Why 501(c)(3) Tax-Exempt Status Does Not Count as Federal Financial Assistance Under Title IX

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ABSTRACT: Two federal district courts in Maryland and California have ruled that private schools are subject to Title IX of the Education Amendments of 1972 because their tax-exempt status under Section 501(c)(3) of the Internal Revenue Code counts as federal financial assistance. This major development in the interpretation of Title IX threatens to subject tax-exempt private schools not only to Title IX, but to a number of other statutes and regulations that apply to recipients of federal financial assistance. This would be a significant economic and administrative burden to small schools whose limited resources make it difficult or even impossible to afford compliance. But there is clear evidence that the decisions of the district courts were misguided. While case law on the matter is sparse, the legislative and executive branches have indicated in a variety of ways that they do not consider tax-exempt status to be federal financial assistance. Further, the conduct of private schools who choose to opt out of receiving federal funds to avoid having to comply with Title IX and similar federal laws demonstrate a widespread public understanding that it is possible for a tax-exempt organization to not be subject to Title IX. This Note examines the evidence that 501(c)(3) tax-exemption is not federal financial assistance under Title IX and urges the legislative and executive branches to clarify this fact for the sake of schools that would be adversely affected by a wider acceptance of a contrary interpretation.

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INTRODUCTION

Half a century after the passage of Title IX of the Education Amendments of 1972 ("Title IX"), the law has proven itself effective in opening up opportunities for women in higher education, including, most famously, in high school and college athletic programs.[1] The bill was both inspired and crafted by women who had experienced first-hand the effects of sex-based discrimination in the workplace.[2] Today, women at the peak of their professions credit the law for breaking open possibilities they could not otherwise have imagined.[3] The changes it has made possible are laudable.

As beneficial as the law has proven to be, its implementation is not feasible for a wide swath of schools that play a critical role in America's educational landscape. That is because Title IX applies only to schools that receive federal financial assistance—funds that require their recipients to abide not only by Title IX, but by a "multitude of laws, regulations, and 'guidance'" imposed by the federal government.[4] It has not, so far, applied to the "[m]any independent schools [that] choose not to participate in programs that are considered federal financial assistance because [of] the accompanying regulations [that] require resources that small schools simply do not have."[5]

Two federal district court decisions from 2022 would change that interpretation by defining the tax-exempt status that many such schools enjoy under Section 501(c)(3) of the Internal Revenue Code as federal financial assistance.[6] This Note argues that the clear meaning of Title IX does not include tax-exempt status as federal financial assistance. It begins with a brief overview of the history of Title IX and the decisions in *Buettner-Hartsoe v. Baltimore Lutheran High School Ass'n* and *Herrera ex rel. E.H. v. Valley Christian Academy*.[7] It then analyzes the scant evidence from earlier cases used by *Buettner-Hartsoe* and *Valley Christian Academy* to justify their inclusion of tax-

1. Remy Tumin, *Fifty Years On, Title IX's Legacy Includes Its Durability*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/sports/title-ix-anniversary.html (on file with the *Iowa Law Review*).

2. *Id.*

3. *See* Sana Rahman, *Title IX Allowed Women to Pursue Careers in STEM, NASA Astronaut Says*, HOYA (Jan. 22, 2019), https://thehoya.com/title-ix-allowed-women-pursue-careers-stem-nasa-astronaut-says [https://perma.cc/NCH3-PEVN].

4. Letter from Tyson Langhofer, Senior Couns., All. Defending Freedom, to Miguel A. Cardona, Sec'y of Educ., U.S. Dep't of Educ. (Sept. 11, 2022), https://adflegal.org/sites/default/files/2022-09/Title-IX-Public-Comment-2022-09-11-Violates-Free-Speech-Religion.pdf [https://perma.cc/N5BN-GY27].

5. Roger Riddell, *Federal Judge: Tax-Exempt Private Schools Subject to Title IX*, K-12 DIVE (July 28, 2022), https://www.k12dive.com/news/federal-judge-tax-exempt-private-schools-subject-to-title-ix/628352 [https://perma.cc/2KUS-6JCU] (quoting e-mail from Myra McGovern, Vice President of Media, National Association of Independent Schools).

6. *See* discussion *infra* Section I.C.

7. *See* discussion *infra* Section I.C.

exempt status under Title IX and demonstrate that this evidence is far from sufficient to support the claim for which it is used.[8] It proceeds to examine evidence from Department of Education regulations implementing Title IX, Department of Justice guidance on Title VI of the Civil Rights Act of 1964 (which mirrors Title IX and on which Title IX was based), and the Constitutional authority under which Congress passed Title IX, all of which clearly show an understanding by both the executive and legislative branches that Title IX does not include tax-exempt status as federal financial assistance.[9] Finally, an observation follows of the conduct of private schools over the past fifty years, demonstrating an understanding of Title IX that has enjoyed unquestioned acceptance by the public since the statute's passage into law.[10] This Note then briefly suggests measures that should be taken in response to the recent district court decisions.[11] An abundance of evidence demonstrates that tax-exempt status does not make a school subject to Title IX. For the sake of the many schools that would be burdened by an alternative reading of the statute, that evidence is laid out in detail below.

I. TITLE IX: ITS PASSAGE, EXPANSION, AND NOVEL INTERPRETATION BY TWO FEDERAL DISTRICT COURTS IN 2022

Since Title IX was originally passed into law, its application has been significantly expanded, increasing the burden of compliance for schools that receive federal financial assistance. This Part traces the history of Title IX from its origins as a statute meant to prevent discrimination, to its expanded enforcement to cover sexual harassment, to the recent court cases proposing a novel interpretation of Title IX vastly expanding its previous reach.

A. THE PASSAGE AND PURPOSE OF TITLE IX

Congress passed Title IX, found in 20 U.S. Code §§ 1681–1688, into law on June 23, 1972.[12] Its original and essential words are as follows: "No 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 . . . ."[13] The Office for Civil Rights in the Department of Health, Education, and Welfare

8. *See* discussion *infra* Section II.A.

9. *See* discussion *infra* Sections II.B–.E.

10. *See* discussion *infra* Sections III.A–.C.

11. *See* discussion *infra* Section III.D.

12. *The 14th Amendment and the Evolution of Title IX*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix [https://perma.cc/5CCG-CABA].

13. 20 U.S.C. § 1681(a) (2018).

("HEW")[14] was charged with transforming these seemingly straightforward words into enforceable regulations and enforcing those regulations.[15] HEW issued those regulations on July 21, 1975.[16] They required, among other things, educational institutions to assign an employee to be responsible for ensuring the school complied with Title IX and investigating alleged violations of the statute.[17]

Previous legislation to combat discrimination had intentionally avoided sex-based discrimination.[18] But when the college and university system saw major growth in the 1960s, some began to see a need for more women faculty.[19] Congresswomen Martha Griffiths of Michigan and Edith Green of Oregon led the legislative effort to address this need.[20] Green first suggested that Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in the workplace, be amended to cover employees of colleges and universities.[21] Eventually, Congress decided to draft a separate title.[22] When it was passed into law, Title IX included exemptions for religious schools,[23] military academies, and all-male and all-female private schools.[24]

For the quarter-century after it was passed into law, public attention centered on the statute's effect on college athletics and the opportunities it opened up for women's competition.[25] However, that was not its primary intent.[26] The statute was intended to increase equality among men and women across a range of educational arenas, including in rates of graduate school attendance and participation in science and math education.[27] Representative Green expressed her intention to end the "educational quotas

14. What is now the Department of Education was, at the time Title IX was passed into law, the Department of Health, Education, and Welfare. ELIZABETH TANG ET AL., NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 50, at 3 (2022).

15. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 5 (2005).

16. Claire Kuwana, *50 Years of Title IX: The Defining Moments of Women's Sports*, SPORTS ILLUSTRATED (June 9, 2022), https://www.si.com/college/2022/06/09/title-ix-50-years-timeline (on file with the *Iowa Law Review*).

17. CARPENTER & ACOSTA, *supra* note 15, at 7.

18. Risa L. Lieberwitz et al., *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS'N U. PROFESSORS 69, 70 (2016).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 70–71.

23. The exemption for religious schools is not a complete exemption, but only extends as far as Title IX conflicts with an organization's religious tenets. 34 C.F.R. § 106.12(a) (2023).

24. Lieberwitz et al., *supra* note 18, at 71.

25. *Id.*

26. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 84 (2013) ("[I]t was originally intended to address inequality in science, technology, engineering and math . . . among other topics.").

27. *Id.* at 83.

for admission found at law and medical schools" at the time.[28] Secretary of HEW, Caspar Weinberger, who headed the effort to implement Title IX, stated his goal of ensuring equal pay of teachers regardless of sex and equal opportunity for men and women students to take part in athletics.[29] The statute was essentially "an anti-discrimination law."[30]

B. THE EXPANSION OF TITLE IX TO COVER SEXUAL HARASSMENT

Title IX's "[e]arly interpretation and implementation" reflected this anti-discriminatory intent.[31] But questions soon arose regarding the extent of the statute's language.[32] It was unclear "whether administrative remedies alone" or more extensive remedies "such as . . . individual monetary awards" were available after a Title IX violation.[33] It was also unclear whether the statute covered only the particular programs at a school receiving federal assistance.[34] Perhaps most important for the statute's current expansive nature was the movement to apply Title IX to sexual misconduct in addition to discrimination.[35] The Supreme Court paved the way for this development in 1979 when it "recognized an 'implied private right of action'" in the statute, allowing students to bring individual suits.[36] And in the same period, for the first time, a court (the U.S. Court of Appeals for the District of Columbia Circuit) recognized sexual harassment as sex-based discrimination.[37]

In 1981, the Office for Civil Rights took the recommendation of the National Advisory Council on Women's Educational Programs when it issued policy guidance stating that sexual harassment[38] was a form of sex discrimination prohibited under Title IX.[39] The Supreme Court and other federal courts over the next two decades affirmed the availability of monetary damages to

28. *Id.* at 85.

29. *Id.*

30. *Id.* at 84.

31. Lieberwitz et al., *supra* note 18, at 71–72.

32. *See id.* at 72.

33. *Id.*

34. *Id.* at 72–73.

35. *Id.*

36. *See id.* at 72 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 708 n.42 (1979)).

37. Lieberwitz et al., *supra* note 18, at 73.

38. The Office for Civil Rights defined sexual harassment in this guidance as including "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." OFF. FOR C.R., U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1995), https://files.eric.ed.gov/fulltext/ED402856.pdf [https://perma.cc/5989-2C9T].

39. Lieberwitz et al., *supra* note 18, at 74; *see also* OFF. FOR C.R., U.S. DEP'T OF EDUC., *supra* note 38, at 2 ("Question: What is an institution's legal responsibility to respond to allegations of sexual harassment? Answer: The responsibility is the same as it would be for any other sex discrimination complaint filed under Title IX.").

individual harassment victims under the statute,[40] the applicability of the statute to teacher-student conduct,[41] students' protection under Title IX as equal to that of employees,[42] and schools' potential liability for cases of sexual harassment committed by one student against another.[43] And in 2011, the Department of Education's Office for Civil Rights published a definition of sexual harassment that includes not only "sexual violence," but "a hostile environment based on speech."[44] All of these changes mark a significant development in the interpretation of Title IX since it was first passed into law.

As Title IX's scope has expanded, so have the costs to schools as they seek compliance.[45] The statute "caused a massive expense for schools" when it was first enacted.[46] And as schools face increasing "pressure from the federal government" to focus on protecting against sexual assault and harassment, compliance costs have only increased.[47] Colleges and universities have quickly increased the number of employees assigned to dealing with Title IX compliance.[48] These include "lawyers, investigators, case workers, survivor advocates, peer counselors, workshop leaders and other officials."[49] As an indication of the rapidly expanding Title IX bureaucracy on college and

40. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 66–73 (1992) (observing that the "longstanding rule"—"where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done"—had not been done away with by the Court, and rejecting the notion "that Congress has limited the remedies available to a complainant in a suit brought under Title IX" (quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (alteration omitted))); Lieberwitz et al., *supra* note 18, at 75 ("In the wake of *Franklin*, a series of cases applied the standards of Title VII to students who brought claims of sexual harassment under Title IX.").

41. *Franklin*, 503 U.S. at 75 ("[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex. We believe the same rule should apply when a teacher sexually harasses and abuses a student." (alteration in original) (citation omitted) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986))); Lieberwitz et al., *supra* note 18, at 75.

42. Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421–22 (1996) ("[T]his Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees."); Lieberwitz et al., *supra* note 18, at 75.

43. Davis *ex rel.* LaShonda v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 631 (1999) ("[T]his Court is constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of 'discrimination' actionable under [Title IX]."); Lieberwitz et al., *supra* note 18, at 75.

44. Lieberwitz et al., *supra* note 18, at 77.

45. Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html (on file with the *Iowa Law Review*).

46. Tara García Mathewson, *Colleges Spend Millions on Title IX Compliance*, HIGHER ED DIVE (Mar. 30, 2016), https://www.highereddive.com/news/colleges-spend-millions-on-title-ix-compliance/416525 [https://perma.cc/7S33-7NXE].

47. Hartocollis, *supra* note 45; García Mathewson, *supra* note 46.

48. Hartocollis, *supra* note 45.

49. *Id.*

university campuses, the Association of Title IX Administrators, a "group . . . that did not exist in 2011," had 5,000 members as of 2016, and doubled in size two years in a row between 2014 and 2016.[50] The minimum staff required at a school by Title IX is a single, part-time Title IX coordinator.[51] A full-time coordinator "can earn $50,000 to $150,000 a year."[52] But many schools have much broader implementation schemes that can cost millions of dollars.[53] Colleges asked about the cost of their Title IX compliance have difficulty providing a figure because Title IX compliance efforts span multiple departments and employees with tasks in addition to ensuring Title IX compliance.[54] The costs of compliance with Title IX are felt especially acutely by small schools, who bear the burden not only of financial costs, but of the time and paperwork necessary in order to come into and remain in compliance with the statute.[55]

C. TWO RECENT COURT DECISIONS WITH A NOVEL INTERPRETATION OF TITLE IX

The scope of Title IX was further and significantly broadened in the statute's interpretation by two federal district court cases during the summer of 2022.[56] *Buettner-Hartsoe v. Baltimore Lutheran High School Ass'n* and *Herrera ex rel. E.H. v. Valley Christian Academy* both concluded that schools with 501(c)(3) tax-exempt status, by virtue of that exemption, receive federal financial assistance and are thus subject to Title IX.[57] This interpretation of what Title IX means by "federal financial assistance" overturns long-held assumptions about the meaning of the statute[58] and poses a potentially major change for tax-exempt independent schools.[59]

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50. *Id.*

51. *Id.*

52. *See id.*

53. *Id.*

54. *Id.*

55. *See* Julie Asher, *NCEA, Other Faith-Based Groups Fight Efforts to Broaden Scope of Title IX*, NAT'L CATH. REP. (Aug. 25, 2022), https://www.ncronline.org/news/ncea-other-faith-based-groups-fight-efforts-broaden-scope-title-ix [https://perma.cc/NQJ9-KUFN].

