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TITLE VII IS NOT THE ONLY CURE FOR EMPLOYMENT DISCRIMINATION: THE IMPLICATIONS OF *DOE v. MERCY CATHOLIC MEDICAL CENTER* IN EXPANDING CLAIMS FOR MEDICAL RESIDENTS UNDER TITLE IX

Abstract: In March 2017, in *Doe v. Mercy Catholic Medical Center*, the United States Court of Appeals for the Third Circuit established that medical residents, who function as both students and as employees of a hospital, could bring private causes of action for sex discrimination under Title IX of the Education Amendments of 1972. This ruling revived a long-standing split amongst the Circuits, with the Third Circuit parting company from the Fifth and Seventh Circuits and aligning with the First and Fourth Circuits, which hold Title VII's carefully crafted administrative remedial procedure does not pre-empt claims under Title IX. This Comment argues that the Third Circuit's decision to allow medical residents to bring Title IX claims furthers the goals of the legislation, which seeks to combat discrimination against minorities in education and, more specifically, to advance the number of women in professional fields such as law and medicine. Since successfully completing a medical residency program is a pre-requisite to practicing as a physician, it is important that U.S. courts give medical residents full access to the panoply of remedies available and allow discretion in bringing either a Title VII or Title IX discrimination claim.

INTRODUCTION

Civil rights legislation enacted throughout the 1960s was aimed at broadly protecting against discrimination, yet glaringly failed to address discrimination against gender.¹ In particular, women were being denied the requisite educational opportunities to achieve professional careers in law and medicine.² Congress passed Title IX of the Higher Education Amendments in

¹ See 118 CONG. REC. 5803 (1972) (introducing Title IX and asserting that Congress has focused on eliminating discrimination against racial minorities but overlooked the vast discrimination against the majority of women which still exists within the educational sector); see also *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (noting that the United States has a long history of discrimination against women, dating back to founding of the country).

² See *Discrimination Against Women: Hearings on H.R. 16098 Before the Special Subcomm. on Educ. of the H. Comm. on Educ. and Labor*, 91st Cong. 2, 562 (1971) [hereinafter *Discrimination Against Women*] (discussing the blatant discrimination against women within professional occupations and higher education admissions). The Subcommittee noted that in the United States, women constituted a small percentage of professional medical personnel, compared to in Russia,

1972 to combat gender discrimination in federally funded educational institutions.³ The statute filled the gaps left by Title VI, which aimed to eliminate discrimination in federally financed programs, and Title VII, which aimed to protect against discrimination exclusively in the employment context.⁴ As Senator Evan Bayh noted during the Congressional discussion on Title IX, the goal of the amendment was to provide legal protection for women in higher education, particularly in the legal and medical professions.⁵ Since Title IX's enactment, the disparity between the number of women and men in professional occupations such as law and medicine has significantly diminished.⁶ While the purpose of Title IX has traditionally been focused on equalizing educational opportunities, courts have continuously expanded its cover-

where women constituted 65% of professional medical personnel. *Id.* at 522. The Subcommittee hearing also focused on a long-standing bias against women in medical school admissions. *Id.*

³ See 20 U.S.C. § 1681(a) (2012) (providing that no person will be subject to discrimination based on sex in a federally funded educational program or activity); 118 CONG. REC. 5806–07 (stressing that Title IX would be a comprehensive measure designed to create equal economic opportunities for women in the workforce by providing women legal protection against discrimination in higher education).

⁴ See 118 CONG. REC. 5803 (noting that Title IX's reach to educational facilities would serve to close the gap left by Title VII by extending protections against discrimination in admissions, faculty employment, and scholarships to "any person"); Kristen Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, 31 HUM. RTS. 16, 16 (2004) (noting that Title IX filled the gaps left by Title VI and Title VII, neither of which specifically address gender or discrimination in education). Compare 42 U.S.C. § 2000d (2012) (stating that Title VI broadly prohibits discrimination on the basis of race, national origin, and color within federally financed programs, notably excluding gender), with 42 U.S.C. § 2000e-2(a) (stating that Title VII prohibits discrimination on the basis of sex, race, national origin, age, or color, but only within the employment context). Senator Bayh further noted that Title IX would carry a similar enforcement scheme to Title VI by terminating federal fund disbursement to those facilities found in violation. 118 CONG. REC. 5803.

⁵ See 118 CONG. REC. 5807 (stating that Title IX would provide needed legal protection for women within the educational field as Title VII does not extend protection to employees of educational facilities). As federal funds are often the primary source of funding for medical schools and training programs, Title IX's singular remedial scheme of withholding funds provides incentives for compliance. See *Graduate Medical Education*, Ass'n Am. Med. Colls. ("AAMC"), <https://www.aamc.org/advocacy/gme/> [<https://perma.cc/C83A-GNFN>] (explaining that medical residents typically spend three to seven years in training programs funded by Medicare payments in the form of "direct graduate medical education payments"); see also Janet Lavelle, *U.S. Faces Doctor Shortage—Some See a Crisis—Primary Care Is Expected to Be Hit Especially Hard*, SAN DIEGO UNION TRIB., July 10, 2011, at A1 (claiming that capping federal funds for graduate medical education to 1996 levels limits the number of doctors that can be trained, threatening a shortage of about 91,000 doctors nationwide by 2020).

⁶ See U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1–2 (2012) (detailing Title IX's positive impact on increasing female admission in higher education programs as the number of women enrolled in higher education programs has tripled since the statute's passage); see also NaYoung Rim, *The Effect of Title IX on Gender Disparity in Graduate Education 2* (Harris Sch. of Pub. Policy, Univ. of Chi., Working Paper I24, 2016) (finding that the passage of Title IX played a role in the increase of women in graduate and professional programs).

age to address employment discrimination in educational institutions.⁷ Thus, when bringing a gender discrimination claim against an educational institution, a disagreement exists amongst courts if Title VII's carefully constructed administrative framework should pre-empt a plaintiff's Title IX claim.⁸

In March 2017, in *Doe v. Mercy Catholic Medical Center*, the United States Court of Appeals for the Third Circuit held that a medical resident participating in a private hospital's medical residency program could bring a Title IX claim against the hospital for employment discrimination based on sex.⁹ In reversing the lower court's dismissal of these claims, the Third Circuit declined to follow the reasoning of the Fifth and Seventh Circuits, instead aligning itself with the First and Fourth Circuits.¹⁰ The *Mercy II* ruling

⁷ See, e.g., MERRICK T. ROSSEIN, 3 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 33:2 (2017) (discussing previous Supreme Court and Circuit Court decisions that expanded Title IX's interpretation); see also *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (holding that even though Title VII originated as a comprehensive solution to employment discrimination, a plaintiff is not limited to that statute for relief).

⁸ See *Doe v. Mercy Catholic Med. Ctr. (Mercy II)*, 850 F.3d 545, 560 (2017) (finding that, unlike a student whose sole recourse is Title IX or an employee whose sole recourse is Title VII, a medical resident, who functions both as a student and an employee of the hospital, is not barred from bringing both a Title VII and Title IX claim); see also Kim Turner, *The Rights of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs*, 32 A.B.A. J. LAB. & EMP. L. 229, 246–48 (2017) (providing an overview of the circuit split and reviewing the opinions of district courts in the First and Fourth circuits, where Title VII has been held to not pre-empt Title IX, and a Fifth Circuit opinion which upheld Title VII pre-emption of Title IX). Compare *Ivan v. Kent State Univ.*, 92 F.3d 1185, 1185 n.10 (6th Cir. 1996) (overruling district court's holding that "Title VII pre-empts an individual's private remedy under Title IX" for gender discrimination), *Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 208 (4th Cir. 1994) (holding that a plaintiff can seek relief for a retaliatory employment discrimination claim under both Title VII and Title IX), and *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896–97 (1st Cir. 1988) (holding that Title IX analysis for discriminatory treatment can apply to Title VII for gender discrimination in a university setting as courts have noted the statutes are analogous), with *Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995), and *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996) (holding that Title VII's comprehensive and detailed administrative scheme should pre-empt Title IX claims).

