and what might be done to modify current Title IX regulations to better provide protection for religious organizations and LGBT individuals in a way that is more fair and equal.

As stated previously, there are three major problems historically with the law and the application of Title IX religious exemptions: 1) there is some ambiguity as to whether a religious educational institution is entitled to an exemption simply by its nature of being a religious educational institution, or whether it is within the constitutional rights of OCR to require an application or proof of claim prior to granting a religious exemption; 2) a “controlling organization” is not really required, despite it being a statutory requirement; and 3) an explanation of a conflict between specific Title IX provisions and specific tenets of the controlling religious organization is not really required, nor is there any investigation into the

sincerity of the particular tenets put forth by the educational institution. This Part will examine each of these problems individually and, using ENDA, the Utah Compromise, and FEHA as frameworks, will propose specific solutions to solve these problems and create a better balance between protection of religious educational institutions and LGBT students and employees of those institutions.

### *A. Claim v. Apply and After-the-Fact Lawsuits*

The first problem this Note seeks to address is the ambiguity about “self-executing”: whether religious educational institutions are inherently exempt from Title IX requirements or whether they must actually apply to receive an exemption. Additionally, if they must apply for and be granted an exemption, can they do so after a lawsuit has already been filed against them?

In ENDA and FEHA, case law assumed that religious employers met the requirements; the burden of proof was on the plaintiff to prove that the employer did not meet the requirements for the exemption.<sup>134</sup> All of this was determined in court, after the suit had already been filed, and the religious employer could use his or her status under the exemption as a reason to move to dismiss for failure to state a claim. There were no recorded cases in Nevada, Delaware, or Utah. In the cases under FEHA in California, the plaintiffs were never able to successfully show that an employer was not entitled to the religious exemption. One might argue that this means the law is doing its job at protecting the rights of religious employers—but is it doing it too well and at the expense of individuals who suffer unfair discrimination? In fact, one of the main concerns of religious groups prior to the passage of ENDA was that case load would dramatically increase. This has not occurred.

If no other anti-discrimination law has required a preemptive application to receive a religious exemption, why would OCR have done so with Title IX? While it is not clear what the intent of OCR is with regard to the claiming or granting of religious exemptions, it is clear that it wanted to make the exemption process narrower than in other areas of existing law.

It is also clear that students are a particularly vulnerable

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<sup>134</sup> Henry, 201 Cal. App. 4th at 1045.

population due to their age. In a law review article titled *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, James Dwyer argues that almost all religious exemptions granted to educational institutions with minor students should be revoked in order to promote and maintain the basic welfare of children.<sup>135</sup>

While college students are generally not minors, they are often still dependent on their parents and are at a particularly vulnerable and confusing time of their lives. It is possible that some students may have been persuaded to attend a religious institution by their parents or decided to attend prior to recognizing or openly expressing their sexual orientation or gender identity. While the intention of OCR is not clear in the more stringent process for obtaining religious exemptions in the post-secondary setting, perhaps it is safe to assume that it is best to broaden those protections to a greater extent than those afforded to employees of religious entities. Just because in employment law the burden is on the plaintiff to show that a religious employer does not qualify for an exemption does not mean that same burden should be placed on student plaintiffs.

If OCR wants to place this burden on students—as they have in all previous suits where the exemption was granted after the fact, then: 1) there should be an assumption that a religious educational institution is entitled to a religious exemption until proven otherwise (therefore negating the dispute over claim versus apply) and 2) the qualifications for a religious exemption must be clearer and, perhaps, narrower. By applying to religious educational institutions the same standards that other state anti-discrimination employment laws have put into place, religious educational institutions will have more certain protection in that they will be presumptively exempt. Additionally, with knowledge that a religious exemption presumptively exists, LGBT students will be more likely to be on notice of the exemption and will be afforded better protection overall by the clearer and narrower qualifications.

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<sup>135</sup> James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996).

### *B. Control Test*

While the existence of a control test is a common element among ENDA, the Utah Compromise, and FEHA, as well as Title IX, the requirements that must be met to pass the test are the vaguest in Title IX. Making the requirements clearer would make religious educational institutions more aware of what standards they are required to meet and would ensure proper compliance. Clearer requirements would also ensure that LGBT students are afforded proper protection in situations where the religious educational institution they attend should not be given a religious exemption under the control test. There are two different solutions that could each have a positive impact on Title IX, as demonstrated by their various applications in existing state law, and could be applied together or separately: including a curriculum requirement and/or requiring that all students of a religious university belong to that particular religion.