56. Jeffrey Shields, *Defending Our Independence*, NAT'L BUS. OFFICERS ASS'N (Aug. 9, 2022), https://www.nboa.org/net-assets/article/defending-our-independence [https://perma.cc/S47V-F8KD].

57. *See* Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n, No. 20-cv-3132, 2022 WL 2869041, at *4 (D. Md. July 21, 2022) (citing Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983)); Herrera *ex rel.* E.H. v. Valley Christian Acad., 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022).

58. *See* Ed Whelan, *Addled Ruling that Tax-Exempt Status Subjects Private School to Title IX*, NAT'L REV. (Aug. 2, 2022, 1:57 PM), https://www.nationalreview.com/bench-memos/addled-ruling-that-tax-exempt-status-subjects-private-school-to-title-ix [https://perma.cc/BZH5-R7UW?type=image].

59. *See* Brigid A. Harrington, *Client Alert: Federal Court Rules That Tax-Exempt Private Schools Must Comply with Title IX*, BOWDITCH ATT'YS (July 25, 2022), https://www.bowditch.com/2022/07/25/client-alert-federal-court-rules-that-tax-exempt-private-schools-must-comply-with-title-ix [https://perma.cc/4P59-8PPE].

1. *Buettner-Hartsoe v. Baltimore Lutheran High School Ass'n*

The first of these decisions, *Buettner-Hartsoe v. Baltimore Lutheran High School Ass'n*, involved five women who brought cases against Concordia Preparatory School ("CPS"), formerly known as Baltimore Lutheran High School.[60] CPS is a 501(c)(3) organization.[61] The women alleged that they experienced sexual assault and harassment while students there.[62] When the women brought counts against CPS under Title IX, CPS moved to dismiss.[63] The school argued that it did not directly receive federal financial assistance during the time that the alleged harassment occurred and thus was not subject to that statute.[64] The U.S. District Court for the District of Maryland rejected this claim.[65] It stated that "[t]he tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution. CPS cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX."[66]

As the court recognized, the issue at hand in CPS's motions to dismiss was whether it was "an educational institution receiving federal funds"[67]—that is, the kind of institution that is subject to Title IX.[68] While the Supreme Court has not yet "directly addressed whether tax-exempt status under [section] 501(c)(3) constitutes federal financial assistance for purposes of Title IX," the court relied on several other Supreme Court decisions and decisions of the Fourth Circuit to support its "conclusion that federal tax exemption qualifies as federal financial assistance under Title IX."[69]

The first decision the district court pointed to is *Grove City College v. Bell*.[70] In that case, the Supreme Court ruled that a school receives federal financial assistance if its students receive federal aid.[71] The second decision cited by the district court is *National Collegiate Athletic Ass'n v. Smith*.[72] There, the Supreme Court stated that an entity may "receive federal assistance . . . through an intermediary."[73] Both of these rulings, said the Maryland court, show that an

60. *Buettner-Hartsoe*, 2022 WL 2869041, at *1.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at *3.

67. *Id.*

68. *See* 20 U.S.C. § 1681(a).

69. *Buettner-Hartsoe*, 2022 WL 2869041, at *3.

70. *Id.* at *4 (citing Grove City Coll. v. Bell, 465 U.S. 555, 569–70 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28).

71. *Id.* (citing *Grove City Coll.*, 465 U.S. at 569–70).

72. *Id.* (citing Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999)).

73. *Id.* (quoting *Nat'l Collegiate Athletic Ass'n*, 525 U.S. at 468).

entity may be receiving federal financial assistance for the purposes of Title IX "even if it did not apply for the aid or the aid is indirectly provided."[74]

The court then cited a third case, *Regan v. Taxation with Representation of Washington*, and the Supreme Court's description therein of tax exemptions as "a form of subsidy."[75] The Supreme Court in that case reasoned that "tax exemption[s] [have] much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."[76]

Fourth, the court cited the Supreme Court's decision in *Bob Jones University v. United States* that organizations must align with public policy if they wish to hold tax-exempt status.[77] In *Bob Jones*, the Supreme Court upheld a decision of the Internal Revenue Service to strip the university of its tax-exempt status because of its policies banning interracial dating and marriage among students.[78] The *Buettner-Hartsoe* court reasoned that discrimination on the basis of sex is just as contrary to public policy as racial discrimination.[79] (The assumption being that making CPS subject to Title IX will ensure that a federally financed organization is operating in accordance with public policy.) In support of this conclusion, the *Buettner-Hartsoe* court cited the Supreme Court's decision in *Cannon v. University of Chicago*, which mentioned that Title IX was based off Title VI banning racial discrimination with similar Congressional intent behind each statute.[80]

Finally, the district court acknowledged another district court case, cited by CPS in support of its claim that 501(c)(3) status does not amount to federal financial assistance under Title IX.[81] In *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Illinois*, a federal district court in Illinois ruled in favor of a hockey association when it said that its 501(c)(3) status did not make it subject to Title IX.[82] There, the court mentioned that the statutory language of Title IX explains federal financial assistance and notes "that income tax exemptions are 'conspicuously absent from that laundry list'" of items that constitute federal assistance according to Title IX.[83] It decided that federal financial assistance only includes "direct transfers of federal money, property or services from the government to a program."[84] Notwithstanding the decision of the

74. *Id.*

75. *Id.* (quoting Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983)).

76. *Id.* (quoting *Regan*, 461 U.S. at 544).

77. *Id.* (citing Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983)).

78. *Bob Jones Univ.*, 461 U.S. at 605.

79. *Buettner-Hartsoe*, 2022 WL 2869041, at *4.

80. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

81. *Id.* at *5.

82. *Id.* (citing Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965, 966, 972 (N.D. Ill. 2001)).

83. *Id.* (quoting *Johnny's Icehouse*, 134 F. Supp. 2d at 971).