⁹ *Mercy II*, 850 F.3d at 560. The Third Circuit noted a medical residency—a period of training and clinical instruction after graduating from medical school—qualifies as a "program or activity" under Title IX. *Id.* at 550, 555; see also ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC. ("ACGME"), COMMON PROGRAM REQUIREMENTS 1 (2017) (naming medical residency as an essential educational component to transitioning from a medical student to a fully independent medical practitioner and outlining guidelines for teaching and training medical residents). Guidelines for medical residency training is overseen by the ACGME, a private, non-profit organization whose stated goal is to advance the quality of medical residency education, training, and education. *Id.* See generally *Intro to Main Residency Match*, NAT'L RESIDENCY MATCHING PROGRAM ("NRMP"), <http://www.nrmp.org/intro-to-main-residency-match/> [https://perma.cc/5H64-ETX7] (explaining how medical students are "matched" to their residency programs through a computer-based algorithm). Unlike an employer-employee relationship, medical residents do not have the liberty of negotiating their place of work or salary, as they are "matched" to their respective teaching hospitals based on a rank preference conducted through a central service, the NRMP. *Id.*

¹⁰ *Mercy II*, 850 F.3d at 555. The court reasoned that since the primary goal of Title IX was to eradicate gender discrimination in educational facilities that receive federal funding, a medical

revived the longstanding debate of whether Title VII remains the exclusive remedy for employees in federally funded institutions alleging sex discrimination.¹¹ As the courts have not considered this issue for almost twenty years, the question of whether a medical student can bring a Title IX rather than a Title VII claim is ripe for a Supreme Court ruling.¹²

This Comment argues that the Third Circuit correctly aligned itself with the First and Fourth Circuits in holding that a medical resident is not limited to bringing a Title VII claim for employment discrimination and that a medical residency program qualifies as an educational program or activity subject to Title IX protections.¹³ The Third Circuit reasoned that Title VII and Title IX are distinct statutes providing different methods of due process to address discrimination, and a plaintiff is not limited to only utilizing Title VII to seek relief.¹⁴ In keeping with the Supreme Court's broadly construed interpretation of Title IX, as well as the legislative intent, the Third Circuit's liberal application of Title IX supports the statute's policy goals of eradicating gender discrimination in higher education and the workforce.¹⁵

Part I of this Comment develops the historical framework of Title IX and Title VII, and provides background information on the Third Circuit case that deepened the existing split circuit.¹⁶ Part II of this Comment discusses the Third Circuit's interpretation of the word "education" and the guiding principles the court used to conclude that Title IX encompasses a medical

residency program qualifies as an educational "program or activity" under Title IX. *Id.* The Third Circuit noted that hospitals that provide medical residency programs qualify to receive federal Medicare funds to offer medical education and training programs. *Id.* at 556. An educational institution includes any "public or private elementary or secondary schooling," as well as any vocational, professional, or training institution that in whole or part receives financial assistance. 20 U.S.C. § 1681(c) (2012).

¹¹ See *Fox v. Pittsburg State Univ.*, No. 14-CV-2606-JAR, 2017 WL 2734608, at *7, *9 (D. Kan. June 16, 2017) (finding that circuits are split on whether Title VII pre-empts Title IX). Without Tenth Circuit precedent, the district court aligned with the First, Third, Fourth, and Sixth Circuits in holding that Title VII is not the exclusive remedy for employment discrimination. *Id.*

¹² See ROSSEIN, *supra* note 7 (discussing the Third Circuit's revival of a long-standing split amongst the courts). The Supreme Court previously denied resolving whether Title VII pre-empts Title IX when it failed to grant certiorari for *Lakoski*. *Id.* at n.14; see also *Doe v. Mercy Catholic Med. Ctr. (Mercy I)*, 158 F. Supp. 3d 256, 259 (E.D. Pa 2016) (identifying various interpretations of Title IX but finding no controlling Supreme Court or circuit court precedent).

¹³ See *Mercy II*, 850 F.3d at 555, 559 (holding that Mercy Catholic Hospital fits into the broader definition of an "education" program and the activities covered under Title IX); *supra* note 8 and accompanying text (comparing circuit court interpretations of whether Title VII pre-empts Title IX).

¹⁴ See *supra* notes 7–8 and accompanying text (noting the numerous court opinions that have subsequently interpreted Title IX to apply broadly to employment claims in education).

¹⁵ See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 509, 521 (1982) (holding that, in keeping with Congressional intent, Title IX's application should be broadly applied); 118 CONG. REC. 5807 (stating that Title IX would provide needed legal protection for women within the educational field as Title VII does not extend protection to employees of educational facilities).

¹⁶ See *infra* notes 21–56 and accompanying text.

residency program.¹⁷ Part III of this Comment analyzes whether Title VII pre-empts Title IX, the implications of allowing medical residents to bring Title IX claims, and how the Third Circuit's interpretation fits within Congress' policy goals of eradicating gender discrimination in educational programs.¹⁸

I. TITLE IX'S ORIGINS AND *DOE V. MERCY CATHOLIC MEDICAL CENTER*

Section A of this Part discusses the inception of Title VII and Title IX and analyzes how courts have interpreted these statutes in relation to employment discrimination claims.¹⁹ Section B of this Part provides an overview of the procedural and factual history of *Doe v. Mercy Catholic Hospital*.²⁰

A. Origins and Interpretation of Title VII and Title IX

In the wake of the nation's push for civil rights reform in the 1960s, Congress enacted Title VII as the primary statute addressing employment discrimination claims.²¹ Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate against any individual on the basis of "race, color, religion, sex, or national origin."²² Notably, Title VII has an extensive and carefully crafted administrative remedial procedure aimed at conciliation and making the victim "whole."²³ In order to state a claim for relief under Title VII, a plaintiff must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the discrimi-

¹⁷ See *infra* notes 57–66 and accompanying text.

¹⁸ See *infra* notes 67–86 and accompanying text.

¹⁹ See *infra* notes 21–48 and accompanying text.

²⁰ See *infra* notes 49–56 and accompanying text.

²¹ See Joe Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 169 (1991) (noting that Title VII came out of the Civil Rights hearings on curbing racial discrimination). Title VII was not originally aimed at gender discrimination as the word "sex" was a last-minute amendment to Title VII's final language. *Id.* at 163. It is debated whether the addition was an attempt to kill the statute. *Id.* at 164. The proposal came from Howard Smith, a southern state representative, who vehemently opposed Title VII and had previously tried to block its passage. *Id.* at 177.

²² 42 U.S.C. § 2000e-2 (2012); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971) (finding that Congress' intent in enacting Title VII was to achieve equality within the workplace and combat historically discriminatory hiring practices).