#### *1. Curriculum*

The first solution reflects the language in ENDA and is currently in use by Delaware and Nevada state law. It allows for religious educational institutions to claim an exemption to Title VII if they demonstrate 1) that they are either owned and controlled by a religious corporation, or 2) that the curriculum of the institution is “directed toward the propagation of a particular religion.” As stated previously, there are no recorded cases of suits brought in either Delaware or Nevada under their versions of this statute. This would serve to replace part of the third requirement in the current Title IX control test, which requires that a religious educational institution is considered controlled by a particular religious educational institution if it so states in the charter, or if it is “committed to the doctrines of a particular religion, the members of its governing body are appointed by the controlling religious organization, and it receives a significant amount of financial support from the controlling religious organization.” Instead of requiring financial support and appointment of the governing body by the controlling religious organizations, the requirement would simply be that the curriculum of the religious educational institution propagate a particular religion. This would clarify the requirements for religious

educational institutions which are non-denominational and are not affiliated with a particular official church entity, but do espouse particular religious beliefs in their actual curriculum.

This first solution would substantially broaden the ability of religious educational institutions to receive religious exemptions, though not more so than they have received historically, and would also clarify the requirements so that OCR could continue to recognize exemptions for such schools without violating the language of the Title IX control test.

## 2. *Church member requirement*

The second solution would require that all students and employees at a particular religious educational institution either belong to the controlling religious organization or subscribe to the belief system based on the curriculum of the religious educational institution. As stated above, FEHA already has an exception for religious exemptions for religious healthcare facilities. This exception requires that the employer abide by FEHA and precludes religious exemptions for any employees not in a ministerial role, unless the religious healthcare facility requires that its patients and staff adhere to the particular religious beliefs of the healthcare facility or its controlling religious corporation. Thompson, in his law review article mentioned above, argued that the extension of this healthcare exception should apply to all religious public interest institutions, including educational institutions, when the institution is providing a secular service, and that this also be included in ENDA. The contrasting opinion from the *Catholic Law Review* article states that although the desire to work in healthcare and perform other types of public service can often stem from one's religious beliefs, it does not necessarily mean that the government should extend the right to discriminate to any type of public interest institution that performs secular work and happens to house employees who have chosen that particular profession based on their religious or moral values. This would lead to a system based on religious versus secular motivations of employers and employees, rather than a system based on clearly identifiable religious versus secular work and organizations, and would completely erode any ability for the government to distinguish between who deserves protection and who does not.

While the Title IX control test allows religious educational

institutions to claim a religious exemption based on the fact that it “requires its faculty, students or employees to be members of or otherwise espouse a personal belief in, the religion of the [controlling] organization,” this is only one of three ways to obtain a religious exemption. There are then two different ways to apply this solution. The first would be to make this a blanket requirement under the control test in order to obtain a religious exemption; the educational institution must require its students and employees to adhere to a particular religious belief system.

Or, this could be applied in conjunction with the first solution proposed. The language could be changed to reflect three different options: a requirement that 1) the school is an institution or department of divinity, 2) the charter states that the institution is controlled by a specific religious organization, or 3) the curriculum of the educational institution is directed towards the propagation of a particular religion or belief system *and* requires its students and employees to be members of that religion or adhere to that belief system. This would still allow for the inclusion of schools which are not controlled by a specific religious organization, but would require these schools to limit their students and employees to adherents of the belief system propagated by the curriculum. This would then also extend protection to students who attend religious educational institutions that are not controlled by a particular religious organization and do not require its students to adhere to a particular religion. This solution would be more likely to encourage religious educational institutions that are truly propagating a particular religious belief system to come into compliance, while those who are not so committed to a particular religion or belief system would no longer be able to discriminate against LGBT individuals.

### *C. Conflict with Tenets and Investigation of Sincerity*

The third problem left to be solved in the Title IX regulations is the requirement that a religious educational institution specify which parts of Title IX it would like to be exempted from and which particular tenets of its religion Title IX is in conflict with. Similar to the issue in Subpart A, whether an exemption should be claimed or applied for, there is no particular requirement under ENDA, the Utah Compromise, or FEHA which allows for only certain parts of

the religious exemptions to apply to certain types of discrimination (when looking at sex, gender, gender identity, and sexual orientation). It functions generally as a blanket exemption from all discrimination claims as long as a religious employer meets the religious exemption test.

There are, however, often cases where the sincerity of the institution's particular religious beliefs comes into question. When determining whether particular tenets of a religion are in conflict with particular requirements of Title IX, it is essential to look into the sincerity of the institution's belief and adherence to a tenet it is claiming is in conflict with the Title IX requirement.