84. *Id.* (quoting *Johnny's Icehouse*, 134 F. Supp. 2d at 972).

court in *Johnny's Icehouse*, the Maryland court concluded that the decisions in the other cases it cited carried the weight of authority on the question of tax exemptions as federal assistance.[85]

2. *Herrera ex rel. E.H. v. Valley Christian Academy*

Just four days after the decision in *Buettner-Hartsoe*, the U.S. District Court for the Central District of California ruled in *Herrera ex rel. E.H. v. Valley Christian Academy*.[86] There, the plaintiff, who played for the Cuyama Valley High School football team, sued Valley Christian Academy under Title IX for prohibiting her from competing in football games against Valley Christian Academy because of her sex under the school's policy against male-female physical contact.[87]

The plaintiff claimed that, because Valley Christian Academy was a recipient of federal financial assistance in the form of 501(c)(3) tax-exempt status, it was subject to Title IX.[88] In analyzing her claim, the court took note of Title IX's statutory language about federal financial assistance but noted that the statute does not explicitly define that assistance.[89] Because each party cited cases that came down on either side of the question, the court decided that there was no "controlling precedent" to be followed[90] and pointed to "the plain purpose of [Title IX] . . . to eliminate discrimination in programs or activities benefitting from federal financial assistance."[91] The court characterized the debate over whether a tax exemption is federal assistance as a "[d]istinction[] as to the method of distribution of federal funds or their equivalent" that was "beside the point," and concluded that Valley Christian Academy's tax-exempt status under 501(c)(3) requires it to abide by Title IX.[92]

The decisions in *Buettner-Hartsoe* and *Valley Christian Academy* mark a drastic shift from the longstanding assumption that 501(c)(3) organizations do not, simply by virtue of that status, receive federal financial assistance.[93] This development is especially significant for small, private, and independent schools for whom the possibility of treating a tax exemption as federal financial assistance represents a significant financial and administrative

85. *Id.*

86. *See* Caryn G. Pass, Grace H. Lee, Janice P. Gregerson & Ashley E. Sykes, *Title IX and Tax-Exempt Status: What Two Recent Federal Court Opinions Mean for Independent Schools*, VENABLE LLP (July 28, 2022), https://www.venable.com/insights/publications/2022/07/title-ix-and-tax-exempt-status-what-two-recent [https://perma.cc/4YN9-4XUA].

87. Herrera *ex rel.* E.H. v. Valley Christian Acad., 616 F. Supp. 3d 1040, 1044, 1053–54 (C.D. Cal. 2022).

88. *Id.* at 1049–50.

89. *Id.*

90. *Id.* at 1050.

91. *Id.* (quoting McGlotten v. Connally, 338 F. Supp. 448, 461 (D.D.C. 1972)).

92. *Id.* (quoting *McGlotten*, 338 F. Supp. at 461).

93. *See* Pass et al., *supra* note 86.

obstacle to their continued operations.[94] Yet the case against these decisions is clear. While the reasoning based on previous cases relied upon by *Buettner-Hartsoe* and *Valley Christian Academy* is anemic, abundant evidence of legislative intent in passing Title IX, statutory interpretation by the executive branch, and interpretation of Title IX by the public all point to a conclusion that for nearly half a century has been accepted by all: that the meaning of "federal financial assistance" as that term is used in Title IX does not encompass 501(c)(3) status under the Internal Revenue Code.

II. THE EXCLUSION OF TAX-EXEMPT STATUS FROM FEDERAL FINANCIAL ASSISTANCE AS EXPRESSED BY THE EXECUTIVE AND LEGISLATIVE BRANCHES

An analysis of the relevant evidence from the executive and legislative branches reveals that Title IX is not intended to include an organization's tax-exempt status under Section 501(c)(3) of the Internal Revenue Code as federal financial assistance that would render that organization subject to that statute. The following Section demonstrates the inability of relevant case history to determine this issue, followed by an analysis of the substantial evidence from the executive and legislative branches, including statutory language, regulations, and the constitutional authority under which Congress passed Title IX, that demonstrates that 501(c)(3) status does not count as federal financial assistance under Title IX.

A. THE INSUFFICIENCY OF EXISTING CASE LAW TO DETERMINE WHETHER TITLE IX INCLUDES 501(C)(3) TAX-EXEMPT STATUS AS FEDERAL FINANCIAL ASSISTANCE

The courts in both *Buettner-Hartsoe* and *Valley Christian Academy* sought to justify their holdings primarily on the reasoning found in a handful of older federal district court cases. The connection of the two cases at hand to these older cases is often attenuated. Only one of the cases the courts cited discusses whether 501(c)(3) status equals federal financial assistance under Title IX, and, even then, in only the most passing comment. A brief review of the cases cited will suffice to show that interpretation of Title IX's language must rely not on the sparse case law at hand but instead on evidence from legislative history, executive interpretation and enforcement, and the meaning of the statute as understood by the wider public.

The court in *Buettner-Hartsoe* used case precedent to establish three legal principles that it believed justified its holding that 501(c)(3) status is federal financial assistance. First, it cited *Grove City College v. Bell* and *National Collegiate Athletic Ass'n v. Smith* to state that a school can receive Title IX federal

94. Asher, *supra* note 55.

assistance indirectly, regardless of whether it applied for such aid.[95] In *Grove City College*, the Supreme Court held that a college can be said to receive federal assistance, albeit indirectly, if its "students . . . receive direct Basic Educational Opportunity Grants" from the Department of Education.[96] In *NCAA*, the Court again affirmed that while merely benefiting economically from federal assistance does not subject an institution to Title IX, it was nevertheless possible to receive assistance indirectly in such a way that implicated the statute.[97]

Neither of these cases help the *Buettner-Hartsoe* court's argument. *NCAA*, while affirming the possibility of indirect assistance, rejected the notion that receiving dues payments from recipients of federal assistance was equivalent to receiving federal assistance, either directly or indirectly, because there was no way to determine whether the money used for dues payments was provided to the dues payers through federal assistance.[98] The *Grove City College* case focused on what it meant for a school to *receive* federal financial assistance, not on whether the Basic Educational Opportunity Grants at issue were such assistance (as is the case in *Buettner-Hartsoe* and *Valley Christian Academy*).[99]

The issue in that case was thus the inverse of the issue in the present cases. There was no doubt about whether the educational grants were federal financial assistance, but there was doubt about whether the school was truly receiving that assistance.[100] In contrast, in the present cases, there is no doubt that schools are receiving the benefit of 501(c)(3) status, but there is doubt about whether that benefit is federal financial assistance. In addition, and significantly, the *Grove City College* court could have mentioned Grove City College's 501(c)(3) status while determining whether the college was subject to Title IX but it did not.[101] Furthermore, the court's analysis in *Grove City College* makes it clear that it grounds its conclusion in "the clear statutory language" of Title IX, "evidence of Congress' [sic] intent," and the Department of Education's interpretation of that statute.[102] The issue was not whether the grants assist or benefit the recipient in a merely colloquial sense, but whether

95. Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n, No. 20-cv-3132, 2022 WL 2869041, at *5 (D. Md. July 21, 2022) (citing Grove City Coll. v. Bell, 465 U.S. 555, 564 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28; Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466–67 (1999)).

96. *Grove City Coll.*, 465 U.S. at 559.

97. *Nat'l Collegiate Athletic Ass'n*, 525 U.S. at 468.

98. *Id.*

99. Brief of Amici Curiae in Support of Defendant's Motions for Reconsideration or, in the Alt., to Certify Order for Interlocutory Appeal at 9, *Buettner-Hartsoe*, 2022 WL 2869041 (20-cv-03132) [hereinafter Buettner-Hartsoe Amici Brief]; *Grove City Coll.*, 465 U.S. at 563.

100. Buettner-Hartsoe Amici Brief, *supra* note 99, at 9.

101. *See* Bachman v. Am. Soc'y of Clinical Pathologists, 577 F. Supp. 1257, 1265 (D.N.J. 1983).

102. *Grove City Coll.*, 465 U.S. at 569.

they fall under the specific statutory definition of federal financial assistance in Title IX. So too with 501(c)(3) status.

The *Buettner-Hartsoe* court next cited *Regan*'s conclusion that "tax exemptions . . . are a form of subsidy" with "much the same effect as a cash grant to the [exempt] organization" to establish the claim that the Supreme Court has viewed tax-exemption as a subsidy equivalent to a cash grant.[103] But this holding does not answer the question of whether the statutory language of Title IX includes tax-exempt status in its definition of federal financial assistance.