²³ 42 U.S.C. § 2000e-5(1)(c) (outlining the timeframe for filing a claim and commencing proceedings); see *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (stating that Title VII aims to compensate victims and make them "whole" whereas Title IX is focused on protection); see also Douglas P. Ruth, *Title VII & Title IX =? Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J.L. & PUB. POL'Y 185, 189 (1996) (stating that the Civil Rights Act of 1991 amended Title VII to add compensatory and punitive damages awards for plaintiffs subjected to employment discrimination).

natory act.²⁴ The EEOC is charged with assessing the claim.²⁵ From the date of filing (which also serves to provide notice to the employer), the EEOC then has 180 days to prompt negotiation and settlement if they find a probable cause of action exists.²⁶ If the EEOC finds no grounds for discrimination, it will issue a dismissal.²⁷ This administrative procedure does not completely bar a plaintiff's access to court; the plaintiff can still request a right to sue letter if the negotiation and settlement options fail.²⁸

Congress and President Nixon signed into law Title IX of the Education Amendments of 1972 in order to address gender discrimination in education.²⁹ Title IX provides that no person will be subjected to discrimination on the basis of sex in any "educational program or activity" that is a recipient of federal funds.³⁰ Congress enacted Title IX as a floor amendment with

²⁴ 42 U.S.C. § 2000e-5(b). The Equal Opportunity Employment Commission ("EEOC") was created in 1965 to address employment discrimination and carry out the uniform enforcement of Title VII. *See* U.S. COMM'N ON CIVIL RIGHTS, OVERCOMING THE PAST, FOCUSING ON THE FUTURE: AN ASSESSMENT OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ENFORCEMENT EFFORTS 1–5 (2000) [hereinafter OVERCOMING THE PAST] (providing an overview of the formation and activities of the EEOC). The agency was originally conceived as purely administrative and lacked the authority to litigate claims until 1972. *See* DONALD LIVINGSTON, EEOC LITIGATION AND CHANGE RESOLUTION 4–13 (2d ed. 2014) (discussing the debates resulting in EEOC initially being charged with conciliatory rather than prosecutorial authority). The Equal Opportunity Act of 1972 later gave the agency the power to sue private actors. *Id.* at 12. The agency is primarily charged with enforcing the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, and the Civil Rights Act of 1991. OVERCOMING THE PAST, *supra* at 1–2. *See generally* Overview, EEOC, <https://www.eeoc.gov/eeoc/index.cfm> [<https://perma.cc/ADR6-H4UR>] (overviewing the agency's functions and identifying its goal of preventing discrimination through outreach, education, and technical assistance).

²⁵ 42 U.S.C. § 2000e-5(b)

²⁶ *Id.*; *id.* § 2000e-5(f)(1).

²⁷ *Id.* § 2000e-5(b). *See generally* Roy L. Brooks, *A Roadmap Through Title VII's Procedural & Remedial Labyrinth*, 24 S.U. L. REV. 511, 516 (1995) (explaining Title VII's complex remedial administrative procedure).

²⁸ 42 U.S.C. § 2000e-5(f)(1). If the EEOC finds cause for the complaint, the commission has thirty days to try to settle the dispute. *Id.*; *see also* Ruth, *supra* note 23, at 188 (outlining the administrative and enforcement provisions a plaintiff must exhaust before seeking redress from the courts under Title VII). A right to sue letter is required before a plaintiff may file a private cause of action. Ruth, *supra* note 23, at 188.

²⁹ *See* Susan Perry, *How Title IX Helped Make Women's Dreams of Becoming Doctors a Reality*, MINNPOST (Jan. 23, 2017), <https://www.minnpost.com/second-opinion/2017/01/how-title-ix-helped-make-womens-dreams-becoming-doctors-reality> [<https://perma.cc/K4JJ-CB7D>] (asserting that the passage of Title IX helped more women enter the medical profession); *supra* notes 1–2 and accompanying text (discussing the need for legal protection for women against discrimination in education). Two years after Title IX's passage, the number of women entering medical schools increased by about 22%. Perry, *supra*. While Title IX has eradicated much of discrimination in medical school admissions, the author notes that female physicians still earn less than their male counterparts by an average of \$17,000, signaling the profession's lasting gender bias. *Id.*

³⁰ 20 U.S.C. § 1681(a). Title IX's broad proclamation of prohibition is followed by listing a number of exempt institutions, including: religious institutions, military service camps, public

two primary goals: (1) preventing federal resources from supporting gender discrimination in education programs and (2) affording individual citizens effective protection against such practices.³¹ In order to enforce compliance, the sole remedial measure apparent in Title IX is the withdrawal of federal funds if an educational program or activity is found to be in violation of the statute.³²

As Title IX was enacted to specifically address gender discrimination in education, a key point of contention when addressing employment discrimination claims is the relationship between Title IX and Title VII.³³ Courts have noted the marked distinctions between the legislative intentions

educational institutions that have an established policy of only admitting one sex, fraternities and sororities, boy and girl scouts, “mother-daughter and father-son outings,” and “beauty pageants.” *Id.*

³¹ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). To support their statement of Title IX’s twin aims, the Court noted that Title IX’s enforcement scheme of withholding federal funds mirrored that of Title VI’s. *Id.* Title IX was enacted as a floor amendment; therefore, no committee reports exist, and courts have instead relied on remarks from Senator Bayh, who spearheaded the proposal, exclaiming that the “heart of the amendment” is prohibiting gender discrimination in educational programs receiving federal funds, which would effectively extend the equal employment opportunities provisions in Title VII of the 1964 Civil Rights Act. *See N. Haven*, 456 U.S. at 524 (noting that when Senator Bayh introduced Title IX, the goal was eliminating all discrimination in educational facilities including employment practices).

³² 20 U.S.C. § 1682 (explaining that failure to comply with Title IX results in the removal of funds from the particular program not in compliance). The Department of Health, Education and Welfare (“HEW”) is the federal agency tasked with issuing regulations to enforce Title IX compliance. *See N. Haven*, 456 U.S. at 515–16 (explaining that HEW took over reviewing Title IX claims in 1979). Under the “pinpoint” provision, funds are withdrawn only from the program that is not in compliance. 20 U.S.C. § 1682. The purpose of the pinpoint provision was not to punish innocent bystanders or the entire institution for an individual group or program not in compliance. *See Bd. of Pub. Instruction of Taylor Cty. v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969) (vacating HEW’s decision to terminate funding and relying on Congress’ intent to limit the withdrawal of federal funds). There is a four-step process to withdraw federal funds from a recipient: (1) the recipient must be notified they are not in compliance with the statute in order to achieve voluntary compliance; (2) once an agency has had an opportunity for a hearing and notice, a department official will make a finding of noncompliance; (3) the head of the agency will decide whether or not to approve the suspension of funding; and (4) the head of the agency must file a report with the House and Senate legislative committees that oversee the programs involved and wait thirty days before withdrawing funds. *See Title IX Legal Manual: Fund Suspension & Termination*, DEP’T OF JUSTICE (Aug. 6, 2015), <https://www.justice.gov/crt/title-ix#122> [<https://perma.cc/DXS6-QN7L>] (outlining the scope of Title IX and the steps taken before withdrawing federal funds).

³³ *See Lakoski*, 66 F.3d 751, 756 (5th Cir. 1995) (finding that even though Title VII and Title IX protect individuals from employment discrimination on the basis of sex, Title VII expressly excluded educational institutions from its purview when Title IX was enacted); Lonnie D. Giame-la, *Title IX of the 1972 Education Amendments*, 3 GEO. J. GENDER & L. 439, 448 (2002) (stating that Title VII’s administrative procedure is markedly absent from Title IX which allows a plaintiff to seek immediate judicial redress without first having to file claims with the EEOC or exhaust other administrative procedures); *see also Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) (claiming that in a variety of contexts courts have held that a detailed statute should pre-empt a more general statute).

and interpretations of the two statutes.³⁴ Title IX's broad language is modeled after Title VI, and Title IX was similarly enacted under Congress spending power, acting as a protective measure for individuals at institutions that receive federal funding.³⁵ In order to terminate federal funding, Title IX requires an express finding of an institution's failure to comply with the statutory requirements.³⁶

By comparison, Title VII is an outright prohibition against discriminatory conduct across all employment fields.³⁷ In 1998, in *Gebster v. Lago Vista Independent School District*, the Supreme Court held that Title VII applies to all employers, without regard to federal funding, and aims to broadly eradicate discrimination in employment contexts.³⁸ Title VII seeks to make plaintiffs "whole" by compensating them through monetary damages.³⁹ Title VII's

³⁴ See *Gebser*, 524 U.S. at 286–87 (distinguishing Title IX's contractual framework which acts as a condition on federal funding with Title VII's administrative framework that seeks to make victims "whole"). Compare *Johnson*, 421 U.S. at 459 (finding that Title VII's comprehensive design does not necessarily preclude plaintiffs from seeking other forms of redress), and *N. Haven*, 456 U.S. at 524 (concluding that Title IX's legislative history indicates it was meant to expand Title VII's reach to employment discrimination within the educational realm), with *Lakoski*, 66 F.3d at 755 (noting that Title VII's comprehensive and detailed administrative scheme should pre-empt Title IX's more general remedy).