In a *Stanford Law Review* article discussing the constitutional limits of investigating the sincerity of religious beliefs, Ben Adams and Cynthia Barmore explain that there is some room for courts to look into the sincerity of beliefs in two circumstances: 1) to see if there is a motive to make an insincere claim of belief, and 2) to see if the claimant's behavior is contradictory to the claim made and therefore would constitute fraud.<sup>136</sup> As mentioned previously, there was never any sort of action on the part of OCR to determine if the tenets offered up as contradictory to Title IX requirements were really the tenets subscribed to by the educational institution. If it was assumed that religious educational institutions are entitled to a religious exemption, this would remove any need for OCR to investigate any insincerity in the claims of these educational institutions, or to investigate anything at all. However, if a student or employee of a religious educational institution brings a suit, it would be entirely appropriate for the plaintiff to make a claim that the way in which he or she had been discriminated against was not contradictory to the tenets of the educational institution (if they in fact conceded that the educational institution met the requirements of the control test).

However, these religious tenets should be mandatory in the particular religion of the religious educational institution in order to qualify. For example in a FEHA case, a Jehovah's Witness brought suit against his employer for wrongful termination when he skipped work to attend a religious

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<sup>136</sup> Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014).

conference.<sup>137</sup> The employer attempted to use the fact that this was not a mandatory religious requirement and that the employee had skipped the conference the previous year as evidence that the claim was based on an insincere religious belief.<sup>138</sup> The plaintiff won the suit, however, as the court held that a religious act need not be mandatory for it be sincere.<sup>139</sup> This type of thinking about sincerity of religious belief opens the door to a religious educational institution claiming any sort of belief, even if it is simply a guideline or cultural religious belief. Having a requirement that the particular tenet be a permanent and mandatory part of a religious belief system affords better protection for LGBT individuals and provides clearer guidelines for religious educational institutions. In fact, if the second solution offered in Subpart B—that any religious educational institution which is entitled to an exemption must require that its students and employees adhere to a particular religion or belief system—was required in every religious educational institution, then this requirement that a religious tenet be mandatory in a particular religion would make even more sense.

## V. CONCLUSION

These solutions seek to create a better balance of protection for religious educational institutions and LGBT students and employees of these institutions. There would likely be arguments on both sides about why protections are too limited for both groups, but this is where the Utah Compromise has perhaps offered one of the most effective ways to deal with this problem. While it might appear that religious educational institutions are constrained in their ability to discriminate, perhaps an additional solution is one in which religious students and employees are offered more protection at secular institutions. This was what the Utah Compromise sought to accomplish: while legislators might somewhat limit the abilities of employers to discriminate, they are going to liberate the individual. This is exactly what is proposed by this Note: that the government narrow protections on large organizations

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<sup>137</sup> *California Fair Employment & Hous. Comm'n v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004, 1011 (2004).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

and improve protections for individuals—whether that be based on sexual orientation discrimination or religious discrimination.

In fact, the greatest example of this concept from the Utah Compromise was when the LDS Church and LGBT advocacy groups counseled together with legislators in order to try and reach a fair compromise on SB 296. This cooperation was more unique than the language of the law itself, or even its application. If religious institutions of higher education could come together with LGBT advocacy groups and with OCR and other federal legislators and come to a resolution to balance protections for religious educational institutions and LGBT individuals, then maybe a new law and process used by OCR to enforce Title IX could be agreed upon in a way that will create the best possible balance of protection for everyone.

Based on an analysis of Title IX, ENDA, the Utah Compromise, and FEHA, the resolution that works best for everyone might exist in the form of the solution proposed in this Note. First, the debate over whether religious institutions claim or apply for exemptions would finally come to a close; religious exemptions would be assumed until proven otherwise by a plaintiff. Second, the control test would be clarified; religious educational institutions may now use a curriculum directed toward the propagation of a particular religion as sufficient for qualifying for an exemption, however these institutions must require that all students adhere to the religious belief system of the institution. Third, religious educational institutions would still be expected to discriminate only based on certain parts of Title IX and only if it truly conflicted with a particular mandatory tenet espoused by the controlling religious organization or curriculum.

This solution both broadens and narrows the protections for religious educational institutions and LGBT individuals, but most importantly it clarifies the requirements for religious exemptions to Title IX so that both institutions and individuals might better be able to claim the rights and protections that are afforded to them.

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President and as a Master Scheduler for the Annual International Law and Religion Symposium, as well as President of the Alternative Dispute Resolution Society. Thanks to Fred Gedicks and Kif Augustine-Adams.