Finally, the court cited *Bob Jones*, *Green v. Connally*, and *Cannon* for the principle that schools that discriminate based on sex should not be eligible for a tax-exemption.[104] In *Bob Jones*, the Supreme Court stated that organizations receiving tax exemptions must operate in accord with public policy.[105] *Green* upheld the principle that discrimination causes a school to lose its right to such an exemption.[106] And *Cannon* held that Title VI, which prohibits race discrimination, was the basis for the remedies Congress created under Title IX.[107] These cases presented arguments for when an organization *ought* not receive a tax exemption, but they do not advance inquiry into the issue at hand—does 501(c)(3) status fall under Title IX's definition of federal financial assistance?

The cases cited by the court in *Valley Christian Academy* are similarly unhelpful. The court noted that there is "conflicting case law" on the issue of tax-exempt status as it relates to Title IX and mentioned two cases in support of its conclusion that were also noted by the court in *Buettner-Hartsoe*.[108] First, in *Fulani v. League of Women Voters Education Fund*, a federal district court in New York stated that the defendant was a recipient of federal financial assistance under Title IX because of both its tax-exempt status and receipt of direct grants.[109] However, the court in *Fulani* simply asserted this statement without any analysis or justification.[110] Second, the court noted that in *McGlotten v. Connally* (a case decided in 1972, before Title IX even existed), a federal district court found that tax-exempt status was federal financial assistance for purposes of Title VI.[111] Yet this decision failed to address, of course, Title IX. Further, the finding is contradicted by the Department of

103. *Buettner-Hartsoe*, 2022 WL 2869041, at *4 (citing Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983)).

104. *Id.*

105. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).

106. Green v. Connally, 330 F. Supp. 1150, 1156 (D.D.C. 1971).

107. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

108. Herrera *ex rel.* E.H. v. Valley Christian Acad., 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022); *Buettner-Hartsoe*, 2022 WL 2869041, at *4.

109. Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988).

110. *See id.*

111. *Valley Christian Acad.*, 616 F. Supp. 3d at 1050 (citing McGlotten v. Connally, 338 F. Supp. 448, 461 (D.D.C. 1972)).

Justice's own Title VI guidance, which excludes tax-exempt status from the meaning of federal financial assistance.[112]

The only relevant case law that deals directly with the question of whether 501(c)(3) status constitutes federal financial assistance under Title IX, and that provides any level of analysis for its conclusion on that question, is *Johnny's Icehouse*, cited yet dismissed by both *Buettner-Hartsoe* and *Valley Christian Academy*.[113] In that case, the court did what will be done in more detail below—observed the statutory and regulatory language of Title IX and concluded from the absence of any mention of tax-exempt status that such status does not make an organization subject to Title IX.[114] As can be seen, the case law surrounding this issue is meager. Turning instead to the legislative and executive branches' understandings of Title IX, as well as that of the American public, is now necessary to answer the question that *Buettner-Hartsoe*, *Valley Christian Academy*, and their fellow courts have failed to sufficiently address. Such sources provide not only more substantial material to interpret, but a clearer window into how the statute has been understood by those who have enacted it, enforced it, and operated under its jurisdiction for half a century.

B. Department of Education Regulations Implementing Title IX Limit the Meaning of Federal Financial Assistance to Assistance Given by the Department

Title IX states at 20 U.S.C. § 1682 that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability."[115] Under the authority of this section, the Department of Education has passed regulations governing the interpretation and administration of Title IX.[116] Those regulations are found at 34 C.F.R. § 106. The regulations are a natural starting place for understanding the meaning of the statutory language for two reasons.

First, it is an official interpretation of Title IX published by the executive branch which itself enforces that law. Second, the Supreme Court has held in *Mourning v. Family Publications Service, Inc.* that:

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary

112. C.R. Div., U.S. Dep't of Just., Title VI Legal Manual § 5(C)(1)(d) (2016).

113. *Valley Christian Acad.*, 616 F. Supp. 3d at 1049–50; *Buettner-Hartsoe*, 2022 WL 2869041, at *4–5; Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965, 971 (N.D. Ill. 2001).

114. *Johnny's Icehouse*, 134 F. Supp. 2d at 971.

115. 20 U.S.C. § 1682.

116. 34 C.F.R. § 106 (1980).

> to carry out the provisions of this Act," . . . the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."[117]

The empowering provision of Title IX, found in 20 U.S.C. § 1682 quoted above, does just that.[118] Therefore, so long as the Department of Education's regulations in 34 C.F.R. § 106 are "reasonably related to the purposes of [Title IX]," they must be upheld by the courts.[119]

In § 106.2(g), the Department defines what Title IX means by "federal financial assistance." It states that "[f]ederal financial assistance means any of the following, *when authorized or extended under a law administered by the Department*."[120] A list of specific types of federal financial assistance, to be discussed later in this Note, then follows.[121] The statutory phrase italicized above could mean one of two things. First, it could mean that the list that follows it does not include other types of federal financial assistance that are nevertheless included in Title IX's definition of that term, yet are "authorized or extended"[122] by other federal departments. In other words, it could mean that the list at hand describes only the kinds of federal assistance that count that are also administered under the Department of Education.

Alternatively, the italicized phrase could mean that the phrase "federal financial assistance" in Title IX refers only to that assistance which is "authorized or extended under a law administered by the Department [of Education],"[123] and that assistance given under laws not administered by the Department does not count for purposes of the statute. The second possible meaning is clearly held by the Department of Education in its Policy Interpretation of Title IX published in the Federal Register on December 11, 1979.[124] There, the Department states that "Title IX prohibits educational programs and institutions *funded or otherwise supported by the Department* from discriminating on the basis of sex,"[125] and that "[t]his policy interpretation applies to any public or private institution, person or other entity that

117. Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973) (footnote omitted) (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 277, 280–81 (1969)).

118. *See supra* text accompanying note 115.

119. *Mourning*, 411 U.S. at 369 (quoting *Thorpe*, 393 U.S. at 280–81).

120. 34 C.F.R. § 106.2(g) (2020) (emphasis added).

121. *Id.*

122. *Id.*

123. *Id.*

124. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

125. *Id.* (emphasis added).

operates an educational program or activity *which receives or benefits from financial assistance authorized or extended under a law administered by the Department.*"[126]

Therefore, as a basic "threshold" matter,[127] the Department of Education has defined the language of Title IX for over forty years to exclude federal financial assistance that is provided "under a law [that is] administered by" some other governmental branch or agency, and not by the Department of Education.[128] Such laws include the Internal Revenue Code, and its tax exemption for organizations described in I.R.C. Section 501(c)(3), administered by the Internal Revenue Service. As a result, even if 501(c)(3) tax-exempt status *were* to be considered federal financial assistance, it would not be the federal assistance contemplated by Title IX as the Department of Education itself understands that statute.