³⁵ *Gebser*, 524 U.S. at 286 (noting that Title IX and Title VI both act as a form of agreement: by accepting federal funds, the educational organization or institution agrees to abide by the statute); see *Mercy II*, 850 F.3d at 552 (citing that Title IX's enactment under the Spending Clause effectively makes the statute function like an agreement between the federal government and the recipient); see also Editors, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806, 809 (1975) (stating that Title IX's absolute prohibition against discrimination is identical to Title VI's language, but Title IX is limited to education). Even though Title IX's language mirrors that of Title VI, Title IX exempts certain educational institutions and admissions procedures whereas Title VI's reach is not confined. See Editors, *supra*, at 810 (claiming that Title IX's exemptions illustrate Congress viewed race and sex differently as Title VI has no exemptions). Title VI was enacted in 1964 as the first broad protection against racial discrimination by denying those institutions found in violation from receiving federal funding. See *Title VI Legal Manual: Synopsis of Legislative History & Purpose of Title VI*, DEP'T OF JUSTICE, https://www.justice.gov/crt/fcs/T6manual2#_ftn3 [<https://perma.cc/M4RY-SWQS>] (last updated Jan. 25, 2017) (overviewing history and goals of Title VI). The text of Title VI provides broad protection against discrimination on the basis of race, national origin, or color at any program or institution that receives federal funding. 42 U.S.C. § 2000d. The goal of Title VI was to ensure a uniform policy to eradicate racial discrimination. See 110 CONG. REC. 6544 (1964) (discussing the reasons for federal legislation to effectively combat racial discrimination and end segregation). See generally Paul Easton, Note, *School Attrition Through Enforcement: Title VI Disparate Impact and Verification of Student Immigrant Status*, 54 B.C. L. REV. 313 (2013) (discussing the history of equal protection and segregation as an impetus for Congress enacting Title VI).

³⁶ 20 U.S.C. § 1682.

³⁷ See *Mercy II*, 850 F.3d at 553 (noting that Title VII is rooted in both the Commerce Clause and the Fourteenth Amendment).

³⁸ See *Gebser*, 524 U.S. at 286 (claiming that Title IX's contractual framework is a key distinguishing feature from Title VII's complex structure framed as an outright prohibition).

³⁹ See *id.* at 287 (comparing Title VII's goal of compensating individuals and the statute's retroactive nature to Title IX's proactive nature of protecting individuals from discrimination).

administrative procedure and promotion of conciliation is markedly absent from Title IX's general remedial structure.⁴⁰

Moreover, even though Title IX was not originally viewed as applicable to employment, several Supreme Court decisions have recognized an implied private right of action, effectively broadening Title IX's reach.⁴¹ In 1979, in *Cannon v. University of Chicago*, the Supreme Court recognized a private right of action under Title IX for a plaintiff claiming gender discrimination after being denied admission to the medical schools at University of Chicago and Northwestern University.⁴² Looking to Title IX's legislative history, the court found that since Title IX was patterned after Title VI, there existed an implied private right of action which served Title IX's broader purpose of eradicating gender discrimination in education.⁴³

The Third Circuit also relied on the Supreme Court's 1982 decision in *North Haven Board of Education v. Bell* which established that while Title IX does not expressly authorize a private right of action, it is implied given the statute's broad directive.⁴⁴ In *North Haven*, two public, federally funded

⁴⁰ See 20 U.S.C. § 1682 (providing only one remedy for Title IX violation); see also Ruth, *supra* note 23, at 190 (discussing the significant differences between Title VII and Title IX's enforcement and remedial procedures).

⁴¹ See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (finding that all remedies are available to a plaintiff discriminated against on the basis of sex, including money damages under Title IX); *Cannon*, 441 U.S. at 703, 709 (holding implied private right of action under Title IX against universities receiving federal funding); *Johnson*, 421 U.S. at 459 (holding that a private sector employee is neither deprived of other remedies nor limited to Title VII for relief). No language in Title IX expressly authorizes a plaintiff to bring a private cause of action to obtain relief in federal court. *Cannon*, 441 U.S. at 683. The Court found the private cause of action was implied in Title IX's language as it aligns with Congressional intent. *Id.* at 717.

⁴² See *Cannon*, 441 U.S. at (claiming that lack of an express authorization of a private remedy does not necessarily indicate Congress meant to make that remedy unavailable). Central to the court's decision were the similarities of Title VI and Title IX. *Id.* at 696. Title IX was patterned after Title VI in both the language describing the benefited classes and the administrative scheme to terminate federal funding to those found in violation. *Id.* The Court held that when Title IX was enacted, Title VI had already been construed as allowing a private remedy, and this application had been widely accepted by federal courts. *Id.*

⁴³ *Id.* at 689. In order to find a private right of action, the Court looked to the four factors established in *Cort v. Ash* to decide if Congress meant to allow or imply as much. See *id.* at 688 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). The four factors include: (1) whether plaintiff is part of the class covered under the statute, (2) legislative history, (3) whether finding a private cause of action undermines legislative goal enacting the statute, and (4) whether a federal remedy oversteps into an area of state concern. See *id.* at 689-708. Applying these factors, the Court found a private right of action, as the plaintiff was within the protected class and the availability of attorney fees for actions brought against public educational agencies in Title VI assumes the availability of a private remedy in Title IX, whose language mirrors that of Title VI. *Id.* at 709. Central to the Court's holding was finding that the plaintiff fit within the class designated under Title IX which prohibits discrimination on the basis of sex against "persons," as well as the similarities between Title VI and Title IX. See *id.* at 694.

⁴⁴ *N. Haven*, 456 U.S. at 521 (holding that Title IX's broad language similarly calls for a broad interpretation despite the absence of an express private right of action in the text).

schools filed suit claiming they did not come under Title IX’s purview, as the statute was not intended to cover employment practices in educational facilities.⁴⁵ The Court found that even though Title IX does not directly exclude employees, the debate surrounding the statute’s enactment indicated that Title IX was not intended to be limiting, but rather widely encompassing.⁴⁶ The Court noted that Congress could have inserted “student” or “beneficiary” instead of “person” if the legislature wanted to expressly limit the scope of Title IX.⁴⁷ Since the Supreme Court’s decision in *North Haven*, lower courts have generally adhered to broadly interpreting Title IX’s application to employment discrimination claims and not limited plaintiffs’ avenue of relief to Title VII.⁴⁸

B. Factual and Procedural History of Doe v. Mercy Catholic Medical Center

On April 20, 2015, the plaintiff, proceeding anonymously as Jane Doe, sued Mercy Catholic Medical Center (“Mercy”), a private hospital, in the Eastern District of Pennsylvania two years after her dismissal from a medical residency program, alleging six claims: three claims under Title IX—retaliation, quid pro quo, and hostile environment—as well as three state law claims.⁴⁹ The plaintiff joined Mercy’s diagnostic radiology residency program in 2011 as a second-year resident and claimed the director of the residency program, Dr. James Roe, sexually harassed her and then retaliated against her for complaining about his behavior.⁵⁰ The plaintiff did not file

⁴⁵ *Id.* at 517–18. Looking to the statute’s history, the Court held that employees who benefit from federal grants or contracts, such as the teachers in federally funded schools, fall within Title IX’s discretion. *Id.* at 520.