The Department's regulation in 34 C.F.R. § 106.2(g), which excludes from the meaning of Title IX federal financial assistance not provided under a law administered by the Department, is "reasonably related to the purposes of [Title IX],"[129] defined by the Department as "eliminat[ing] (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance."[130] It defines the limits of the statute's words "federal financial assistance," clarifying the circumstances in which the statute applies. By any standard, such a clarification of the statute's scope bears some rational relationship to the statute's purpose. Therefore, courts are bound to uphold the regulation's validity.[131]

C. *Department of Education Title IX Regulations Do Not Include Tax-Exempt Status in Their Definition of Federal Financial Assistance*

After it limits the meaning of federal financial assistance to such assistance given under the authorization of the Department of Education (thus precluding 501(c)(3) status as a threshold matter), 34 C.F.R. § 106.2(g) provides a list of the types of "federal financial assistance" that are included in the Department's understanding of that phrase. As the court in *Johnny's Icehouse* recognized, the list is "comprehensive"—the items included in it are not given only as

126. *Id.* at 71414 (emphasis added).

127. Whelan, *supra* note 58 (noting problems with this definition of "federal financial assistance").

128. *See* 34 C.F.R. § 106.2(g) (2020). Laws enforced by the Department of Education include, for example, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Family Educational Rights and Privacy Act ("FERPA"). ADAM STOLL, REBECCA R. SKINNER & DAVID P. SMOLE, CONG. RSCH. SERV., IF10551, A SUMMARY OF FEDERAL EDUCATION LAWS ADMINISTERED BY THE U.S. DEPARTMENT OF EDUCATION 2 (2022).

129. Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973) (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 280–81 (1969)).

130. 34 C.F.R. § 106.1 (2020).

131. *See Mourning*, 411 U.S. at 369.

examples of federal financial assistance.[132] This is seen in the language used to preface the list—"[f]ederal financial assistance *means* any of the following . . . ."[133] The Department of Education could have indicated that this list was non-exhaustive by replacing the word "means" with "includes," but it did not.

The list includes five items that fall under the federal government's interpretation of "federal financial assistance" as that phrase is used in Title IX. First, "grant[s] or loan[s] of Federal financial assistance, including funds made available for" various purposes;[134] second, "grant[s] of Federal real or personal property or any interest therein";[135] third, the "[p]rovision of the services of Federal personnel";[136] fourth, the sale, lease, or use "of Federal property" for reduced or no consideration;[137] and fifth, "[a]ny other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity."[138]

Tax-exempt status is clearly not "[a] grant of Federal real or personal property," a "[p]rovision of . . . personnel," or a "[s]ale or lease of Federal property"—the kinds of assistance defined in 34 C.F.R. § 106.2(g)(2)–(4).[139] What about § 106.2(g)(1), describing grants and loans, or § 106.2(g)(5) which includes "[a]ny other contract, agreement, or arrangement"?[140] As for § 106.2(g)(1), the subsection uses the words "grant" and "loan" as nouns. To read them as verbs would ignore the article "[a]" immediately preceding them and violate the canon of statutory interpretation against surplusage[141] by creating a circular definition of federal financial assistance—"federal financial assistance" would be defined in this reading of § 106.2(g)(1) as the giving of federal financial assistance, "a gift (as of land or money) for a particular purpose,"[142] and "money lent at interest."[143] Tax-exempt status is neither a gift given by the federal government nor a loan of money. Thus, it does not fall into the financial assistance described in § 106.2(g)(1).

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132. *See* Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965, 971 (N.D. Ill. 2001).

133. 34 C.F.R. § 106.2(g) (2020) (emphasis added).

134. *Id.* § 106.2(g)(1).

135. *Id.* § 106.2(g)(2).

136. *Id.* § 106.2(g)(3).

137. *Id.* § 106.2(g)(4).

138. *Id.* § 106.2(g)(5).

139. *Id.* § 106.2(g)(2)–(4).

140. *Id.* § 106.2(g)(1), (5).

141. Bryan A. Garner & Antonin Scalia, *A Dozen Canons of Statutory and Constitutional Text Construction*, JUDICATURE, Autumn 2015, at 80, 80.

142. *Grant*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/grant [https://perma.cc/6HDJ-F8TK].

143. *Loan*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/loan [https://perma.cc/D6C7-4TNP].

Section 106.2(g)(5) is the broadest of the five types of federal financial assistance defined in § 106.2(g) and refers to "[a]ny other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty."[144] First of all, exemption from the income tax under I.R.C. Section 501(c)(3) is not a "contract, agreement, or arrangement."[145] 501(c)(3) status is not a contract, because there is neither "mutual assent to [any] exchange," nor any consideration.[146] It is simply a formal recognition by the government that an organization falls into a particular category of organizations. While it is true that the government could be said to have "agreed" or "arranged" to not subject 501(c)(3) organizations to certain taxes, this pushes the limits of what these words might reasonably mean given the context. The federal government decided on its own, through the legislative process, and not through any negotiated agreement reached with particular organizations, to exempt non-profit organizations from the income tax. For the same reason, 501(c)(3) status cannot be considered an "arrangement" as § 106.2(g)(5) uses that term, for under the statutory canon of *noscitur a sociis*,[147] "arrangement" should be understood in a sense similar to the words "contract" and "agreement" that immediately precede it; that is, as "an informal agreement or settlement"[148]—some kind of negotiation reached between multiple parties.

Second, to understand what § 106.2(g)(5) means by "assistance," it is necessary to read its language in light of § 106.2(g)(1)–(4). Each of those clauses describes a tangible resource such as money, property, or personnel that the government provides to the recipient.[149] I.R.C. Section 501(c)(3) does not confer any such assistance upon the organizations it describes.

As one court noted regarding the list of what counts as federal financial assistance in § 106.2(g), "[w]hat is conspicuously absent from that laundry list is income tax exemption."[150] Even if the categories of assistance laid out in § 106.2(g) qualified as assistance when extended under a law such as I.R.C. Section 501(c)(3) that is not administered by the Department of Education (which they do not), income tax exemption under I.R.C. Section 501(c)(3) still would not fall under any of the categories of federal financial assistance included in Title IX as that statute is officially interpreted by the federal

144. 34 C.F.R. § 106.2(g)(5) (2020).

145. *Id.*

146. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981).

147. 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:16 (Clark Kimball & Gregory V. Bell eds., 7th ed. 2022).

148. *Arrangement*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/arrangement [https://perma.cc/BH76-QF5R].

149. Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965, 972 (N.D. Ill. 2001).

150. *Id.* at 971.

government. As a result, "the doctrine of *expressio unis est exclusio alterius*" applies, which "instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded."[151] Tax-exempt status was excluded from federal financial assistance in Title IX as officially interpreted by 34 C.F.R. § 106.2(g), and so was intended to be excluded.

D. THE DEPARTMENT OF JUSTICE HAS EXPLICITLY STATED THAT TAX EXEMPTION DOES NOT COUNT AS FEDERAL FINANCIAL ASSISTANCE FOR PURPOSES OF TITLE VI

Clear evidence of the meaning of Title IX can also be gleaned from its broader statutory context. Congress wrote Title IX purposefully modeling it after Title VI of the Civil Rights Act of 1964,[152] which prohibits racial "discrimination under any program or activity receiving Federal financial assistance."[153] Except for their respective clauses about discrimination based on race and sex, and for the word "education" in Title IX, the two titles are essentially identical. Because of these strong connections between the two statutes, official guidance on the meaning of one sheds important light on the meaning of the other.