⁴⁶ *Id.* at 521–22; 544 (reviewing Title IX’s legislative history and concluding that Congress did not attempt to limit Title IX’s expansive language).

⁴⁷ *Id.* at 521. The Court further elaborated that Congress thwarted attempts to limit Title IX’s scope by rejecting a proposal that would have exempted employees of educational institutions from Title IX’s protection. *Id.* at 534.

⁴⁸ See *Fox*, 2017 WL 2734608, at *6–7 (holding that Title VII is not the exclusive remedy for employment discrimination); *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756, 773–74 (M.D. Pa. 2016) (finding that *Cannon* and *N. Haven* broadened Title IX’s reach and therefore Title VII did not pre-empt a discrimination claim brought under Title IX).

⁴⁹ *Mercy I*, 158 F. Supp. 3d at 257. The plaintiff’s (“Doe”) state law claims of contract-based gender discrimination, wrongful termination, and breach of covenant of good faith were summarily dismissed without prejudice. *Id.* The district court also held that the continuing violation claim was time barred, as Title IX claims have a two-year statute of limitations. *Id.* at 262. The district court noted the continuing violations doctrine is an equitable exception to the timely filing requirement, but the doctrine did not apply here since there were only two isolated incidents. *Id.* The court questioned, however, whether this Title VII legal theory even applies for Title IX cases. *Id.*

⁵⁰ *Mercy II*, 850 F.3d at 550. The plaintiff claimed the defendant, Dr. James Roe (“Roe”), inquired about her personal life when she was living apart from her husband and expressed interest in meeting while the two of them attended a conference in Chicago. *Id.* The plaintiff sent mes-

Title VII charges with the Equal Employment Opportunity Commission (“EEOC”).⁵¹

The district court upheld the defendant’s motion to dismiss, holding that Title IX does not apply to Mercy because it does not qualify as an “education program or activity” under 20 U.S.C § 1681(a).⁵² The district court further alleged that even if the plaintiff could bring Title IX claims, she could not use Title IX to circumvent time-barred Title VII claims.⁵³

The plaintiff timely appealed to the Third Circuit, which affirmed in part holding that the Title IX hostile work environment claim was time barred, reversed in part holding that the plaintiff could bring Title IX retaliation and quid pro quo claims, and remanded the case for further proceedings.⁵⁴ The Third Circuit upheld the plaintiff’s claim that medical residents

sages stating that she wanted to keep a professional relationship, and Roe apparently reported these messages to the human resources department, who met with Roe after these allegations. *Id.* Roe also touched the plaintiff’s hand at work and stated that the unwelcome sexual attention negatively impacted her experience; the human resources recommended the plaintiff to a psychiatrist. *Id.* at 551. Roe’s overtures intensified in the fall of 2012 upon learning that both of them were getting divorced, claiming that he wanted a relationship and on one instance reached across her body and pressed his arm against her breast during work. *Id.* Rejecting his advances, Roe retaliated by giving the plaintiff poor recommendations for fellowship applications and removed her name from a research paper that she helped author. *Id.* The plaintiff complained to human resources and was again referred to a psychiatrist. *Id.* After receiving a letter of termination, Doe appealed the decision four days later, but the dismissal was upheld, and the plaintiff left the program. *Id.*

⁵¹ See *Mercy I*, 158 F. Supp. 3d at 258, 261 (acknowledging that Title VII requires action within 180 days whereas Title IX’s two-year statute of limitations only allowed plaintiff’s Title IX claim).

⁵² See *id.* at 259–60. Central to the district court’s decision that residents are employees was that residents do not pay tuition or receive a degree, are paid for their services, and are protected by state labor laws and boards. See *id.* at 259; see also *Employees Under the National Labor Relations Board*, ACGME (Mar. 1, 2000), <http://www.acgme.org/About-Us/Publications-and-Resources/Archived-Papers/Position-Papers/Employees-Under-the-National-Labor-Relations-Act> [https://perma.cc/3KFX-L6EU] (discussing the National Labor Relations Board decision in 2010 which designated medical residents as employees to afford them protection under state laws for collective bargaining and joining labor unions). Further, the court noted there are significant differences between medical students and medical residents, including payment for patient care services. *Mercy I*, 158 F. Supp. 3d at 259–60. Despite some educational components, the court claimed Congress only intended Title IX to narrowly apply to “education” programs within the realm of schools. *Id.* The court concluded that simply because the training medical residents received was educational, it did not necessarily convert the entire program into an “educational program” as originally conceived under Title IX. *Id.* at 260. The court found professional relationship, rather than an educational relationship, more applicable to a medical resident and determined the claims should be governed by Title VII. *Id.* at 259.

⁵³ See *Mercy I*, 158 F. Supp. 3d at 261 (concluding that without congressional authorization for Title IX plaintiffs to be exempted from Title VII’s administrative procedure, plaintiffs should not be allowed to circumvent carefully structured procedures when their claims would otherwise be time barred).

⁵⁴ *Mercy II*, 850 F.3d at 549. Quid pro quo claims are traditionally analyzed under Title VII legal theories. See *id.* at 564 (holding that employees are not barred from pursuing claims under

can bring private claims of action under Title IX by finding that such claims are a “mixed question of law and fact,” thereby significantly broadening Title IX’s scope.⁵⁵ The issue of whether a medical residency program can be classified as “educational” under Title IX was a matter of first impression.⁵⁶

II. A MEDICAL RESIDENCY PROGRAM QUALIFIES AS “EDUCATIONAL” UNDER TITLE IX

The Third Circuit’s ruling in *Doe v. Mercy Catholic Medical Center* relied heavily on a broad interpretation of Title IX in holding that a medical resident was not barred from bringing a private right of action.⁵⁷ The deci-

both Title VII and Title IX). The Third Circuit held that the plaintiff was not barred from bringing a quid pro quo claim. *Id.* While the Third Circuit acknowledged the Supreme Court had yet to extend *Cannon*’s implied private right of action claims to quid pro quo claims, the Third Circuit reasoned that barring this claim would be against the Court’s continuous holdings of applying a broad interpretation of Title IX in other contexts. *See id.* at 564–65 (noting that Title IX was enacted to cover a wide range of discrimination). The court reasoned quid pro quo claims are explicit in sexual discrimination claims, as adverse actions generally result from the subordinate refusing to submit to a supervisor or manager’s sexual advances. *See id.* at 565. In support of its holding, the court found the First Circuit in *Lipsett* impliedly recognized a medical resident’s ability to bring a quid pro quo claim. *Id.*; *see Lipsett*, 864 F.2d at 897 (1988) (acknowledging that the plaintiff, a medical resident, qualifies as both a student and an employee). *But see Mercy I*, 158 F. Supp. 3d at 259 n.1. (reasoning that the Supreme Court’s decision in *Gebser* substantially abrogated the First Circuit’s decision in *Lipsett*). The district court concluded Title IX could not be equated to Title VII, as there were substantial differences in Title VII and Title IX statutes and their mechanisms for relief. *Mercy I*, 158 F. Supp. 3d at 261.

⁵⁵ *Mercy II*, 850 F.3d at 556. The Third Circuit conceded that a medical resident can qualify as an employee under Title VII by applying the factors for determining employment from *Nationwide Mutual Insurance Co. v. Darden*. *Id.* at 559 (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). The factors include: whether Mercy was a “source of instrumentalities and tools of [the plaintiff’s] work,” how the plaintiff was assigned work, how long she worked at Mercy, how she was paid, her role in hiring, and her role in Mercy’s primary business of administering healthcare services. *Id.*

⁵⁶ *See id.* at 552 (deciding whether medical residency programs are subject to Title IX is a question of first impression). Prior to the *Mercy I* decision, no court had considered whether a medical residency program qualified as an “educational program or activity” under Title IX. *Mercy I*, 158 F. Supp. 3d at 259.

⁵⁷ *Doe v. Mercy Catholic Med. Ctr.* (*Mercy II*), 850 F.3d 545, 563 (3d Cir. 2017). The Third Circuit relied on six Supreme Court decisions that called for a broad application of Title IX. *Id.* at 560. *See Jackson v. Birmingham*, 544 U.S. 167, 180 (2005) (holding that Congress intended to prevent and protect individuals against gender discrimination, and if plaintiffs who reported Title IX violations could not bring private actions for retaliation, it would deter reporting); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (finding monetary damages available to a plaintiff discriminated against on the basis of sex under Title IX); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 509, 536 n.26 (1982) (holding that Congress provided numerous different remedies to protect individuals against employment discrimination); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (finding that Congress intended an implied private remedy under Title IX); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (emphasizing that the Court’s decision in *Johnson* that Title VII did not pre-empt other remedies applied only to private, and not federal, employment); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (finding that Title VII’s compre-

sion furthered a long standing split among the circuits: aligning the Third Circuit with the First and the Fourth Circuits and parting with the Fifth and Seventh Circuits, which hold that Title VII provides the exclusive remedy for gender discrimination in the workplace.⁵⁸ As courts have not decided this issue of pre-emption, it is ripe for a Supreme Court ruling.⁵⁹

Before reconciling the tension between Title VII and Title IX, the Third Circuit first addressed whether a medical resident fit within the definition of “education” under Title IX.⁶⁰ Interestingly, the Supreme Court has yet to define the meaning of “education” and reconcile the general language of “program and activity” with the modifier “education” in 20 U.S.C. § 1681(a) (1972).⁶¹ To define education, the Third Circuit looked to Congress’ intent, specifically its disagreement with the Supreme Court’s 1984 decision in *Grove City College v. Bell*, where the Court narrowly read the phrase “education program or activity” to conclude that federal funding only applied to certain parts of the organization and did not extend to the en-

hensive design does not preclude plaintiffs from seeking other forms of redress under federal statutes).⁵⁸

⁵⁸ See *supra* note 8 and accompanying text (discussing Fifth and Seventh Circuit decisions holding that Title VII pre-empts Title IX discrimination claims unlike the First and Fourth Circuits which hold that plaintiffs are not limited to Title VII remedies).

⁵⁹ See *supra* notes 11–12 and accompanying text (noting that the court has yet to resolve whether Title VII pre-empts Title IX employment discrimination claims).

⁶⁰ *Mercy II*, 850 F.3d at 553. The Third Circuit went further than previous courts by defining the limits of the term “education” and establishing a non-exhaustive list of four factors that can be used to determine whether a program is “educational.” *Id.* at 556. Noting that this list is not exhaustive, the court named the following features to be considered: (1) the structure of a program (either part-time or full-time), (2) if a program provides a certification or degree based on training, (3) if a program has instructors, a grading system, or accepts tuition, or (4) the program is accredited through an organization or entity. *Id.* Applying these factors, the court held that the medical residency program qualifies as educational because it is affiliated with Drexel University, accredited by the ACGME, has a mission that is in part educational, and provides a structured teaching program to receive the training necessary to become a certified doctor. *Id.* at 556–57. The Third Circuit focused on the fact that Mercy held itself out as an educational program, calling its residency program a “structured educational experience.” *Id.* at 557.

⁶¹ See *id.* at 554 (finding that case law offers little guidance for the definition and interpretation of education). The district court surmised that Congress meant to confine Title IX’s application to the realm of “schooling” by keeping education as a modifier for “programs and activities.” See *Doe v. Mercy Catholic Hosp. (Mercy I)*, 158 F. Supp. 3d 256, 260 (E.D. Pa. 2016) (stating without the “education” modifier, Title IX could potentially include any program or experience that involved any degree of learning or obtaining knowledge). The Third Circuit disagreed with the district court’s analysis by indicating that Congress distinctly defined “educational institutions” that did not come under Title IX’s purview, which shows Congressional intent for “education” to extend beyond the narrow interpretation of traditional schooling facilities and apply broadly to programs with educational components. See *Mercy II*, 850 F.3d at 554. Congress only used “educational institution” to indicate where Title IX did not control. *Id.* Since Congress explicitly exempted fraternities, military academics, religious schools, the YMCA, and the Girl Scouts from Title IX, Congress did not mean to confine Title IX to institutions “in the sense of schooling.” *Id.*

ture institution.⁶² In response to this ruling, Congress enacted the Civil Rights Restoration Act of 1987 (“CRRA”), which broadly defined the phrase “program or activity” to encompass all operations that receive federal funding.⁶³

Looking to the Second Circuit’s decision in 1997 in *O’Connor v. Davis*, the Third Circuit similarly held that an “education program or activity” is one whose program characteristics comport to having an educational purpose.⁶⁴ The Third Circuit stated that this broader reading aligns with the Eighth and Ninth Circuit decisions applying Title IX to state prison systems that offered inmates educational programs, as well as a First Circuit decision that held a medical residency program fell under Title IX’s purview.⁶⁵

⁶² See *id.* at 553 (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 573 (1984)) (finding that the Congressional action of passing subsequent legislation to reverse the *Grove City College* holding provides support for Congressional intent of a broad application of Title IX). Only the federal aid program that received federal funds came under Title IX’s reach, not the entire college. *Grove City Coll.*, 465 U.S. at 573. By narrowly interpreting the phrase “program or activity,” the Court held that the athletic program, which did not directly receive funding, was not subject to Title IX regulations. *Id.* at 574.

⁶³ See 20 U.S.C. § 1687 (2012) (defining program or activity for the purposes of Title IX). The Civil Rights Restoration Act of 1987 (“CRRA”) further defined the term “program or activity” to include the following: state or local government institutions, college, universities, any institutions of higher educational learning or educational school systems, corporations, partnerships, or private organizations that receive federal funding “as a whole” or are “principally engaged in the business of providing education, healthcare, housing, social services, or parks, and recreation.” See *id.* (covering specifically any entity that provides education or healthcare services); see also *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 466 (1999) (holding that Congress’s passage of the CRRA deemed to define program and activity under Title IX to extend institution wide); Michael P. Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L. REV. 149, 162 (1990) (finding that Congress passed the CRRA in order to restore Title IX’s institutional, rather than program specific, focus). The *Grove City College* decision effectively held that unless the athletic department directly received federal funding, it was not subject to Title IX regulations. Villalobos, *supra* at 158. After the *Grove City College* decision, at least 674 Title IX complaints were dismissed. *Id.* at 161. To combat this problem, the CRRA changed the wording of the statute to include *any* recipient of federal funding in order for the entire institution to be held accountable under Title IX. *Id.* at 162.