The Department of Justice's Title VI Legal Manual explicitly addresses the question of whether "typical tax benefits" count as federal financial assistance under that Title, briefly describing the majority of court cases that have found that they do not, and "a few" cases that have found that they do.[154] More importantly, however, is the language that prefaces the list of these cases. There, the Department states that "[t]ypical tax benefits—tax exemptions, tax deductions, and most tax credits—are not considered federal financial assistance."[155] And most importantly, the Department goes on to cite the Department of the Treasury's regulation implementing Title IX—which uses the exact same language to define federal financial assistance as that found in 34 C.F.R. § 106.2(g)(1)–(5) from the Department of Education—as an example of a regulation in which "typical tax benefits are not included in the . . . definition[] of federal financial assistance because they are not contractual in nature."[156] Thus, the Department of Justice has directly indicated that it does not consider tax exemption to be federal financial assistance under statutory language that was used as a model for and essentially identical to the

151. Buettner-Hartsoe Amici Brief, *supra* note 99, at 5 (quoting Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 864 (4th Cir. 2001)).

152. *Title IX Legal Manual*, U.S. DEP'T. OF JUST.: C.R. DIV. (Sept. 14, 2023), https://www.justice.gov/crt/title-ix [https://perma.cc/P5NS-P69S].

153. 42 U.S.C. § 2000d.

154. C.R. DIV., U.S. DEP'T OF JUST., *supra* note 112, § 5(C)(1)(d).

155. *Id.*

156. *Id.* (citing 31 C.F.R. § 28.105 (2000)).

language of Title IX. And it has also stated that it interprets the regulatory language defining federal financial assistance under Title IX to exclude tax exemptions. While acknowledging the minority of cases that have been decided to the contrary, the Department of Justice's own guidance states its position that tax exemptions are not federal financial assistance under Title IX.

E. CONGRESS PASSED TITLE IX UNDER ITS SPENDING POWER AUTHORITY, GIVING TITLE IX THE NATURE OF A CONTRACT ONLY VALID UPON KNOWING ACCEPTANCE OF ITS TERMS

To hold that Title IX includes tax-exempt status within the meaning of federal financial assistance does not only go against the executive branch's express interpretation of that statute. It is contrary to the intention of Congress, which is evident from the constitutional authority under which it passed Title IX into law. Congress passed Title IX by the authority given to it in the Spending Clause of the U.S. Constitution.[157] The unique way in which Spending Clause legislation functions[158] has significant implications for the interpretation of any purported conditions that a statute places on the receipt of federal funds—implications that apply squarely to the meaning of federal financial assistance in Title IX.

The Spending Clause of the U.S. Constitution gives Congress the authority to spend money for the "general [w]elfare" of the nation.[159] While most laws passed by Congress are binding upon the relevant parties regardless of their consent, Spending Clause legislation is contractual.[160] It "condition[s] an offer of federal funding on a promise by the recipient not to discriminate."[161] As a result, "*the 'legitimacy of Congress' power' to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on 'whether the [recipient] voluntarily and knowingly accepts the terms of th[at] "contract.*'"'"[162]

This principle played out in *Pennhurst State School and Hospital v. Halderman*. The case dealt with a complaint brought by a resident of a state hospital for the mentally disabled.[163] She claimed that the conditions at the hospital "were unsanitary, inhumane, and dangerous."[164] Among her claims was that these conditions violated the Developmentally Disabled Assistance and Bill of

157. U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States."); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181 (2005) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998)).

158. *See* Cummings v. Premier Rehab Keller, PLLC, 596 U.S. 212, 219 (2022).

159. U.S. CONST. art. I, § 8, cl. 1.

160. *See Cummings*, 596 U.S. at 219 (quoting *Gebser*, 524 U.S. at 286).

161. *See id.* (quoting *Gebser*, 524 U.S. at 286).

162. *See id.* (alterations in original) (emphasis added) (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

163. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 6 (1981).

164. *Id.*

Rights Act of 1975.[165] In analyzing this claim, the Court turned to the authority by which Congress passed the Act.[166] It was passed by Congress's "spending power alone."[167] The Court noted the contractual nature of spending power legislation, in which "in return for federal funds, the States agree to comply with federally imposed conditions."[168] Because of this contractual nature, the Court said, "[t]he legitimacy of" spending power legislation depends on whether a recipient of federal funds "voluntarily and knowingly accepts the terms of the 'contract.'"[169] With these principles in mind, the Court ruled that the Act in question did not grant the respondent the rights that she claimed were violated, because protection of such rights by a state was not a clear statutory condition to the receipt of federal funds.[170]

The contractual nature of Title IX arising out of its spending power justification is yet another signpost to the statute's original meaning. As the Court in *Pennhurst* noted, in a law such as Title IX, a recipient of federal funds (a school) agrees to abide by certain conditions (no sex-based discrimination) in return for those funds.[171] It must agree to these conditions "voluntarily and knowingly."[172] This does not describe the situation of tax-exempt schools, who far from accepting the terms of the Title IX "contract," have been blissfully unaware that they were ever a party to it to begin with.[173] Knowing acceptance of such a contract is impossible without a recipient's awareness of the conditions that a law places "on its receipt of" federal funds.[174] This rule describes perfectly the state of tax-exempt schools for nearly half a century. They have been entirely unaware that Title IX places any conditions on their receipt of tax-exempt status. It is therefore impossible that they have knowingly accepted such terms of Title IX, and as a result, Title IX does not bind them.[175]

III. THE EXCLUSION OF TAX-EXEMPT STATUS FROM FEDERAL FINANCIAL ASSISTANCE AS UNDERSTOOD BY THE AMERICAN PUBLIC

The regulatory language discussed above provides sufficient insight into the way in which Title IX is understood by those whose duty it is to administer and enforce it. In the process of interpreting a statute, however, it is also "critical" to discern "*the public understanding* of [that statute] in the period after

165. *Id.* at 5.
166. *Id.* at 15.
167. *Id.*
168. *Id.* at 17.
169. *Id.*
170. *See id.* at 18.
171. *Id.* at 17.
172. *Id.*
173. *See* Whelan, *supra* note 58.
174. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 182 (2005).
175. Cummings v. Premier Rehab Keller, PLLC, 596 U.S. 212, 219 (2022).

its enactment."[176] This means asking "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context."[177] This "ordinary meaning" of a statute is important for two reasons.[178] First, if citizens are expected to obey the law, they must be able to understand its meaning.[179] Second, in order for citizens to keep the representatives they elect accountable for the laws that they pass, they must be able to understand those laws.[180]

When courts interpret laws according to this "ordinary meaning," they too remain accountable to the public, rather than claiming that they have reached an interpretation that only they can understand.[181] In the case of Title IX, the common-sense reading of the statute adhered to by the federal government as described above is the same as the interpretation of the statute by a sector of the American public that for nearly five decades has paid close attention to its requirements—the administrative staff of private schools. This is evident from the fact that a small yet strong contingent of such schools—nineteen in total according to a count by the James G. Martin Center for Academic Renewal[182]—have explicitly chosen to forgo all federal funds so as to remain independent of federal regulation.[183] The common decision of these schools provides a key insight into the public's understanding of the meaning of the phrase "federal financial assistance" in Title IX, an understanding "critical" to getting at the statute's meaning.[184] The insight is this: their decision to forgo federal funds directly implies that they do not consider their 501(c)(3) status to be "federal financial assistance" under Title IX. So why forgo such funds if one thinks that their 501(c)(3) status makes them subject to that statute anyway? The point is not that a statutory interpretation relied on by a significant number of people or organizations cannot be overturned, but that the wide and largely unchallenged acceptance of such an interpretation is persuasive evidence of statutory intent.

176. *See* District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

177. Bostock v. Clayton County, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) (quoting John F. Manning, *The Absurdity Doctrine*, 166 HARV. L. REV. 2387, 2393 (2003)).

178. *See id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. JAY SCHALIN, THE JAMES G. MARTIN CTR. FOR ACAD. RENEWAL, BREAKING AWAY FROM LEVIATHAN: COLLEGES CAN THRIVE WITHOUT FEDERAL FUNDING 6–7 (2022), https://www.jamesgmartin.center/wp-content/uploads/2022/08/Breaking_Away_From_Leviathan.pdf [https://perma.cc/9XBR-LQ6N].

183. *Id.* at 4.

184. *See* District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

A. HILLSDALE COLLEGE

Perhaps the best-known school to forgo federal funding is Hillsdale College, which has held tax-exempt status since 1943.[185] In 1975, HEW notified colleges and universities that they were required to demonstrate compliance with new affirmative action law.[186] Hillsdale's trustees believed that Title IX requirements, in particular, violated the school's ability to operate freely, and informed HEW that it did not intend to comply.[187] Over the next five years, the school's position gained publicity and became a symbol of what some saw as resistance to improper government overreach.[188] During that time, it spent approximately "half a million dollars on" attorney fees as it prepared to defend its case in court.[189] When Grove City College's similar failure to comply with Title IX was challenged by HEW, Hillsdale worked together with the school's leadership, and the arguments it developed for its own case were used in defense of Grove City College.[190] When Grove City lost, Hillsdale decided to "no longer accept students with federal grants and loans" so as to avoid having to comply with Title IX.[191] Instead, it would offer financial aid through other, private sources.[192] Former Hillsdale President George Roche explained this decision of the college as being grounded in its founding commitment to principles of "civil and religious liberty."[193] Over the following decades, other small, private colleges and universities followed a similar path.

B. CHRISTENDOM COLLEGE

Christendom College, a private Catholic college in Front Royal, Virginia, is likewise open about its choice not to receive federal financial assistance. Founded with 501(c)(3) status in 1977,[194] it chose to "never . . . accept federal funding" from the outset.[195] Its decision was driven by a belief that such financial independence would allow it to freely "teach the Catholic Faith

185. *Hillsdale College*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/381374230 [https://perma.cc/C94H-37GB].

186. George Roche, *The Price of Independence*, IMPRIMIS, Jan. 1989, at 1, 1.

187. *Id.* at 2.

188. *Id.*

189. *Id.*

190. *Id.* at 2–3.

191. *Id.* at 3.

192. *Id.*

193. *Id.* at 1.

194. *Christendom Educational Corporation*, CHARITY NAVIGATOR, https://www.charitynavigator.org/ein/541031437 [https://perma.cc/MJF2-F5K9].

195. *Why Christendom College Rejects Federal Funding*, CHRISTENDOM COLL. (2023), https://giving.christendom.edu/the-freedom-fund/why-christendom-college-rejects-federal-funding [https://perma.cc/4ULM-7GL6].

without government interference."[196] The college's website explains its concern over administrative overreach, and a belief that other Catholic colleges' choice to receive federal funds since the mid-twentieth century has led to a dilution of their religious identity.[197] Christendom also expresses hesitancy to receive federal aid due to the high costs of the "administrative and bureaucratic structures" that federal regulations require.[198] Instead, it chooses to rely on donations to cover the costs of financial aid that students at other schools would receive from the federal government.[199]

C. *NEW FRANKLIN COLLEGE*

A college's choice to forgo federal funding requires more than a desire to remain independent of perceived government intrusion into institutional affairs. New Franklin College provides an example of the commitment such a choice entails. The private college was founded in 2006 out of a commitment to reforming perceived failures in the traditional model of higher education.[200] Its founder, Gary Wilbur, recalls his and his colleagues' explicit choice to incorporate as a 501(c)(3) organization.[201] Once that was decided, they made a conscious choice to forgo federal funding in part to avoid mandatory compliance with Title IX because of the "bureaucracy required for participation" in the statute.[202] To be able to afford this choice, the school has made a number of significant sacrifices.[203] It has only ten members on its faculty.[204] It employs "only two fulltime non-teaching administrators" and a handful of part-time employees.[205] Wilbur openly confesses that the size of the school's operation makes it "a problem [to do] everything that needs to be done."[206] Nevertheless, he states that such sacrifices are worth it "to keep 'the vision of the college unencumbered,' and to ensure that there is 'no way an exterior entity could put pressure on us . . . and say, "You've taken money from us, therefore you have to do things in a particular way."'"[207]

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. SCHALIN, *supra* note 182, at 11.
201. *Id.* at 11–12.
202. *Id.* at 11.
203. *See id.* at 11–12.
204. *Id.* at 12.
205. *Id.*
206. *Id.*
207. *Id.* (quoting Greg Wilbur, founder and president of New College Franklin).

D. Conclusions from Schools' Choices to Forgo Federal Funding

Hillsdale, Christendom, and New Franklin demonstrate the deeply conscious nature of the choice of a small yet robust minority of colleges to forgo the federal funding that they know would require them to comply with Title IX. Their decisions to do so, if nothing else, are deeply rooted in a set of convictions that animate the college's mission, and supported by a willingness to undergo real financial sacrifice to remain financially independent.[208] Most importantly, each is established as a 501(c)(3) organization.[209] The assumption made by each of these schools' leaders, so obvious that it is easy to miss, is that their organization's 501(c)(3) status does not in itself make it subject to Title IX. If it did, they would have no reason to make the sacrifices they do to avoid compliance. For over almost half a century, the federal government and the general public has been conscious of the motive behind these schools' refusal to take federal funds,[210] and this knowledge has been accompanied by a tacit acceptance of the logic behind the schools' decisions to do so, whether one agrees with their motives. The choice of these colleges, the rigor with which their leaders have thought through that choice, and the lack of controversy over the logic behind it, amply demonstrate that the publicly accepted meaning of Title IX excludes tax-exempt status from what the statute means by "federal financial assistance."

Conclusion

The decisions in *Buettner-Hartsoe* and *Valley Christian Academy* subsist on scarce reasoning from a handful of older cases that even the *Valley Christian Academy* court admits are inconclusive.[211] But substantial evidence is available to demonstrate that the executive branch, legislative branch, and broader public have not all been guilty of the same significant misreading of Title IX for the past half century. Such an implausible implication, necessary for those who hold to the recent district courts' logic, is itself reason to second-guess those courts' conclusions. As has been shown, the federal government and American public have not been misreading Title IX. They have rightly understood that schools are not recipients of federal financial assistance simply because they enjoy tax-exempt status. Such an interpretation respects Title IX's significant contributions to American education, the need of small and independent schools to be able to operate free of financial and administrative burdens more easily borne by larger institutions, and the clear

208. *Id.* at 5.

209. *Hillsdale College*, *supra* note 185; *Christendom Educational Corporation*, *supra* note 194; SCHALIN, *supra* note 182, at 11.

210. Roche, *supra* note 186, at 2.

211. Herrera *ex rel.* E.H. v. Valley Christian Acad., 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022) (noting an "[a]bsen[ce] [of] controlling precedent").

intent of Title IX as it continues to open doors to women in education as it has for the past fifty years.