⁶⁴ See *Mercy II*, 850 F.3d at 555 (finding that an education program or activity is classified as one that reasonably could be said to have some educational mission or purpose); *O’Connor v. Davis*, 126 F.3d 112, 118 (2d Cir. 1997) (holding that a student who volunteered at a hospital could not bring a Title IX claim because the hospital’s primary purpose was not educational, nor did it fit into an educational program or activity under Title IX). To support its contention that *Mercy* can be subject to Title IX, the Third Circuit distinguished the hospital in *O’Connor* from a teaching hospital like *Mercy*, which combines employment with medical training for residents. *Mercy II*, 850 F.3d at 555.

⁶⁵ See *Mercy II*, 850 F.3d at 555 (finding that circuit opinions support the court’s conclusion that Title IX was meant to extend beyond the traditional realm of schooling); *Roubideaux v. N.D. Dep’t of Corr.*, 570 F.3d 966, 976–78 (8th Cir. 2009) (affirming that Title IX applies to prisons and vocational education programs); *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 613–15 (8th Cir. 1997) (finding that prisons were not exempted from Title IX); *Jeldness v. Pearce*, 30 F.3d 1220, 1224–26 (9th Cir. 1994) (finding that Title IX is not meant to apply solely to traditional schooling programs). To further support a broad interpretation, the court also considered that twenty-one

The Third Circuit concluded by noting that whether a program can be deemed “educational” is a mixed question of law and fact, which leaves open the door for the Supreme Court to affirmatively define the term.⁶⁶

III. IMPLICATIONS OF MEDICAL RESIDENTS’ ABILITY TO BRING TITLE IX CLAIMS

By classifying a medical residency program as subject to Title IX, the Third Circuit aligned itself with the legislature’s overarching policy objective of advancing women in education.⁶⁷ The Third Circuit identified four principles from previous Supreme Court decisions that provided the basis for expanding Title IX as a concurrent remedy to Title VII: (1) plaintiffs are not limited to Title VII as their only means of redress for employment discrimination; (2) whether plaintiffs can use Title IX to circumvent Title VII’s exhaustive administrative procedure is a question for Congress and not for the courts; (3) the implied private right of action in Title IX’s statute applies to both employees and students; and (4) this implied private right of action extends to employees in federally funded education programs.⁶⁸

Although the Third Circuit concluded that whether Title VII’s administrative framework should pre-empt Title IX is a congressional policy question, this question of pre-emption is not new.⁶⁹ Courts have long recognized

federal agencies, including the Department of Education and Health and Human Services, broadly interpreted the term “educational program or activity” to apply to “any education program or activity” whether or not it was affiliated with an educational institution. *Mercy II*, 850 F.3d at 555

⁶⁶ See *Mercy II*, 850 F.3d at 556 (indicating that when the facts are not contested, the question of whether a program falls under Title IX will be decided by a judge, whereas a jury will decide a factual dispute).

⁶⁷ See 118 CONG. REC. 5803 (remarking that a “failure” of the American education system is its discrimination against women); see also *Discrimination Against Women*, *supra* note 2, at 518–20 (discussing that four medical schools openly proclaimed to discriminate against women). The committee members indicated federal funds were the “lifeblood” of medical schools and residency programs, accounting for over half of all training expenditures. *Discrimination Against Women*, *supra* note 2, at 520.

⁶⁸ See *Doe v. Mercy Catholic Med. Ctr. (Mercy II)*, 850 F.3d 545, 560 (relying on prior Supreme Court decisions to expand Title IX’s reach).

⁶⁹ See *Fox v. Pittsburg State Univ.*, No. 14-CV-2606-JAR, 2017 WL 2734608, at *6, *7 (D. Kan. June 16, 2017) (stating that the issue of whether Title VII pre-empts Title IX remains unsettled); *Ruth*, *supra* note 23, at 198 (discussing the implications of whether Title VII should pre-empt Title IX); see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 509, 543 (1982) (Powell, J., dissenting) (discussing tension between Title VII and Title IX, noting that unlike Title VII, Title IX makes no reference to employment). Justice Powell disagreed that Title IX’s use of the word “person” should be so broadly construed. *N. Haven*, 456 U.S. at 543. He stated that a plain reading of the statute confines Title IX’s application to direct beneficiaries, such as students enrolled in the program rather than janitors working at the school. *Id.* at 541. He further believed that the court overlooked the importance of Title IX mirroring Title VI’s construction. *Id.* at 546. In particular, Title IX was enacted to specifically close gaps within education not covered under Title VII. *Id.* at 544.

that Title VII is not the exclusive remedy for plaintiffs facing discrimination whether in the employment or educational realm.⁷⁰ While the Supreme Court in 2005 recognized in *Jackson v. Birmingham* that Title IX and Title VII are vastly different statutes, the Court has yet to claim a preference for Title VII's administrative procedure over Title IX's singular remedial structure.⁷¹ While the parallels between Title IX and Title VII indicate that there are some overlapping legal theories, the Court's continued expansive interpretation of Title IX indicates the Third Circuit did not overreach by interpreting Title IX to apply to a medical residency program.⁷²

Significantly, the two circuit court opinions holding that Title VII does pre-empt Title IX were both decided over twenty years ago, pre-dating the Supreme Court's decision in *Jackson*.⁷³ The Court in *Jackson* recognized that an employee had a right to bring a retaliation claim under Title IX even though he was not the target of gender discrimination.⁷⁴ The Court reasoned that the lack of an express directive naming retaliation as a possible claim under Title IX did not bar the employee from bringing the claim.⁷⁵ In contrast, in 1995, the Fifth Circuit in *Lakoski v. James* held that Title VII pre-empted a Title IX claim, relying heavily on Title VII's specific remedial procedure and the statute's aim of conciliation, which was not apparent in Title IX.⁷⁶ Thus, the Court's holding in *Jackson*, along with more recent circuit

⁷⁰ See *infra* note 8 and accompanying text (discussing circuit opinions holding that Title VII does not pre-empt Title IX).

⁷¹ See *Jackson v. Birmingham*, 544 U.S. 167, 175 (2005) (finding that a plaintiff was not limited to Title VII when seeking relief for a retaliation claim on the basis of gender discrimination).

⁷² See *id.* at 174 (reversing the Circuit Court decision of no retaliation claim because Title IX is meant to have a broad construction); see also *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) (finding that courts generally review Title IX discrimination claims using Title VII's legal analysis).

⁷³ See *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996) (finding that Title VII pre-empted an employee's Title IX and § 1983 discrimination claims and that Title IX pre-empted § 1983 equal protection claims); *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995) (holding that Title VII pre-empted Title IX employment discrimination claims); see also *Mercy II*, 850 F.3d at 563 (declining to follow *Lakoski* and *Waid* because the decisions pre-dated the Supreme Court's decision in *Jackson*, which expressly recognized an employee's private right of action).

⁷⁴ *Jackson*, 544 U.S. at 179. The Court held that a male coach of a girls basketball team who was fired for reporting the discrimination in how the teams were treated could bring a retaliation claim even if he was not the target of the original discrimination. *Id.* The Court reasoned that Title IX was meant to cover any person who complained about discriminatory practices, as the goal of Title IX is to prevent the use of federal dollars to support discrimination. *Id.* at 180.

⁷⁵ See *id.* at 175 (concluding that Title IX's broad directive permits a retaliation claim for speaking out against discriminatory practices and that Title VII's specific language does not preclude Title IX relief).

⁷⁶ See *Lakoski*, 66 F.3d at 753 (finding that Congress did not intend to offer plaintiffs an avenue to bypass Title VII's complex remedial procedure). *But see Mercy II*, 850 F.3d at 563 (declining to follow *Lakoski* because the decision pre-dated the Supreme Court's decision in *Jackson*, which expressly recognized an employee's right to bring a Title IX claim).

court decisions, including that of the Third Circuit, indicate a larger trend toward broadening Title IX's application.⁷⁷

Moreover, the Supreme Court's 2009 decision in *Fitzgerald v. Barnstable School Committee* abrogated the Seventh Circuit's opinion in *Waid v. Merrill Area Public Schools*, by holding that Title IX was not the exclusive remedy for addressing gender discrimination in schools, allowing an elementary school student and her parents to bring a § 1983 Equal Protection claim.⁷⁸ The decision in *Fitzgerald* breaks with the Seventh Circuit's analysis in *Waid*, indicating that the Court will likely agree with the Third Circuit's decision that a medical resident is not restricted to only bringing a Title VII claim.⁷⁹

As the remedial goal of Title VII is to make employees "whole" who have suffered harm, a key consideration in assessing the Third Circuit's opinion is understanding that medical residents, unlike employees, cannot similarly be made whole through limited compensatory or punitive damages, as they cannot practice medicine without graduating from a residency program.⁸⁰ Therefore, Title IX, a proactive measure designed to protect residents, provides a more efficient and effective means of due process than

⁷⁷ See *Mercy II*, 850 F.3d at 563 (rejecting a narrow reading of *Jackson* by noting that the Court repeatedly endorsed Title IX's broad application). Since the Court held a basketball coach, indirectly affected by discrimination, could bring a retaliation claim, the Court might disagree with the Fifth Circuit's narrow holding in light of the Court's application of Title IX. See *Jackson*, 544 U.S. at 183 (finding that the Court broadly interpreted Title IX's private cause of action since *Cannon* and *Gebser*).

⁷⁸ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009) (comparing the substantive rights and remedies under Title IX and Equal Protection claims to conclude that Title IX's narrower application does not preclude broader § 1983 claims); see *Waid*, 91 F.3d at 862 (finding that an employee's constitutional claims of equal protection are pre-empted under Title IX). The court surmised that Title IX's enforcement mechanism of removing federal funds created a strong incentive for educational institutions to proactively comply with the statute and safeguard constitutional rights. *Waid*, 91 F.3d at 862. Thus, the plaintiffs could not bring a claim under both statutes. *Id.*

⁷⁹ See *Fitzgerald*, 555 U.S. at 258 (holding that Title IX does not pre-empt § 1983 Equal Protection claims). Central to the Court's decision was the difference in protections afforded under Title IX, as the statute exempts some institutions, which could form the basis of a constitutional claim. *Id.* at 257. Additionally, the Court found that the variation in "remedial schemes" and damages indicated that § 1983 is a generally broader directive for protecting constitutional rights. *Id.* at 258.

⁸⁰ See *Mercy II*, 850 F.3d at 564 (finding that plaintiffs may pursue protection against discrimination under both Title VII and Title IX); Stewart R. Reuter, *Professional Liability in Postgraduate Medical Education*, 15 J. LEGAL MED. 485, 485 (1994) (explaining that medical residents are akin to medical students and cannot become fully licensed physicians without successfully completing residency training); Lindsey Ferguson, Comment, *Whistleblowing Is Not Just for Gym Class, Looking into the Past, Present and Future of Title IX*, 39 TEX. TECH L. REV. 167, 191 (2006) (discussing the differences in damages under Title VII and Title IX, as Title VII's framework sets a limit on the amount of compensatory and punitive damages available to the plaintiff).

Title VII's retroactive focus on conciliation and settlement objectives.⁸¹ Shortly after the passage of Title IX, in 1975 the Supreme Court recognized, in *Johnson v. Railway Express Agency, Inc.*, that Congress made both administrative and judicial remedies available to those seeking relief.⁸² Although the *Johnson* decision analyzed the differences between Title VII and § 1983 Equal Protection claims, it is conceivable that the Supreme Court would similarly uphold the Third Circuit's decision that a medical resident should be entitled to both Title VII's administrative procedure and Title IX's access to direct judicial relief.⁸³

Further, the Third Circuit's decision aligns with the stated policy and legislative goals of Title IX to eradicate gender discrimination in education.⁸⁴ Although the Third Circuit did not address the question of whether Mercy actually received federal funds, Medicare is the largest financial contributor to teaching hospitals' residency programs.⁸⁵ Thus, the Third Circuit's decision to hold accountable those institutions that receive federal Medicare funds directly upholds Congress' vision when it enacted Title IX to ensure equal access to higher education.⁸⁶

⁸¹ See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (finding that Title IX does not limit damages, allowing access to a full range of remedies).

⁸² See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (holding that an employee is not limited to Title VII for relief in discrimination claims).

⁸³ See *id.* at 461 (finding that Congress gave plaintiffs a valuable choice in deciding between administrative or judicial remedies). If the Third Circuit ruled that medical residents could not bring Title IX claims, it could have presented barriers for residents to obtain relief as a medical residency is determined by a "match system" using a computer algorithm to fill the limited number of spaces. See *Medicare Resident Limits "Caps,"* AAMC, https://www.aamc.org/advocacy/gme/71178/gme_gme0012.html [<https://perma.cc/F6GX-G6ZY>] (explaining that the number of medical residency spots have been capped at 1996 levels since the passage of the Balanced Budget Act in 1997, potentially leading to shortages within the medical field).

⁸⁴ See *supra* notes 3–5 and accompanying text (discussing how Title IX was enacted to provide legal protection against gender discrimination in education).

⁸⁵ See *Mercy II*, 850 F.3d at 558 (noting that this assumes Mercy receives federal funds as the hospital did not raise this claim in the initial proceeding); see also Amitabh Chandra et al., *The Economics of Graduate Medical Education*, *NEW ENG. J. MED.* (May 14, 2014), [http://www.nejm.org/doi/full/10.1056/NEJMp1402468?query=featured_home& \[https://perma.cc/LG7P-BVNQ\]](http://www.nejm.org/doi/full/10.1056/NEJMp1402468?query=featured_home&[https://perma.cc/LG7P-BVNQ]) (noting that unlike medical students, medical residents are paid for their services). Medicare annually accounts for \$9.5 billion in federal funds to teaching hospitals, \$3 billion of which is directly used for medical education and resident salaries. Chandra, *supra*.

⁸⁶ See *supra* note 5 and accompanying text (discussing the goal of Title IX to provide legal protection against discrimination for women in education by withdrawing federal funds from institutions found in violation). The ruling in *Mercy II* could pressure hospitals to provide safeguards against discrimination in order to retain needed funding. See Maria Castellecci, *Hospitals' Residency Programs Must Abide by Title IX*, *MOD. HEALTHCARE* (Mar. 9, 2017), <http://www.modernhealthcare.com/article/20170309/NEWS/170309885> [<https://perma.cc/EQZ2-9CXX>] (noting that the *Mercy II* decision impacts over seven-hundred teaching hospitals which rely on federal funding to train residents).

CONCLUSION

The Third Circuit correctly applied a broad reading of Title IX by holding that a medical residency program is subject to Title IX's reach and allowing a medical resident to bring a retaliation and quid pro quo claim under either Title IX or Title VII. While there has been much discussion on whether Title VII pre-empts Title IX in the employment context, *Doe v. Mercy Catholic Medical Center* presents a unique issue at the intersection of education and employment discrimination. It is evident from the legislative history surrounding the Educational Amendments of 1972 and the Courts expanding interpretation of Title IX that Congress intended Title IX to broadly apply to a variety of educational institutions rather than be confined to the traditional educational realm of schooling. Unlike a full-time student whose sole recourse is Title IX or a full-time employee whose sole recourse is Title VII, the Third Circuit's ruling in *Mercy II* allows residents the full panoply of legal protection and remedies available should they face discrimination.

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